SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 82,333
LT CASE NO. 82-352-CF-B
(Martin County)

ALPHONSO CAVE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee

_____/

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR ST. LUCIE COUNTY, FLORIDA
(Criminal Division)

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CERTIFICATE OF INTERESTED PERSONS

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2. Alphonso Cave
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PRELIMINARY STATEMENT

ALPHONSO CAVE is the Appellant. The Appellant will also be referred to by name or as the "Defendant". The State of Florida is the Appellee and will also be referred to as the "State".

This is an appeal from a Final Judgment imposing the death penalty entered by acting Circuit Judge Thomas J. Walsh (R1579-82).

The symbol "R", followed by the page number, will refer to the documentary portion of the record on appeal.

The symbol "T", followed by the page number, will refer to the transcript portion of the record on appeal. The transcripts appear in Volumes XV - XXIII.

STATEMENT OF THE CASE AND FACTS

A. PRE-TRIAL MATTERS

The United States District Court for the Middle District of Florida entered a habeas corpus order vacating the sentence of death and requiring a new sentencing hearing. The District Court's decision was affirmed on appeal and this resentencing follows. *See* Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992).

FAILURE TO HOLD RESENTENCING WITHIN 90 DAYS

On August 3, 1990, the United States District Court for the Middle District of Florida entered an Order vacating the sentence of death and requiring that a new sentencing hearing be afforded within ninety days of the entry of the Order (R415-16). Although the State appealed, the State failed to obtain a stay of the habeas corpus order until September 25, 1990 (R427), by which time fifty-three days had elapsed. In due course, the 11th Circuit Court of Appeals affirmed the District Court's Order. Cave v. Singletary, *supra*.

On October 22, 1992, Judge Walsh conducted a status hearing in Martin County at which the Public Defender's Office was present, but the Defendant was not (R33, 1145-52, 1179). Having received a copy of the 11th Circuit's Mandate, Judge Walsh scheduled the resentencing "for trial within the mandated time period" on November 30, 1992 (R33, 34, 1148-49).

On November 17, 1992, the Public Defender's Office moved to continue the

resentencing hearing (R37-8). Judge Walsh entered an Order continuing the resentencing until April 26, 1993 (R44). No hearing was held and the Defendant did not "sign off" on the Public Defender's Motion.

On December 16, 1992, the Public Defender's Office moved to withdraw (R49-50). The motion was heard on January 14, 1993 at which the Defendant was present. Judge Walsh granted the Motion To Withdraw, and specially appointed private counsel (T1022-25, R55-6).

On February 8, 1993, Judge Walsh rescheduled the resentencing date for May 3, 1993 at the request of the State (R69-70).

On April 12, 1993, the Defendant presented his motion to vacate the death penalty based upon the failure to hold a new sentencing hearing within ninety days as ordered by the federal court (R404-27, 1152-85). Submitted as an exhibit at the hearing was a copy of the 11th Circuit's Mandate issued September 17, 1992 (R1154-55, 1179) which was received and docketed by the Clerk of the United States District Court on September 21, 1992 (R1164-65). Although the prosecutor conceded that the ninety day period ran on October 28, 1992 (R1166), the trial court denied the motion (R1183-84).

MOTION FOR DISQUALIFICATION OF JUDGE

Over the objection of the Defendant (T1098-99, 1107-08), the Court accepted evidence in rebuttal to the allegations contained in the Defendant's Motion For Disqualification of Judge (T1108-09, R303-13).

The witnesses established that, in April, 1982, Thomas Walsh was a felony prosecutor in the Fort Pierce office. At that time, there were four felony prosecutors, one

juvenile prosecutor, a consumer protection advocate, and two or three misdemeanor prosecutors (T1111-14). Attorneys were encouraged to consult and to assist each other (T1116).

The four felony prosecutors were located in the same area and they shared secretaries who worked in a single, common area. The entire office shared a single reception area, library and lunch room (T1114-15).

There was no effort to screen Walsh either from the prosecutors assigned to the "Slater" murder or from the witnesses connected with the prosecution (T1119-20). Although the witnesses[1] denied personally discussing the Slater prosecution in the presence of Walsh, the evidence did not establish that Walsh had no contact with other persons or evidence associated with the case (T1125, 1127-29, 1147-48, 1158, 1162-63, R1722-24).

The principal Slater case prosecutors were James Midelis and Robert Stone, both of whom worked out of the Fort Pierce office (T1126-27). The main case file was kept in Midelis' office (T1132-33). Both Midelis and Stone continued to work on matters associated with the Slater prosecution until Stone resigned in 1985 and until Midelis became a County Judge in 1986 (T1126-27, 1140-41, R1722-24). Walsh continued to work at the Fort Pierce office until becoming a county judge in 1989.

Although Midelis could not recall whether he handled non-capital felonies in 1982 and 1983, the Defendant's rebuttal evidence showed that Midelis maintained an active non-capital caseload. *See* Defendant's Exhibits 1-17 (T1166-92, R1725-1875). In fact, Midelis

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[1] The witnesses were Bruce Colton, James Midelis, Thomas Ranew, David Powers, Richard Barlow and Robert Stone (by affidavit). The murder prosecutions of all four Defendants were collectively referred to as the "Slater" case, a reference to the victim's last name.

co-prosecuted a three week trial with Walsh in January-February, 1984 (T1152-53).

The disqualification motion was denied (T1196, R540).

CONSTITUTIONAL OBJECTIONS

On March 26, 1993, the trial Court heard and denied Defendant's pre-trial Motions #1-14 (T2464-81, R339-41, 291). These motions dealt with procedural and constitutional attacks on the death penalty statute and the standard jury instructions.

PSYCHOLOGICAL ISSUES

On February 24, 1993, the State's motion for psychiatric/psychological examinations was granted over the Defendant's numerous objections (T1052-54, R72-79).

On March 31, 1993, the State's motion to require the Defendant to list witness was heard (R284-86). The State sought to compel the Defendant to list Dr. Sheldon Rifkin as a witness so that his deposition could be taken (T1077-80). The Defendant responded by requesting ore tenus for the appointment of a confidential psychologist with no previous connection to the case (T1081-89).

The trial Court found that Dr. Rifkin was no longer a confidential expert due to his testimony in post-conviction proceedings. The trial Court took notice of the entire court file, including the post-conviction relief hearing that took place in June, 1988, and the report of Dr. Rifkin that was admitted at the post-conviction proceeding as Exhibit "4" (T1089-92).

Although the defense was not ordered to list Dr. Rifkin as a witness, the trial court imposed a timetable of the "next couple of days" during which the defense must decide whether Dr. Rifkin will re-examine the Defendant. The Defendant renewed his request for

a new and different confidential expert to determine the existence of mental status mitigators. The trial court specifically ruled that the State has a right to be present for any psychological examination of the Defendant by Dr. Rifkin (T1092-96, 2500-01).

On April 1, 1993, the Defendant's Motion For Appointment of Confidential Defense Psychologist was heard (R317-19). In opposition to the defense request for a confidential examination, Dr. Greg Landrum, a clinical psychologist, testified that the presence of a prosecutor would not interfere with a non-confidential assessment, but he conceded that it may interfere with a "confidential" examination (T1209, 1216-18). Dr. Landrum agreed that the facts surrounding a capital case are a normal part of the questioning process in order to determine the mental state of the accused at the time of the offense. He said that the only time he would not question a capital defendant about the facts of the case would be if the assessment was purely to determine competency to stand trial (T1218-19).

Judge Walsh denied the request for a confidential defense psychologist (T1221). Only after the denial of this request did the Defendant request the appointment of Dr. Rifkin to re-examine the Defendant as a non-confidential expert (T1222).

On April 16, 1993, the State's designated psychiatrist, Dr. McKinley Cheshire, commenced the examination compelled by order of the Court dated March 3, 1993 (R259-61). Because the Defendant refused to answer questions from Dr. Cheshire regarding all events from April 25, 1982 through May 5, 1982 (including another robbery occurring just hours before the instant homicide), an aggravated battery occurring in the jail, and a rape charge in Pennsylvania (T1244), the State filed a Motion For Emergency Hearing seeking to compel the Defendant to cooperate (R347-61).

The State suggested that an examination by Dr. Cheshire should be compelled in order to rebut the expert witnesses listed by the defense, Dr. Rifkin and Dr. Harry Krop (T1245-46). At the motion hearing, the trial court reviewed Dr. Krop's 1988 report and the transcript of previous testimony given by Dr. Krop at the Defendant's post-conviction relief proceeding conducted on June 17 and 21, 1988 (T1246-47). If the Defendant continued to remain silent, the State asked the trial court to strike any defense expert testimony concerning mental mitigators (T1248-49).

Dr. Cheshire testified that he conducted part of an examination of the Defendant on April 16, 1993 at the St. Lucie County Jail, but that that Defendant refused to answer questions concerning the specified areas on the basis of the 5th Amendment (T1263-71). Dr. Cheshire testified that it is important and necessary for him to question the Defendant regarding the circumstances surrounding the murder in order to evaluate the existence of aggravating and mitigating factors (T1263-71).

Dr. Cheshire admitted that it is not necessary to interview a defendant in order to reach a conclusion regarding the presence or absence of mitigating facts (T1275-76); and that he is capable of rendering an opinion without actually interviewing an accused (T1277-80).

Judge Walsh ordered the Defendant as follows:

> [T]o answer all questions proffered by Dr. Cheshire related to the facts and circumstances surrounding the dates of April 25 through and including May 5, 1982, as well as answer all questions regarding specific facts of any other criminal acts or arrests or convictions including an alleged prior rape arrest, conviction, or accusation, and an aggravated battery case alleged to have occurred in the Martin County Jail, and any other robberies that may have occurred or are alleged to have

> occurred on the night in question or any time in between April 25, 1982, and May 5, 1982.

(T1280-81).

Judge Walsh said the Defendant would be ordered to show cause why he should not be held in direct criminal contempt if he continued to refuse to answer questions propounded by Dr. Cheshire (T1282-84). After the conclusion of the April 16, 1993 hearing, Dr. Cheshire resumed his attempts to examine the Defendant relative to the areas ordered by Judge Walsh. The Defendant, invoking his right to remain silent, refused to discuss these matters. Consequently, the hearing on the State's Motion For Emergency Hearing resumed on April 19, 1993 (T1285-1318).

In open court, Judge Walsh directed the Defendant to talk with the State's psychiatrist and, "answer all his questions" (T1297-98). Invoking his right to remain silent, the Defendant refused to discuss the specified areas with Dr. Cheshire. The trial court found the Defendant in direct criminal contempt because the refusal occurred in open court and because the previous refusal to answer questions, although occurring outside the presence of the court, was admitted into testimony (T1298-99). The trial court sentenced the Defendant to five (5) months and twenty-eight (28) days in the county jail consecutive to any other sentence (T1300-01; R430-34). However, the conviction and sentence were subsequently set aside by Judge Walsh after the sentence of death was imposed (T1544).

Judge Walsh allowed the scheduled examination of the Defendant by Dr. Rifkin to take place, but warned that the Defendant's mental health experts would be excluded (T1302) if the scope of Dr. Rifkin's examination was limited in the same way that Dr. Cheshire's was (T1309-10). Judge Walsh reserved the right to impose additional sanctions

and ordered, over objection, Dr. Rifkin's examination of the Defendant to be tape recorded (T1311-16).

On April 23, 1993, the trial court resumed the hearing on what sanctions to impose for the Defendant's refusal to answer questions. The trial court was advised that Dr. Rifkin's April 19, 1993 examination was restricted in the same manner as Dr. Cheshire's had been; and that on April 20, 1993, the prosecutor deposed Dr. Rifkin for approximately seven (7) hours (T1386, R701-952) during which the Defendant objected to questions concerning the same prohibited areas and limited Dr. Rifkin from answering (T1321-22). Dr. Rifkin acknowledged that he utilized Dr. Krop's May 23, 1988 report in conducting his evaluation of the Defendant (T1328).

Both Dr. Krop's 1988 report and his testimony at the June, 1988 post-conviction relief proceeding were introduced into evidence (T1328-31; R1876-82).

Dr. Rifkin's Testimony

The defense called Dr. Rifkin to testify and he was recognized as an expert in the area of clinical psychology. He examined the Defendant in 1982; reviewed Dr. Krop's 1988 report; and re-examined the Defendant on April 19, 1993. Dr. Rifkin testified that the Defendant has consistently been found to have an I.Q. of 70-80, which is the borderline range of intellectual abilities (T1340-42, 1350). Although Dr. Rifkin had diagnosed the Defendant in 1982 as having an "anti-social personality disorder in an individual who is demonstrating borderline intellectual functioning and a possible residual learning disability", he has changed that opinion, in part, on the basis of Dr. Krop's 1988 evaluation and report (T1344-45). Dr. Rifkin testified that he reconsidered his 1982 diagnosis when

he was called upon to give a deposition in November, 1988 (T1346). During the interim between 1982 and 1988, Dr. Rifkin had not personally re-evaluated the Defendant, but had gained access to additional information through Dr. Krop's report. Dr. Rifkin considered access to that information to be important. He agreed that a psychologist should have complete access to the Defendant's thinking both during the crime, immediately before the crime, and after the commission of the crime in order to have a thorough examination (T1347-48). Dr. Rifkin acknowledged that he was not permitted to question the Defendant regarding the specified areas during the April 19, 1993 examination (T1349).

In 1982, Dr. Rifkin had been appointed as a confidential defense expert. During the 1982 evaluation, Dr. Rifkin attempted to question the Defendant regarding the facts of the case, including activities before and after the homicide, but the Defendant refused to discuss those matters. Dr. Rifkin said that he could disregard all aspects of Dr. Krop's report, but that he would be unable to form an opinion regarding mitigating factors except with regard to intellectual ability (T1372-74).

Dr. Krop's Report and 1988 Testimony

In the report and the 1988 testimony which were admitted into evidence (T1328-31, R1877-82), Dr. Krop, a psychologist, described interviewing the Defendant on May 20, 1988 at Florida State Prison. After a standard battery of psychological tests was administered, the Defendant described the circumstances surrounding the robbery. He claimed that he had been drinking gin and smoking marijuana throughout the night before committing the robbery leading the victim's death. The Defendant said that he believed that the girl would be released unhurt. Although the Defendant said he did not see the actual stabbing, he saw

Bush hold up a bloody knife. He said that another co-defendant shot the victim.

The Defendant admitted beginning to use alcohol at the age of 17 and to heavy use beginning in his early 20's; and said that he began using marijuana in the 9th grade, then subsequently experimented with heroin, THC, cocaine, and other pills.

Dr. Krop established the Defendant's full scale I.Q. at 72. He said that the Defendant expressed considerable remorse for the victim and how his conviction affected his own family; said that the Defendant's "personality profile does not reflect any anti-social tendencies and his evaluation is inconsistent with any violent propensities"; described the Defendant as a "passive, non-assertive individual with limited intellectual functioning"; and concluded that the Defendant's involvement was caused, in part, by his intoxicated state. He described the Defendant as "excellent candidate for rehabilitation". The 1988 testimony essentially restates the report.

The Sanctions

Judge Walsh granted the State's request for sanctions (R441-44). Striking the testimony of Dr. Krop on all matters proffered, Judge Walsh specifically said that he had reviewed the testimony given by Dr. Krop at the post-conviction relief hearing and the report. As to Dr. Rifkin, Judge Walsh excluded all testimony except as to intellectual ability. He restricted Rifkin from relying, in any way, upon the report, impressions, or deposition of Dr. Krop (T1383-85).

B. THE RESENTENCING

The trial commenced in Pinellas County on May 3, 1993. Over the Defendant's pre-

trial objection (R478-80, 1329) and a renewed objection at trial (T13), the trial court, in giving the preliminary instructions to the jury, advised that the Defendant had been previously found guilty of Count I, charging first degree murder, then read from the Indictment that the Defendant did "unlawfully from a premeditated design to affect the death of a human being, kill and murder Frances Julia Slater" (T4-5).

After the jury was sworn, the Defendant presented his objections to the Florida Standard Jury Instructions and proposed modifications (R562-82, T227-32). The Court denied the Defendant's special requested preliminary instruction (T230-31).

During the course of the State's opening argument (T237-57), the prosecutor said "and after the Defendant heard the statement of John Earl Bush he too confessed to the murder, the kidnapping and robbery". The Defendant timely objected on *Bruton* grounds, moved for mistrial, and for a curative instruction. The trial court denied the Motion For Mistrial, but instructed the jury to disregard "any reference that was made in regard to what any other person said" (T249-51).

STATE'S EVIDENCE

On the evening of April 26, 1982, the victim, Frances Julia Slater, appeared for her 11p.m. to 7a.m. shift. At the time of shift change, the cash register was balanced and a deposit was dropped into a floor safe (T439-41, 456).

Because the victim was scheduled to work the midnight shift alone, the store manager visited the store between 2:00-2:20a.m. (on April 27, 1982) (T456). A Stuart policewoman observed Slater sweeping the floor at 2:15 a.m. (T472-75).

At approximately 2:30 a.m., Danielle Symonds (Girouard) left her home for the

purpose of delivering newspapers. As she lived a short distance away, she arrived at the intersection in front of the convenience store shortly after leaving home. While stopped at a stoplight, Symonds had a clear view into the convenience store. She observed a vehicle in front of the convenience store and three black men in the store, but did not see a clerk. She saw another man sitting in the backseat of the car on the passenger side. After the light turned green, Symonds stopped at a gas station and noticed it was 3:00 a.m. (T464-71).

At approximately 3:00 a.m., Mark Hall entered the convenience store and found it completely empty. Observing that the cash register was open, he called out for the attendant several times, then called the police. He was in the store 2-3 minutes before calling the police (T446-49).

Police officer Margaret Schwarz was dispatched to the store at 3:04 a.m., and arrived at 3:05 a.m. in response to a call from Mark Hall. After speaking with Hall, Schwarz went into the store and observed the open cash register drawer and the open safe (T475-82). After being notified that the clerk was missing, the store manager returned to the store. The manager determined that $134.00 was missing (T451-57).

At approximately 3:45 a.m., Timothy Bargo, a deputy with the St. Lucie County Sheriff's Department, observed a vehicle northbound, on State Road 609, approximately one mile north of the Martin County line. The vehicle was headed from the Indiantown area of Martin County (T390-94). After observing a rear lamp "flickering erratically", Deputy Bargo effectuated a stop (T391). He secured a driver's license from the driver who he identified as John Bush, and a valid registration for the vehicle (T393).

Deputy Bargo requested identification from the three passengers, but they did not have any. The front seat passenger gave the name Mike Goodman. The passenger on the rear passenger side gave the name Willie Jerome Brown. The passenger on the rear driver side gave the name Alphonso King Brown (T395-97).

Through crime scene technician Miles Heckendorn, it was established that "Mike Goodman" gave a birthdate of June 11, 1963, and that J.B. Parker's actual birthdate is June 11, 1962. It was also established that Alphonso King Brown gave a birthdate of November 12, 1958, and that Alphonso Cave's actual birthdate is also November 12, 1958 (T383-86).

Deputy Bargo said that none of the occupants of the car appeared to be intoxicated. He did not smell an alcoholic beverage on any occupant (T397).

After being advised to repair the defective tail lamp, Bush was allowed to leave at 4:12 a.m. Shortly thereafter, Deputy Bargo was notified by his dispatcher that there was a discrepancy in the registration. As a result, he effectuated a second stop of the Bush vehicle at 4:16 a.m. Deputy Bargo was assisted this time by Corporal Willie Williams (T398-401).

After the Bush vehicle was stopped a second time, Bargo determined that the computer made an error. After Bush was told he was free to go the second time, the car would not start and the passenger identified as "Mike Goodman" got out. "Goodman" opened the hood and played with the battery cables until the vehicle started. Deputy Bargo was unable to identify the three passengers in the vehicle, but positively identified Bush as the driver (T400-01). Deputy Bargo was unable to say that Alphonso Cave was the one who

identified himself as Mike Goodman (T408-09).

Responding as a back-up to Deputy Bargo, Corporal Williams said that, upon his arrival, Bush was standing outside the car. He also identified Cave as working on the battery (T487-89). Williams admitted that he was unable to say who was sitting in what position when Deputy Bargo first stopped the vehicle (T495).

Later that day at approximately 4:50 p.m., the victim's body was found on an embankment along State Road 76, approximately 12-13 miles West of Stuart (T270-71, 356, 360-61, 370-73). The crime scene was processed, then the body was transferred for an autopsy (T271).

With the assistance of a map, crime scene diagrams, and aerial photographs, the witnesses described the area where the body was found as consisting predominantly of cattle ranches and citrus groves (T287-89, 322-24, 338-39). The driving time between the convenience store and the location where the body was found, proceeding at a legal speed limit, is approximately 17 minutes (T293). The drive from where the body was found to where Deputy Bargo first stopped the Bush vehicle took approximately 30 minutes (T293-94).

On April 28, 1982, the autopsy was performed by Dr. Ronald Wright, Chief Medical Examiner for Broward County (T411-14). At the time of the autopsy, the victim was still wearing a smock and name tag from the convenience store (T312-13).

Dr. Wright described a non-fatal stab wound to the abdomen. Such a stab wound could be quite painful, said Dr. Wright, if it occurred before death (T417-19). Because of the possibility that the heart could continue to beat even after brain death, Dr. Wright

could not establish whether the stab wound occurred before the gun shot or after it (T432).

Dr. Wright described a gunshot wound to the back of the victim's head. Dr. Wright said the barrel of the gun was at least two feet from the victim's head when she was shot. He said the injuries were consistent with the victim falling to her knees due to the stomach stab wound, then being shot in the back of the head (T419-23). Although the wounds were consistent with this scenario, Dr. Wright was unable to determine whether the victim was standing up, sitting down or crouched over at the time of the gunshot (T428-29).

Dr. Wright concluded that the victim died as a result of the gunshot wound to the head (T426); and that there was instantaneous cessation of brain function, although the heart may have continued to beat for a time. He said there was no pain associated with the gunshot (T430-31).

Dr. Wright described urine stains found on the victim's pants. He said that the urine stains could have occurred while the victim was alive or after death. At first, Dr. Wright said it was most probable that the bladder voiding occurred while the victim was alive (T424-25).

On cross-examination, Dr. Wright confirmed his theory that the victim was laying on the ground on her left side due to the lividity pattern that was present at the time of the autopsy. After being shown several crime scene photographs, Dr. Wright admitted that the victim's body was laying on her right side. Based upon the position of the body depicted in the crime scene photographs, Dr. Wright agreed that the release of urine could have occurred after death as a result of gravity. In light of these photographs, Dr. Wright agreed that it was impossible to determine whether the urine was released in fear or was

a post-mortem phenomenon (T427-28).

Dr. Wright described a small laceration found on one of the victim's fingers. He described the laceration as being a half inch in total length and "very superficial". Dr. Wright associated the laceration with a blunt instrument because it was a tearing as opposed to a cutting. He agreed that it was impossible to determine whether the finger laceration had been caused by the sharp edge of a knife, but thought that it was not likely to have been so caused because of the tearing (T429).

A full external examination of the body found no bruises or cigarette burns (T429-30).

At the autopsy, a crime scene technician collected the victim's clothing and various hair combings from the victim. The samples and clothing were delivered to the Fort Pierce Crime Laboratory for microscopic examination (T342-43, 355-56).

A crime scene technician also obtained carpet fiber samples from the T.V. room at the victim's home. These carpet samples were also transported to the crime laboratory (T344-45).

As a result of information received from Deputy Bargo, investigators initiated contact with John Bush. As a result of statements made by Bush, the investigators sought the assistance of the Fort Pierce Police Department and the St. Lucie County Sheriff's Department in locating Alphonso Cave, Terry Wayne Johnson, and J.B. Parker (T275-83, 524-27).

Detective Lloyd Jones described meeting with John Bush on May 4, 1982. Det. Jones testified that he "obtained a confession" from Bush. The Defendant objected on

Bruton grounds, moved for a mistrial, and for a curative instruction. The trial court denied the Motion For Mistrial, but instructed the jury to disregard what they had just heard (T535-37).

In the early morning hours of May 5, 1982, Det. Jones went to Cave's Fort Pierce residence and requested that he come to the Fort Pierce State Attorney's Office. Once at the State Attorney's Office, Cave initially denied any knowledge or involvement in the homicide, abduction and robbery. After this denial, the tape recording of the Bush statement was played for Cave. After hearing this statement, Cave told Det. Jones that he committed the armed robbery, took the victim out of the store, and put her into the car; that the victim pleaded for her life while being transported in the car; that Bush stabbed her; that Parker shot her; and that the victim had said "she would do anything if they would go ahead and free her" (T537-41). Cave admitted placing the victim in the car by himself at gunpoint (T566).

Cave's tape recorded statement was played for the jury. In this, Cave admitted being with Bush, Parker, and Johnson (T548); admitted "casing" the store earlier that night (T560); said he, himself, had the gun, went into the store, and demanded money (T548) which she gave to Bush (T559-60); and that the victim pulled money out of the cash register (T551). Cave asked where the rest of the money was which she got from the floor safe (T559-60); then he put her in the car (T548) which was parked in front of the store (T553).

During the taped statement, Cave said that he thought they were going to let the girl go; that, after the car stopped, everyone got out of the car; that Bush stuck the girl with the knife, then she fell; and that Parker shot her in the head. Cave said he actually saw

Bush knife her; and was certain Parker shot her with Bush's .38 caliber pistol. Cave said that she was shot lying down (T549); and that Parker was standing right over her when he shot her (T549, 553). Cave said he was drunk, but knew what he was doing (T551). Cave denied knowing she was going to be killed and denied any plan to kill the girl (T554-56). After the killing, Bush was driving back to Fort Pierce when the car was stopped twice. The money from the robbery was split up (T553-54).

Brenda Strachen testified that she was living with Cave in April, 1982; and had been living with him since 1978. Strachen did not believe that the Defendant was stupid or slow or mentally retarded (T503-06).

On the morning of April 27, 1982, Strachen was at her mother's house when the Defendant arrived (T506). Cave appeared scared and pale, upset and nervous (T514). He gave Strachen coin rolls which he said had come from the store they robbed. Cave said that they had split the money up and that he gave Strachen his share; that the victim was pleading for her life on the drive from Stuart (T507-08); and that Bush had killed the girl (T509, 514).

Later on in the morning of April 27, 1982, Strachen saw the Defendant with Bush, Johnson and Parker in her mother's front yard (T509). After this, Cave said that Parker killed the girl; that either Bush or Parker had said they didn't want to leave any witnesses; and that the girl was pulling her hair out, crying, and begging them not to kill her (T512, 517).

MICHAEL BRYANT

Michael Bryant said he was in the Martin County Jail in July, 1982 in a cell with

Cave (T570-71), he said he overheard a conversation concerning the Slater murder. Bryant said that Cave was talking with Bush who was "a couple of cells down". According to Bryant, Bush told Cave "we wouldn't never been in here if you didn't try to burn her with a cigarette butt"; and "you stabbed her in the stomach". According to Bryant, Bush said to Cave, "Well, you popped a cap in the back of her head" (T571-72).

After Bryant heard this conversation, he claimed that Cave demanded "some booty". The following morning, Bryant says Cave threatened him if he told the jailer. Bryant said that he had to tell and that he got beat up. Bryant said that Cave hit him in the nose and that 4 other men helped beat him up (T572-73).

On cross-examination, the Defendant asked Bryant, "How did you find yourself in the Martin County Jail during July of 1982?" (T574). The State objected on the basis of improper impeachment.

The defense proffered the cross-examination of Bryant. He admitted being in the Martin County Jail in July, 1982 on a burglary charge. After the beating incident, Bryant was taken to the emergency room for treatment. Bryant admitted attempting to escape. Even though Bryant had been charged with escape, Bryant was released from the Martin County Jail without having to post a bond on the escape charge. The escape charge was dropped and Bryant admitted entering a plea of no contest in County Court (T588-90).

During the proffers, the Defendant introduced defense Exhibit "3" which showed the disposition of the Broward County burglary charge which was a withhold of adjudication and straight probation (R1931-33). The Defendant introduced defense Exhibit "4", the Arrest Affidavit for the attempted escape, which was executed by Art Jackson (R1934-35,

T590-91, 596). Bryant admitted the escape was dropped (T595). The Defendant introduced as defense Exhibit "6" documents showing Bryant's arrest in Okeechobee County for violating a civil injunction and an arrest for battery (R1938-44). The Defendant introduced defense Exhibit "7" concerning the aggravated battery charge against Cave (R1945-52, T591-92).

During the proffers, Bryant admitted making a statement that he had never been in any trouble in Okeechobee, but has, in fact, been arrested twice there (T599). The trial court excluded any testimony regarding both Okeechobee arrests and the Broward County burglary charge (T607-08). The trial court reviewed Bryant's deposition (T579-82, 755; R621-700).

Back before the jury, the Defendant continued the cross-examination of Bryant. Bryant admitted being in the Martin County Jail in July, 1982 on a burglary charge out of Broward County (T610). When the Defendant attempted to confront Bryant about his attempt to escape from the emergency room, the State objected, but not in time to prevent Bryant from falsely answering, "No sir". The Defendant was instructed not to ask any more questions about the escape charge. The jury was instructed to disregard the last question and any inference that may be drawn from it (T610-11).

Bryant claimed that he told prosecutor Robert Stone about the Defendant's confession (T612) in St. Petersburg in December, 1982 during the first trial (T613). Bryant claimed that he told both Art Jackson and Robert Stone all about the confession (T618).

The Defendant was prohibited from asking Bryant about his civil suit against Martin County (T618-20).

Bryant said that he was absolutely sure that Bush had access from his cell to the same day room as Bryant's cell (T620), but Art Jackson, in subsequent testimony, denied that Bush had access to the same day room (T641).

The defense was precluded from asking, on cross-examination, questions concerning contraband pictures of naked women which Bryant claimed were prominently posted by Cave in the cell (T615-17). During the Defendant's case in chief, the defense sought to readdress the contraband pictures. The testimony of Michael Bryant was proffered outside the presence of the jury. Bryant testified that Cave had pictures of naked white women in the cell covering an area of 2 1/2 feet and that these pictures were plainly visible. Bryant says he reported these pictures to Jackson (T692-94).

During the Defendant's case in chief, the defense also proffered the testimony of Arthur Jackson outside the presence of the jury. Jackson testified that pictures of nude women were not permitted in the Martin County Jail in 1982. When such pictures were found, they were confiscated and destroyed. Jackson had no recollection of Bryant reporting any nude pictures and had no recollection of confiscating any such pictures from Cave's cell. There was no mention of such contraband in Jackson's reports (T688-92). The Court refused to allow the proffered testimony, during the Defendant's case in chief, as not being proper impeachment and being beyond the scope of direct examination (T696).

EVIDENCE CORROBORATING MICHAEL BRYANT

Lt. Art Jackson testified that Bryant was in the same cell with Cave (T625). On July 21, 1982, after Jackson was advised of an altercation, Bryant was brought down to Jackson's office to give a statement. Jackson said that Bryant told him that he had

overheard Cave "bragging about an incident in which he was charged and placed in jail"; and that Cave had admitted shooting the victim. Bryant said that Cave had said he "wanted some booty". Cave asked Bryant if he would tell, then Cave beat Bryant up. At the time of this interview, Jackson said that Bryant's face was bleeding and swollen; and that it was subsequently determined that his nose was broken (T625-27). As a result, Cave was arrested for a misdemeanor battery for punching Bryant (T627, 634-36).

Jackson said he overheard the Defendant tell Bryant that if he told what happened, he would do more to him (T633).

When confronted with his reports involving the transaction, Jackson admitted that there was no mention of the triggerman statement. Jackson did not remember whether he brought the statement to the attention of Robert Stone or to other investigators involved in the homicide case. When confronted with his February 16, 1989 testimony from the federal habeas corpus proceeding, Jackson admitted that he did not mention the triggerman statement there either (T637-41, R1953-68).

HAIR AND FIBER EVIDENCE

Daniel Nippes was recognized by the trial court as an expert in the area of trace and microscopic evidence (T648-51). Nippes processed Bush's vehicle at the crime laboratory and had received the clothing and personal effects of the victim. Exemplars of carpet fibers drawn from the victim's home were also submitted to the crime lab (T651-53).

The carpet fiber exemplars obtained from the victim's home were compared to fibers found on the victim's clothing and fibers found in Bush's vehicle (T654). Nippes described finding a carpet fiber on the victim's tennis shoes which was identified as coming from the

rear carpet of the Bush vehicle. Nippes described this as a "primary transfer" from the automobile carpet to the victim's shoes. Carpet fibers originating from the Bush vehicle were also found on the victim's pants (T657-59).

A hair was recovered from the right rear area of the Bush vehicle. Nippes concluded that the hair found in Bush's vehicle was consistent with having originated from the victim's head. Nippes described the hair taken from the vehicle as having been prematurely removed from the victim's scalp due to the attachment of a "bulbous root". He said the hair had been "forcibly extracted in some form from the scalp" (T659-60).

Additional fibers taken from the rear of the Bush vehicle were found to have originated from the victim's home. Nippes theorized that carpet fibers from the victim's home were transferred onto the victim's clothing, then deposited into the Bush vehicle during the course of the kidnapping. This is an example of a "secondary transfer" (T661-62).

VIDEO RE-ENACTMENT

The State recalled Sheriff Crowder who described a videotaped reenactment of the ride from the convenience store to the area the body was found. The court allowed the video re-enactment, State's Exhibit "43", into evidence over the Defendant's objection. The video reenactment was made at 11:05 p.m. on April 22, 1993. The video reenactment was played before the jury (T664-70).

The video re-enactment ended with a loud noise identified as a gunshot to simulate the point where the murder would have occurred, followed by the departure of a vehicle, Judge Walsh denied the Defendant's motion to strike the video reenactment because of the

gunshot (T673-75, 687-88).

DEFENSE MITIGATION EVIDENCE

At the outset of Dr. Rifkin's testimony, the State renewed its objections made at the April 23 hearing (T702). Judge Walsh precluded the Defendant from asking Dr. Rifkin any questions based upon Dr. Krop's evaluation in accordance with an earlier ruling. Judge Walsh agreed to consider the testimony previously given by Dr. Rifkin, including the report of Dr. Krop, in making his ruling (T705-07).

In front of the jury, Dr. Rifkin said that he conducted a Wexler I.Q. test of Cave in 1982. He scored a verbal I.Q. of 77, a performance I.Q. of 79, and a full scale I.Q. of 76 (T708-09). In April, 1993, Dr. Rifkin readministered the test. He testified that the results were a verbal I.Q. of 75, a performance I.Q. of 78, and a full scale I.Q. of 75. He testified that there was no statistical difference between the I.Q. results from 1982 and from 1993. Dr. Rifkin described Cave's I.Q. as falling into the "borderline range of intelligence; and said that approximately 9% of the population have an I.Q. below 80" (T709-10).

Reverend James Carswell, and his wife Valerie Carswell, started operating a rooming house in about 1981. They rented a room to Cave who was described as a "very mannerable young man" and respectful. After Cave had lived in the rooming house for about six (6) months, they gave Cave the job of cleaning up in return for free rent. Cave kept the rooming house very neat and the Carswells had no trouble from him at all. Cave was the "quiet type" who was reliable in performing his work obligations (T678-83).

June Dunn met the Defendant when he was 15 or 16 years old. Dunn lived across the street from the Defendant's family for about three years. Although Dunn moved away,

she maintained contact with the Defendant and his family. She described the Defendant as "always very friendly" and "always real polite". The Defendant sometimes cared for Dunn's children. Dunn said the Defendant interacted very well with his family and with people in the neighborhood (T757-58). Dunn observed the Defendant take care of his own son (T761).

Patricia Young is the Defendant's younger sister by several years. She said the Defendant treated her well and was a protective big brother (T763-65). She said the Defendant spent a lot of time with his son before being arrested on these charges, and that the relationship was "very good". Before the Defendant's arrest, Young described the Defendant as financially supporting his son and participating in the "newborn baby part of raising his son". She took the Defendant's son to visit him at the prison (T766-67).

Annie Pearl Anderson lived next door to the Defendant's family for about five years. Anderson said the Defendant and his family were "real close" . While living next door to the Defendant's family, Anderson had a lot of contact with the Defendant as he was growing up (T771-72). Anderson described the Defendant as interacting well with the neighborhood children; that the Defendant would help watch over her own children which he seemed to do with responsibility; and described the Defendant as being helpful to his family (T773).

Emma Andrews is the Defendant's aunt. Andrews said she had two sons, Frank and Dana. At the time of the trial, Frank was 31 and Dana was 30. She said Frank and Dana, growing up, were good friends with the Defendant and spent alot of time together. Before Andrews moved away in 1970, Cave spent most of the time at Andrews house, including

nights. She described the Defendant as a child as being a "happy-go-lucky kid" who liked to fish, a "normal kid who went to church with his grandmother (T776-78).

Andrews described an incident where the Defendant, Frank and Dana went fishing near the South Bridge over the Indian River in Fort Pierce. The tidal current was very swift and Frank, not knowing how to swim, was in danger of drowning. The Defendant jumped in and saved Frank's life. Andrews said the Defendant loved his son and spent as much time with him as he could; and that the Defendant was a good father (T779-781).

Luvenia Lockhart and the Defendant are cousins and are the same age. Growing up, Lockhart's family lived right behind the Defendant's family. The played together growing up. She described the Defendant as a "caring person" who is "very sensitive". Lockhart said she entrusted the Defendant with the care of her own son and the Defendant's nephew (T791-92). She said the Defendant's stepfather worked for the railroad and was away from home quite a bit. The Defendant's mother was also away from home quite a bit with her job caring for elderly people (T788-92).

Lockhart said the Defendant came from a loving family and that his stepfather treated him like his own son. She said that the Defendant was disciplined, but not abused; and that the Defendant knew right from wrong. She never saw the Defendant mistreated or abused during his childhood (T796-797).

Versie Wells testified that she knew the Defendant since he was about 6 years old and saw him grow up. Wells said the Defendant would help out in the yard, taking out the garbage, mowing the lawn, going to the store, and helping to care for her sick daughter. The Defendant never asked for any money. After the Defendant moved away from his

mother's house, Wells said she remained friendly with the Defendant and that he continued to do errands for her and to help her mow and maintain the yard (T865-70).

Frank Hines has known the Defendant since the Defendant was six years old and is married to the Defendant's mother (T799). As a child, Hines described the Defendant as a "good boy", and a "good listener", who loved sports. He said the Defendant never was a problem child. Hines said that he treated the Defendant like his own son. He said the Defendant was "dutiful" around the home and that he helped people (T799-800).

Hines coached a little league baseball team on which the Defendant played. Hines rated the Defendant as an average baseball player who interacted well with other players. Hines said the Defendant was not mentally or physically abused as a child; and that he spent a lot of time with the Defendant (T801-04).

Connie Hines is the Defendant's mother (T811). She described the Defendant, as a child, as being "playful and mannerable". She said the Defendant never gave her any trouble; that he would help an elderly neighbor, Versie Wells, by mowing her yard and going to the store for her; and that he did not request payment for doing these things (T813-14).

After receiving a telephone call, Hines went down to the Fort Pierce State Attorney's Office at about 2:30-3:00 a.m. in the morning. A man told her that the Defendant was being questioned (T817). After arriving at the State Attorney's Office, she spoke privately with the Defendant. The Defendant told her about the murder. He said Bush had cut the girl across the stomach and Parker had shot her; that he admitted going into the store himself and bringing the girl out but that he had no idea they were going to hurt her

(T818); and that he admitted bringing the girl out of the store and having the gun. The Defendant told his mother that the victim was pleading and begging not to be killed (T825-26); but he denied shooting her (T819).

DEFENDANT'S REBUTTAL TO MICHAEL BRYANT TESTIMONY

During the period of April - December, 1982, Tom Ranew was the lead State Attorney Investigator assigned to the case. In this capacity, Ranew was not aware of any statements allegedly made by the Defendant to Michael Bryant in the Martin County Jail on July 21, 1982. Both Ranew and Michael Bryant were present for the December, 1982 trial in St. Petersburg (T829-30).

The Defendant objected to the prosecutor's question whether Bryant had told Ranew of a confession by the Defendant. The Defendant argued that the statement was not made before there was a motive to fabricate and, therefore, was not proper rehabilitation (T831-832). Ranew was permitted to answer the question and stated that Bryant did describe the confession during an interview conducted on April 30, 1993 (T833-34).

During April, 1982, David Powers was the supervisor of the investigators at the Martin County Sheriff's Office involved in this murder investigation. In his capacity as a supervisor, Powers did not become aware of any alleged confession made by the Defendant to Michael Bryant during the period of July - December, 1982 (T835-36).

During 1982, David Phoebus was the third attorney on this murder investigation. Phoebus' primary responsibility was for coordination of witnesses and physical evidence (T840-41).

During July, 1982, Phoebus said that he spoke with Jackson "a lot" regarding the

battery at the Martin County Jail. The Defendant sought to refresh Phoebus' recollection with defense Exhibit "12", a cover sheet from the State Attorney file dealing with the battery investigation (T841-42, R1991-92). Phoebus recognized his handwriting, but denied having an independent recollection of the substance of the document. The State objected to the question, "As indicated on the piece of paper, did you speak with Art Jackson on July 23, 1982?" (T842).[2]

Based on the State's objection, a proffer was made outside the presence of the jury. Phoebus admitted speaking with Jackson between July 23 - 26, 1982 concerning the battery investigation. Phoebus said he had no recollection whether Jackson reported a confession allegedly made by Cave to Bryant (T843-44). Phoebus admitted that a confession as to the actual triggerman would have been of absolute importance during 1982. Citing Florida Statute 90.614(2), the State argued that the proffered testimony was extrinsic evidence and not admissible (T844-45). The Defendant suggested that Jackson was motivated to pass information concerning the Bryant confession on to the prosecutors in the murder case. The trial court refused to allow the proffered testimony (T844-48).

When testimony resumed in front of the jury, Phoebus said he had no independent recollection, during the time period up to the first trial, of any reports that the Defendant confessed to Bryant in the Martin County Jail. Phoebus said that information of such a confession would have been obviously important (T848-49).

On cross-examination, the State suggested that a major law enforcement problem

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[2] The cover sheet contained handwritten notes from July 23, 1982 which state in part: "Talked to Art Jackson - V(ictim) out of jail. Told Art when (I) saw him to get him up here for SA." (R1992).

was the "failure to communicate information either within the department or throughout different departments". The State suggested that a breakdown in communication is not evidence one way or the other (T849-50). At a bench conference, the Defendant asked the Court to reconsider allowing the defense to question Phoebus whether Jackson had an opportunity to report the information, but failed to do so. The trial court, again, refused to allow the question (T851-52).

At the time of the initial prosecution, Robert Stone was the elected State Attorney for the Nineteenth Judicial Circuit. In that capacity, Stone was personally involved in handling the Cave prosecution. Stone tried the original case in December, 1982. He denied being aware of any jail-house confessions reportedly made by Cave to Bryant. Stone denied meeting with Bryant in St. Petersburg during December, 1982 (T852-53).

PROFFER CONCERNING DEATH OF DEFENDANT'S SON

The Defendant proffered the testimony of Connie Hines outside the presence of the jury concerning the death of the Defendant's son (T855-58). Judge Walsh had refused to allow the testimony before the jury (T808-10).

Hines described the Defendant's relationship to his son, Alphonso Freeman, as "very close" despite the Defendant's incarceration since 1982. Hines said that the boy, while riding a bicycle, was hit from behind by an automobile. She said that the boy's death caused the Defendant alot of grief. A picture of the boy was marked for identification as Defendant's Exhibit "13" (T856-58).

Marked for identification were Defendant's Exhibit "14", a birth certificate (R1993-1994); as Defendant's Exhibit "15", a death certificate (R1995-96); and as Defendant's

Exhibit "16", an accident report (R1997-2001, T858). These established that the Defendant's son was born on January 13, 1979 and died on December 30, 1992.

The trial court agreed to consider the previous evidence and submitted and argument made at the hearing on State's Motion In Limine #5 (R457-59, T859, 1440-48). The court reaffirmed its previous ruling excluding evidence of the Defendant's death, and the effect of it upon the Defendant, as being irrelevant (T859-61).

STATE'S REBUTTAL

In rebuttal, the State called Dr. McKinley Cheshire to testify. The Defendant renewed his objections to the pretrial requirement that the Defendant submit to a compelled psychiatric evaluation (T927).

After being accepted in the field of psychiatry, Dr. Cheshire said that an I.Q. score is neither indicative of overall intelligence nor does it reflect an ability to function in society; and that I.Q testing of the black population is not valid (T932-34). Dr. Cheshire concluded that the Defendant was smarter than the I.Q. measured by Dr. Rifkin (T937-941). Dr. Cheshire added that both school records and I.Q. scores, considered together, are not a fair and accurate way to measure intelligence (T943).

On redirect examination, Dr. Cheshire described the Defendant as a "very smart person, particularly street smart" with an "excellent memory" and an "ability to analyze". He implied that the Wechsler I.Q. test is a "white man's test" (T954).

CHARGE CONFERENCE

The Defendant presented his objections to the proposed instructions at the charge conference (T880-926). The defense represented the Defendant's special requested jury

instruction #1 (R562-82); and presented Defendant's special requested jury instructions #2-8 (R1000-1030, T880-82). The Defendant objected to the standard jury instructions proposed by the State (T882-91). The trial court denied all of the Defendant's special requested jury instructions (T906, R1121-40).

STATE'S SUMMATION

The prosecutor argued that the Defendant was the triggerman (T969).

The prosecutor argued that the Defendant was riding in the front passenger seat when Bush's car was stopped by Deputy Bargo (T970-71).

During the State's closing, the Defendant objected to the replaying of the video reenactment and suggested that, if the video is played to the jury, that the volume be turned off. The trial court denied this objection and allowed the video to be played (T973-74).

JURY INSTRUCTIONS AND VERDICT

The trial court instructed the jury (T987-98). The jury was provided with a complete copy of the instructions (T997, R1035-49).

The jury voted 10-2 in favor of death (R999, T1012).

C. ALLOCUTION HEARING

At the allocution hearing, the Defendant submitted twelve (12) exhibits into evidence (T1468-70).

Admitted as Defendant's Exhibit "1" was the January 6, 1983 trial testimony of Georgianne Williams given in the case of State v. J.B. Parker. During the Parker trial, the State called Georgianne Williams to establish that Parker was the actual gunman. She

described a conversation with Parker during which:

> He told me, he said, "I shot her and John stabbed her". And he said if I mentioned it, it would be my word against his. He said that John already had a past record, it would be on him, anyway.

(R2010), *see also* (R2016, 2037).

Admitted as Defendant's Exhibit "4" was the January 7, 1993 trial testimony of J.B. Parker in the case of State v. J.B. Parker. On his own behalf, Parker said the four men had purchased 1/2 gallon of gin earlier on the evening of the homicide, and that they smoked a couple of bags of reefer (R2098, 2100)[3]. During the evening before and after the homicide, Parker said that he sat in the front passenger seat; Cave sat in the rear seat on the driver's side; and that Johnson sat in the rear seat on the passenger side (R2102, 2158, 2190). Parker said that Bush had possession of the pistol during the time period before the robbery and abduction of Slater (R2107-08). During the course of the robbery, Cave had possession of the gun and brought the girl out to the car (R2110-11, 2180). Bush ordered Cave to put the girl in the car. Once this was done, Bush demanded the gun back from Cave (R2113).

As Bush was driving, Bush told the girl to "just be quiet, won't nothin' happen to you". After a while, Bush said he would have to kill her in order to avoid returning to prison (R2114-15). When Bush pulled the car off the side of the road, Bush had a knife stuck in his pants and possession of the gun. Bush told Cave to let the girl out of the car because she was sitting in the back seat between Johnson and Cave (R2115-16, 2193).

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[3] At one point Parker said he passed out (R2184).

Bush grabbed the girl by the arm and walked her around to the back of the car. Cave got back into the car where both Parker and Johnson were still sitting (R2116). Parker said he saw Bush stab the girl and then he heard a shot (R2117). Parker denied shooting the girl (R2187). Bush got back in the car and drove off. Bush threw the knife out of the car and handed the gun back to Cave (R2118).

Parker said he identified himself to the deputy as "Mike Goodwin" (R2120). After the car was stopped the second time, it wouldn't start again so both Bush and Parker checked under the hood. Parker adjusted the battery cable and the car started (R2121-22). Parker denied receiving any money from the robbery (R2123).

Parker denied telling Georgianne Williams that he shot the victim (R2127), and ever talking to her alone (R2182).

Admitted as Defendant's Exhibit "2" was the January 6, 1993 trial testimony of Art Jackson given on behalf of the State in the Case of State v. J.B. Parker. Jackson corroborated that Georgianne Williams was present in the Martin County Jail on May 8, 1992 to meet with Bush; and that Bush's cell was directly across the hall from Parker's (R2054-55). Jackson said that Georgianne Williams was able to correctly identify the cell containing Parker on that date (R2055-56). Although the purpose of Jackson's testimony was to corroborate evidence pointing to Parker as the triggerman, Jackson did not mention Bryant's statement concerning an adoptive admission that Cave was the triggerman.

Admitted as Defendant's Exhibit "5" was the State's guilt phase closing argument given on January 7, 1983 in the case of State v. J.B. Parker. In this closing, prosecutor Robert Stone argued:

> The other way of proving first degree murder is by premeditated design. Now, that simply is this, that the death occurred; in this case it was done by a gunshot wound; that J.B. Parker did it, and he did it with the intent to kill. Its as simply as that.

(R2225).

With respect to seating position in the car when it was stopped by Deputy Bargo, prosecutor Stone argued:

> He (Parker) was sitting in the front seat; he wasn't sitting in the back seat, he wasn't just along for a joy ride, he and John Earl (Bush) were sitting in the front seat.

(R2235).

Prosecutor Stone vigorously argued that Georgianne Williams was without reason or motive to lie; that her testimony was credible; and that Parker had admitted to her to being the triggerman (R2242-43).

After arguing that Bush knifed the victim, prosecutor Stone said, "I also submit to you that J.B. Parker did the shooting" (R2244). Prosecutor Stone went on to suggest:

> And John Earl Bush stabbed her and J.B. Parker stood over her behind her and executed her, on the morning of April 27, 1982. And that is consistent with the evidence in this case. That is consistent with Georgianne's testimony.

(R2245).

The State split its closing arguments between prosecutors Stone and Midelis. Consistently with Stone's previous argument, Midelis said, "And I submit to you that it was J.B. Parker that fired the fatal bullet" (R2250); and suggested that Georgianne Williams was telling the truth (R2260).

Admitted as Defendant's Exhibit "6" was the State's penalty phase arguments given on January 10, 1983 in the case of State v. J.B. Parker. During this penalty phase argument, prosecutor Midelis said, "I submit to you that J.B. Parker executed Frances Julia Slater" (R2276). Midelis suggested that Bush's wound did not cause death, but that "J.B. Parker shooting her in the head did". Midelis said rhetorically, "Ask yourself, by what authority did J.B. Parker have to take this girl's life" (R2277). Midelis urged, "No doubt about it, he (Parker) was the triggerman (R2278). Midelis said "He (Parker) committed the ultimate act; killing someone; and "My God, he (Parker) is the one who killed her" (R2289). Midelis argued, "J.B. Parker had no right to play God and take her life (R2292).

Admitted as Defendant's Exhibit "7" was the "finding in conformity with Section 921.141(3), Florida Statutes (1981)" which was signed by Circuit Judge Phillip G. Nourse on January 1, 1984 (R2315-17). Judge Nourse found that Parker shot the victim; and that the victim was transported in the back seat of Bush's car between two of Parker's co-defendants. The death penalty was imposed against Parker.

Admitted as Defendant's Exhibit "10" was the "post sentence investigation" performed by the Department of Corrections on March 8, 1994 in State v. J.B. Parker (R2349-60). The report quotes prosecutors Stone and Midelis as saying "Parker was the shooter and if anyone deserves to be executed, he does" (R2360).

Admitted as Defendant's Exhibit "9" was the State's guilt phase closing argument in the case of State v. John Earl Bush. In this closing, prosecutor Stone argued that Cave was located in the back seat and that Parker was in the front passenger seat (R2331).

Prosecutor Midelis stated, "State's Exhibit number 22 (the bullet) is what happens when a live round is fired by John Earl Bush and smashes into the skull of Frances Julia Slater" (R2341-42).

Admitted as Defendant's Exhibit "11" was the grand jury testimony of Terry Wayne Johnson given before the grand jury on May 20, 1982. According to Johnson, Cave let the girl out of the car, then got back into the car. Bush took the girl around the side of the car and stabbed her with the knife. Meanwhile, Parker reached across Johnson and got the gun from Cave. Presumably, Parker shot the girl, but Johnson did not actually see it (R2374-75, 2393-95).

Introduced as Defendant's Exhibit "12" was the May 5, 1982 statement of Terry Wayne Johnson to Sheriff Crowder (R2399-2436). Johnson said the four men drank a 1/2 gallon of gin during the evening before the homicide (R2403). Johnson said he asked Cave what he was "fixin' to do with this white girl"; and that Cave said the girl was going to taken "down the road and we gonna put her out". Cave told the girl she wasn't going to be hurt. After Cave helped the girl out of the car, Cave got back into the driver's side rear seat. Johnson said that Bush met the girl, then he heard the girl "holler" followed by a shot. At the time of the hollering, both Bush and Parker were outside the car because it was dark, Johnson did not see who shot the girl (R2405-08). After letting the girl out, Cave got back into the car (R2409, 2418). Parker was not in the car when Johnson heard the shot (R2409). Bush was driving and Parker was in the front, passenger seat the whole time (R2412). The money was split up between all four men (R2429).

SENTENCING

On June 25, 1993, Judge Walsh found the following aggravating factors (T1530-44):

1. The homicide occurred while the Defendant was engaged or was an accomplice in the commission of or an attempt to commit a robbery and/or a kidnapping;

2. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest for effecting an escape from custody;

3. The capital felony was committed for pecuniary gain;

4. The capital felony was especially heinous, atrocious, and cruel (HAC); and

5. The capital felony was committed in a cold, calculated, and premeditated manner without any pretence of moral or legal justification (CCP).

The trial court found that the statutory mitigating factor involving lack of prior criminal activity, Sections 921.141(6)(a), had been waived by the Defendant; and that there was no evidence presented regarding statutory mitigating factors contained in Sections 921.141(6)(b), (c), (d), (e), (f), and (g). The trial court said the defense waived the statutory mitigating factors because an instruction was not requested (T1538-39).

The trial court was unable to conclude that Cave personally shot the victim, but made a finding that he was a "major participant in each facet of the crime" (T1536-37).

As to non-statutory mitigating factors, Judge Walsh found the following:

1. The Defendant may not have been the person who actually shot the victim;

2. The State has argued in trials of co-defendants Bush and Parker that each, in turn, shot the victim;

3. The Defendant is loved and cherished by his family and friends;

4. The Defendant timely confessed to the police, his mother, his girlfriend and in jail;

5. The Defendant has a low numerical I.Q.; and

6. The Defendant was a polite and loving child.[4] (T1541).

The Final Judgment of the Sentence of Death was entered (R1579-82).

The Defendant filed a request for reconsideration of that portion of the sentencing order that the victim' head hair was forcibly removed (R1637-48). The Defendant sought to supplement the record with evidence that a trial court's assumptions as to how the hair was removed are unfounded. The Defendant sought to introduce evidence that the hair could have, consistently with the evidence had been "prematurely removed" by a number of equally feasible explanations. The Motion For Reconsideration was denied without a hearing (R1636).

This timely appeal follows.

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[4] Judge Walsh listed 1-4 as non-statutory mitigating factors found by a preponderance of the evidence. Numbers 5 and 6 are implied by the context.

SUMMARY OF ARGUMENT

POINT I

Judge Walsh erroneously refused to disqualify himself as Judge. Instead of ruling upon the facial sufficiency of the motion, Judge Walsh improperly conducted an evidentiary hearing on the allegations made. The Defendant justifiably feared that Judge Walsh was biased on account of information or attitudes to which he was exposed while employed as a prosecuting attorney in the same office as the prosecutors handling the Slater case from 1982 - 1986.

POINT II

The trial court erroneously refused to grant the Defendant a confidential psychological examination relative to the existence of mental status mitigators. The Defendant's right to remain silent was violated by the State's presence at his own psychologists examination, and by the requirement that he submit to a compelled examination by the State psychiatrist. The Defendant was denied an opportunity to explore and present mental status mitigators because of the penalty improperly imposed by Judge Walsh due to the Defendant's exercise of his right to remain silent.

POINT III

The Defendant was denied a fair trial by the trial court's refusal to instruct on six statutory mitigating factors. Based upon the Court's refusal to allow certain evidence, and the refusal to instruct on the statutory mitigating factors, the Defendant was denied the weighing process essential to the constitutionality of Section 921.141.

POINT IV

The State adduced evidence of an adoptive admission allegedly made by the Defendant in the presence of Michael Bryant. The trial court precluded the Defendant from effectively cross-examining Bryant with inconsistent evidence and evidence of bias or motive to prevaricate. These restrictions cannot be deemed harmless because Judge Walsh, who heard the impeaching evidence, rejected Bryant's testimony.

POINT V

The trial court should have granted a mistrial due to *Bruton* references to confessions of a non-testifying co-defendant. The adoptive admission, referenced above, consisted of a statement allegedly made by co-defendant Bush in the presence of Cave. As there was little evidence pointing toward Bush's guilt, the references to Bush's "confession" buttressed the asserted reliabilty of the adoptive admission. These references denied Cave effective confrontation and a fair trial.

POINT VI

Before and during trial, the Defendant objected to the CCP instruction as unconstitutionally vague. The controlling precedent of Jackson v. State, 19 FLW, S 215 (Fla. April 21, 1994), requires reversal and remand for a new sentencing hearing before a jury.

POINT VII

The trial court should have directed a life sentence based upon the failure of the State to conduct a new sentencing proceeding within the time period required by the federal habeas corpus order.

POINT VIII

The Defendant was denied a fair resentencing by the introduction of a video re-enactment. The video was theatrically staged for maximum emotional impact. Although the video was represented to portray the path of travel or the amount of time, the video concluded with a gunshot, followed by a view of a car pulling away into the darkness. This inflammatory video was cumulative to other evidence. The final gunshot scene was irrelevant because the medical examiner testified that death was instaneously caused by the only gunshot. This inflammatory video was so effective that the prosecutor played it for the concluding 17 minutes of his summation.

POINT IX

Contrary to the Defendant's constitutional right to introduce mitigating evidence pertaining to any aspect of his character, the trial court erroneously precluded the Defendant from adducing evidence of his relationship to his son during the course of the Defendant's incarceration, and the subsequent impact of his son's accidental death in December, 1992.

POINT X

The trial court failed to consider and weigh important mitigating factors. Because of other errors in this case, it cannot be said that the trial court conducted a proper weighing of the mitigating and aggravating factors. This reviewing court cannot ignore evidence of mitigating circumstances.

POINT XI

The CCP aggravating factor was not established by the evidence. The evidence

failed to demonstrate beyond a reasonable doubt that the Defendant should be vicariously liable for the actions of co-defendants.

POINT XII

The HAC aggravating factor was not established by the evidence. The evidence failed to establish beyond a reasonable doubt the Defendant's vicarious liability for the actions of co-defendants. The evidence was not inconsistent with the Defendant's claimed belief that the victim was to be released unharmed in a remote location.

POINT XIII

The witness elimination aggravating factor was not established by the evidence. The evidence did not establish beyond a reasonable doubt that the Defendant is vicariously liable for the actions of co-defendants. The circumstantial evidence failed to establish the dominant motive behind the kidnapping was murder. The evidence was not inconsistent with the Defendant's claimed belief that the victim was to be released unharmed in a remote location.

POINT XIV

The pecuniary gain aggravating factor was not established by the evidence. The evidence failed to establish beyond a reasonable doubt that the killing was a step in furtherance of the sought-after gain. The evidence did not refute the Defendant's explanation that the victim would be released unharmed in a remote location. As a circumstantial evidence was not inconsistent with the Defendant's explanation, the pecuniary gain aggravating factor should not be found.

POINT XV

The current HAC jury instruction, as modified in 1991, is defective and unconstitutional. This instruction fails to act as a limit on the jury's exercise of discretion in the consideration of this aggravating factor. Accordingly, the amended instruction continues to be unconstitutionally vague as its predecessor was found to be.

POINT XVI

The witness elimination jury instruction is unconstitutionally vague. The standard jury instruction fails to limit the advisory jury's discretion by telling them that the dominant or only motive for the murder must be the elimination of a witness.

POINT XVII

The pecuniary gain instruction is unconstitutionally vague. The standard jury instruction is unconstitutionally vague because it fails to advise the jury that the murder must be a step in furtherance of the sought-after gain.

POINT XVIII

The trial court erred in refusing to reconsider evidence relative to the removal of hair. The trial court's supposition that the victim's hair may have been removed as she was dragged from the car is supported neither by the evidence nor scientific principles. The trial court should have allowed the Defendant to submit additional information pertaining to this issue.

ARGUMENT

POINT I

THE DENIAL OF THE DEFENDANT'S MOTION FOR DISQUALIFICATION OF JUDGE WAS REVERSIBLE ERROR

The Defendant's timely filed Motion For Disqualification of Judge (R303-13) should have been granted without further hearing[5]. The trial judge erroneously conducted a full evidentiary hearing on the factual allegations contained in the motion (T1098-1196). The denial of this motion deprived the Defendant of a fair trial due to the appearance of impropriety in having a trial judge who worked closely with the prosecution team during the initial prosecution of this case in 1982 - 1986; and in violation of the 5th, 6th, 8th, and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution.

Over the objection of the Defendant (T1098-99, 1107-08), the Court allowed the State to introduce evidence in rebuttal to the Defendant's motion. This testimony confirmed the essential facts alleged by the Defendant in his motion and supporting affidavits. The witnesses could not state that information and opinions were not shared by others with then-prosecutor Walsh (T1119-20, 1125), nor were they able to say whether Walsh may have developed some special knowledge of the case from other sources (T1127-29).

The disqualification rule was established "to insure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused

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[5] By Order dated March 23, 1993, the trial judge was appointed by Chief Justice of the Supreme Court to try this case in the 6th Judicial Circuit of Florida as a temporary judge. The Defendant's Motion For Disqualification of Judge was filed on April 1, 1993 which is within the period of time provided by Rule 2.160, Florida Rules of Judicial Administration.

for the purposes of judge-shopping, delay or some other reason not related to providing for the fairness and impartiality of the proceeding". Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983). The inquiry should focus on the reasonableness of the Defendant's belief that he will not receive a fair hearing:

> [A] party seeking to disqualify a judge need only show a well-grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling. The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

Id. at 1086 (quotation marks and citations omitted).

To be sufficient, *Livingston* said:

> Facts alleged in the motion need only show that the party making it has a well-grounded fear that he will not receive a fair trial at the hands of the judge. If the attested facts supporting the suggestion are reasonably sufficient to create such a fear, it is not for the trial judge to say that it is not there.

Id. at 1087 (quotation marks and citations omitted). *See* Rogers v. State, 630 So.2d 513 (Fla. 1993); Denson v. State, 609 So.2d 627 (Fla. 4th DCA 1992) (Assistant State Attorney is subject to cause challenge to uphold integrity of judicial process).

The Defendant's motion was facially sufficient and, therefore, the trial judge should not have passed upon the truth of the allegations. In Bundy v. Rudd, 366 So.2d 440, 442 (Fla. 1978), it was said:

> [A] judge who was presented with a motion for his disqualification shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. When a judge has looked beyond the mere legal sufficiency of a suggestion of

> prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry *and on that basis alone established grounds for his disqualification.* Our disqualification rule, which limits the trial to a bear determination of legal sufficiency, was expressly designed to prevent what occurred in this case - the creation of an intolerable adversary atmosphere between the trial judge and the litigant (quotation marks and citation omitted) (Emphasis supplied).

Judge Walsh's finding of legal insufficiency (T1196) is not consistent with the standard set forth in Rule 2.160(d)(1), to wit: whether the "party fears that he or she will not receive a fair trial or hearing because of specially described prejudice or bias of the judge". The Defendant's fears were based upon facts specifically set out in his motion and the affidavits. Additionally, the supplemental evidence introduced at the hearing supported the Defendant's claim that he had justifiable fear that Judge Walsh had developed knowledge dehors the record.

Cannon 3(C)(1), of the Code of Judicial Conduct, says that a trial judge should disqualify himself when his "impartiality might reasonably be questioned", including instances where he has "personal knowledge of disputed evidentiary facts concerning the proceeding" or where he served with a lawyer handling the matter in controversy.

In the instant case, the ultimate decision, of how to weigh the evidence and whether to accept the jury's recommendation, was upon Judge Walsh. Previous exposure to the case as an Assistant State Attorney could reasonably be seen as affecting the decision making process. As such, the Defendant's fears set out in the motion are reasonable and sufficient to support the motion. In addition, the Defendant specifically adopted the State's evidence for the purpose of supplementing his motion (T1164).

As the allegations were legally sufficient, the trial judge erroneously denied the Defendant's request for disqualification. *See* Roberts v. State, 161 So.2d 877 (Fla. 2nd DCA 1964). The mere fact of allowing an evidentiary hearing establishes the grounds for disqualification. The remedy is reversal for a new sentencing proceeding. *See* Berkowitz v. Rieser, 625 So.2d 971 (Fla. 2nd DCA 1993).

POINT II

THE DEFENDANT WAS DENIED AN OPPORTUNITY TO EXPLORE AND TO PRESENT MENTAL STATUS MITIGATION EVIDENCE

A. THE DEFENDANT WAS ENTITLED TO A CONFIDENTIAL PSYCHOLOGICAL EXAMINATION TO EXPLORE THE EXISTENCE OF MENTAL STATUS MITIGATORS

The trial judge refused to appoint a confidential defense psychologist to assist the Defendant in exploring the existence of mental mitigators (T1221). Due to the refusal to allow for a confidential examination, the Defendant's non-confidential expert was unable to discuss the facts surrounding the homicide and potential aggravating factors due to a lack of privilege. The refusal of the trial court to allow a confidential expert denied the Defendant a fair trial in violation of the 5th, 6th, 8th and 14th Amendments to the United States Constitution, Article I, Sections 9, 16, and 17 of the Florida Constitution, and Florida Rule of Criminal Procedure 3.216.

In 1982, Dr. Sheldon Rifkin, PhD, a clinical psychologist, was appointed to examine the Defendant as a confidential defense expert. During subsequent post-conviction relief proceedings conducted in the Circuit Court, Dr. Rifkin's report was admitted as an exhibit. The Court took judicial notice of this proceeding and found that he was no longer a

confidential expert due to the revealing of this report and due to his testimony in the post-conviction proceedings (T1089-92).

The Defendant's request for the appointment of a new confidential psychologist with no previous connection to the case was denied (T1088-89, 1092). The Defendant's request for appointment of a confidential expert was authorized under Rule 3.216(a). *See* Lovette v. State, 636 So.2d 1304 (Fla. 1994) (attorney/client privilege extends to confidential expert). The fact that a previous confidential examination had taken place is of no importance because a resentencing is a new proceeding. *See* Huff v. State, 495 So.2d 145 (Fla. 1986) (citing F.R.Cr.P. 3.640(a) for the proposition that a "new trial shall proceed in all respects as if no former trial had occurred"). A new confidential evaluation was required by virtue of the fact that previous counsel had been found to be incompetent for failing to investigate penalty phase mitigation. Cave v. Singletary, *supra*.

In this proceeding, the State was seeking the death penalty. Accordingly, heightened standards of due process apply. *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("where a defendant's life is at stake, the court has been particularly sensitive to ensure that every safeguard is observed"); Proffitt v. Wainwright, 685 F.2d 1227, *cert. denied*, 464 U.S. 1002 (1983) (11th Cir. 1982) (reliability in the fact finding aspect of sentencing is a cornerstone of death penalty jurisprudence).

The Defendant's right to remain silent applies to mental health examinations in criminal cases. *See* Estelle v. Smith, 451 U.S. 454 (1981); Satterwhite v. Texas, 486 U.S. 249 (1988). Just as important is the Defendant's right to present any aspect of the Defendant's character or circumstances of the crime which may act in mitigation. *See*

Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987).

Due to the trial court's refusal to grant a confidential expert, the Defendant was not examined relative to the facts and circumstances surrounding the offense (T1349). The expert evidence clearly showed that such an examination was necessary to determine mental status at the time of the offense. Based on the concurring testimony of all three psychological experts, *See* testimony of Doctors Landrum, Cheshire and Rifkin (T1218-19, 1263-71, 1347-48), the refusal to provide a confidential examination denied the Defendant the effective assistance of a psychological expert. An ineffective psychological examination has previously justified a reversal of a death sentence. State v. Sireci, 502 So.2d 1221 (Fla. 1987); Mason v. State, 489 So.2d 734 (Fla. 1986).[6]

The denial of a confidential examination precluded any expert inquiry into mental status mitigation. The reliability of the weighing process was thereby undermined. The Defendant is entitled to a new sentencing proceeding.

B. THE DEFENDANT'S RIGHT TO REMAIN SILENT WAS VIOLATED BY THE STATE'S PRESENCE AT DR. RIFKIN'S EXAMINATION OF THE DEFENDANT

As indicated above in Point IIA, the right to remain silent extends to a Defendant who undergoes a defense psychological evaluation. *E.g.*, Estelle v. Smith, *supra*. The trial court erroneously, over timely objection, required the Defendant to allow the prosecutor to be present during an examination by his own expert (T1093-96, 1199-21).

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[6] As Dr. Rifkin had also been appointed as a confidential expert for a co-defendant, he should never have been appointed as a confidential expert for Cave. Even the prosecutor said, "I've never heard of one psychologist interviewing both defendants involved in the same case..." *See* Dr. Rifkin's deposition (R709-710). Also, Dr. Rifkin did not examine Cave with respect to penalty phase issues during the 1982 evaluation (R831).

Without question, the Defendant was entitled to investigate the basis for any mental status mitigation. The assistance of a mental health expert in establishing mental status mitigators is subject to the work product and attorney/client privileges. Lovette v. State, *supra*; Rose v. State, 591 So.2d 195 (Fla. 4th DCA 1991); Pouncy v. State, 353 So.2d 640 (Fla. 3rd DCA 1977); United States v. Alvarez, 519 F.2d 1036 (3rd Cir. 1975). The purpose of appointing a confidential expert under Rule 3.216 is, in part, to protect the Defendant's right to remain silent and to avoid conflict with the attorney/client privilege. The trial court has no discretion to deny the appointment of a confidential expert under this rule. Hatfield v. Cobb, 620 So.2d 256 (Fla. 2nd DCA 1993).

The issue is whether the State is entitled to intrude upon the defense psychological evaluation *before* the defense has had an opportunity to evaluate the efficacy of putting forth mental status mitigation evidence. It is the intrusion upon this process which is the fundamental error and which not only deprived the Defendant of an opportunity to investigate the existence of mental status mitigation, but also resulted in the exclusion of evidence known to be favorable. This error was compounded by the requirement that the State submit to a non-confidential examination *in the presence of the prosecutor*. For the reasons described by Drs. Cheshire, Landrum, and Rifkin, the Defendant was not provided an effective psychological evaluation because of the inability of the Defendant to disclose the facts surrounding the offense to the examining expert under a cloak of privilege in violation of the 5th, 6th, 8th and 14th Amendments to the United States Constitution, and Article I, Sections 9, 16 and 17 of the Florida Constitution.

C. THE TRIAL COURT ERRONEOUSLY REQUIRED THE DEFENDANT TO SUBMIT TO A COMPELLED PSYCHIATRIC EXAMINATION

There is no rule requiring a defendant in a capital resentencing procedure to submit to a compelled psychiatric examination. The Court's order compelling the Defendant to submit to examination by a State psychiatrist violated the Defendant's constitutional right to remain silent and right to prepare for trial.

In Burns v. State, 609 So.2d 600 (Fla. 1992), a procedure was approved whereby the State's mental health expert was allowed to remain in the courtroom during the penalty phase testimony. This exception to the rule of sequestration was permitted because there was no authority for a compelled examination of this defendant:

> We do not pass on whether the Court erred in denying the State's request to have an expert examine Burns. However, because there is no rule of criminal procedure that specifically authorizes a State's expert to examine a defendant facing the death penalty when the defendant intends to establish either statutory or non-statutory mental mitigating factors during the penalty phase of the trial, the matter has been brought to the attention of the Florida Criminal Rules Committee for consideration.

Id. at 606, note 1. However, the State may be entitled to a compelled examination where competency to stand trial is questioned or where the defense raises insanity, Henry v. State, 574 So.2d 66 (Fla. 1991); Holland v. State, 636 So.2d 1289 (Fla. 1994), or in the case of the battered spouse syndrome. *See* State v. Hickson, 630 So.2d 172 (Fla. 1993) (court adopted emergency Rule 3.201 dealing with battered spouse syndrome).

As there was no authority for a compelled examination, the Defendant properly exercised his right to remain silent in refusing to discuss the operative facts with Dr. Cheshire. These subsequently imposed penalties deprived the Defendant of a fair trial and

the right to present mitigation in violation of the 5th, 6th, 8th, and 14th Amendments to the United States Constitution, and Article I, Sections 9, 16, and 17 of the Florida Constitution.

D. THE TRIAL COURT ERRONEOUSLY EXCLUDED MENTAL STATUS MITIGATION EVIDENCE BECAUSE OF THE DEFENDANT'S REFUSAL TO SUBMIT TO A COMPELLED PSYCHIATRIC EXAMINATION

Even if, *arguendo*, a penalty for remaining silent was appropriate, the complete exclusion of mental status mitigation evidence was disproportionate and denied the Defendant a fair trial in violation of the 5th, 6th, 8th, and 14th Amendments to the United States Constitution, and Article I, Sections 9, 16, and 17 of the Florida Constitution.

As previously ordered by the Court (R259-61), Dr. Cheshire commenced a compelled examination of the Defendant on April 16, 1993. Based on the refusal of the Defendant to answer questions regarding the facts of the offense and certain other matters, the State filed a Motion For Emergency Hearing seeking to compel the Defendant's cooperation (R347-61). After a hearing, Judge Walsh ordered the Defendant to "cooperate", and threatened him with both contempt and exclusion of any defense expert testimony concerning mental status mitigators if he continued to refuse (T1248-49).

Judge Walsh ordered the Defendant as follows:

> **[T]o answer all questions proffered by Dr. Cheshire related to the facts and circumstances surrounding the dates of April 25 through and including May 5, 1982, as well as answer all questions regarding specific facts of any other criminal acts or arrests or convictions including an alleged prior rape arrest, conviction, or accusation, and an aggravated battery case alleged to have occurred in the Martin County Jail, and any other robberies that may have occurred or are alleged to have occurred on the night in question or any time in between April 25, 1982, and May 5, 1982.**

(T1280-81).

At the resumption of the hearing on the State's Motion For Emergency Hearing, on April 19, 1993, Judge Walsh was advised of the Defendant's continued refusal to answer questions (T1285-1318). Finding the Defendant in direct criminal contempt[7], Judge Walsh sentenced him to five months and twenty-eight days in the County Jail consecutive to any other sentence (T1300-01, R430-34). Judge Walsh delayed ruling on the State's request for exclusion of evidence until after Dr. Rifkin examined the Defendant. Judge Walsh warned that the Defendant's mental status evidence would be excluded if the scope of Dr. Rifkin's examination was limited in the same way that Dr. Cheshire's was (T1302-11).

On April 19, 1993, the Defendant was examined by his non-confidential expert, Dr. Rifkin, and refused to answer the same areas as he had refused to answer for Dr. Cheshire (T1313-16). On April 23, 1993, the trial court resumed the hearing on the State's request for sanctions. At this hearing, Dr. Krop's 1988 report and his testimony from a June, 1988 post-conviction relief proceeding were introduced as exhibits (T1328-31, R1876-82), and Dr. Rifkin testified in person.

Dr. Rifkin testified that he initially examined the Defendant in 1982 as a confidential defense expert, but that the Defendant refused to discuss the circumstances surrounding the homicide. In 1988, Dr. Rifkin was asked to reconsider his evaluation of the Defendant

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[7] The Defendant urged that the matter was not subject to a direct criminal contempt because the Defendant's refusal did not occur in the presence of the trial judge; that the right to remain silent was a defense to the contempt; that only civil contempt could be exercised to coerce compliance with a court order; and that indirect criminal proceedings were improper for failure to comply with F.R.Cr.P. 3.840 (T1287-1292). In open court, Judge Walsh directed the Defendant to speak with the State's psychiatrist and "answer all his questions". The Defendant refused. Judge Walsh based the direct criminal contempt on the refusal which occurred in open court (T1297-99).

after a review of Dr. Krop's 1988 report. Based on this review, Dr. Rifkin changed his opinion. Dr. Rifkin considered access to the additional information contained in Dr. Krop's report to be important. Subsequently, Dr. Rifkin re-examined the Defendant on April 19, 1993, but he was not permitted to discuss the specified areas (T1339-57).

Dr. Rifkin said that complete access to the Defendant's thinking immediately before, during and after the commission of the crime is necessary in order to have a thorough examination (T1347-48). Because of the inability to question the Defendant relative to the facts surrounding the offense, either in 1982 or 1993, Dr. Rifkin said that he would be unable to form an opinion regarding mental status mitigators unless he could rely on the information contained in Dr. Krop's report and testimony (T1372-74).

Dr. Krop's favorable testimony would have shown that the Defendant had been under the influence of alcohol and drugs throughout the night of the homicide. Dr. Krop established that the Defendant expressed remorse; that his personal profile did not reflect anti-social tendencies; that he has limited intellectual functioning; that the Defendant's involvement was caused partly by intoxication; and that the Defendant is an "excellent candidate for rehabilitation".

After considering these matters[8], Judge Walsh excluded all mental status mitigation evidence except as to intellectual ability. Judge Walsh excluded Dr. Krop from testifying at all and instructed Dr. Rifkin not to rely, in any way, upon the report, impressions, or previous testimony of Dr. Krop (T1383-85). These rulings were memorialized in an order

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[8] The tape recording of Dr. Rifkin's April 19, 1993 evaluation was introduced as an exhibit (T1386, 1448, R2458-59).

which concluded:

> The following sanctions are imposed...due to defendant's continued refusal to comply with this court's order:
>
> (1) Dr. H. Krop's testimony, his report and any reference to his conclusions are hereby stricken and his testimony will be disallowed at the Phase II hearing;
>
> (2) Dr. Sheldon Rifkin's testimony, his report and any reference to his conclusions are hereby stricken and his testimony will be allowed *but for* his testimony and his conclusions will be allowed as related to mental age/I.Q. testimony, but will be limited to this aspect only (emphasis in original).

(R441-44).

During the resentencing hearing, Judge Walsh reaffirmed his pre-trial ruling restricting the testimony of Dr. Rifkin and excluding the testimony of Dr. Krop (T702-07). Dr. Rifkin was permitted to testify, before the jury, with respect to I.Q. only (T708-48).

The excluded evidence prevented the Defendant from introducing evidence from which the jury may have inferred the following statutory mitigating factors:

1) that the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance, F.S. 921.141(6)(b);

2) that the Defendant was an accomplice in the capital felony committed by another person, and the Defendant's participation was relatively minor, F.S. 921.141(6)(c);

3) that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law with substantially impaired, F.S. 921.141(6)(e);

4) that the Defendant could not have reasonably foreseen that his conduct

in the course of the commission of the offense would cause or would create a grave risk of death to one or more persons, F.S. 921.141(6)(g).

5) mental status mitigation based on the "catch-all" provision of the standard jury instruction. *See* Easley v. State, 629 So.2d 1046 (Fla. 2nd DCA 1993) (Error for trial court to restrict information on which mental health expert may base opinion).

In Ake v. Oklahoma, 470 U.S. 68 (1985), the United States Supreme Court established that a defendant is entitled to the assistance of his own mental health expert as an element of due process and to protect against cruel and unusual punishment. Although the defendant was in the possession of mitigating expert evidence, the trial court *prevented* these experts from testifying. Even if the defendant was not entitled to a confidential expert, the defendant was entitled, at a minimum to introduce the existing evidence. The exclusion of relevant mitigating evidence violates the teaching of Hitchcock v. Dugger, *supra*. *See* Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, supra.; Lockett v. Ohio, *supra*.

The rule was succinctly set out in *Hitchcock v. Dugger*:

> We have held that in capital cases, the sentence may not refuse to consider or be precluded from considering any relevant mitigating evidence (citations and quotation marks omitted).

481 U.S. at 394.

Unlike the situation in *Hitchcock v. Dugger*, there was no exclusion of evidence on account of a statutory limitation. Instead, the trial court arbitrarily excluded evidence which was clearly relevant and admissible under the standards set forth in *Hitchcock v. Dugger*. *See* Hitchcock v. State, 578 So.2d 685 (Fla. 1990), *cert. denied*, 112 S.Ct. 311

(1991) (State cannot ban relevant mitigating evidence from being presented and considered during the penalty phase); Maxwell v. State, 603 So.2d 490 (Fla. 1992); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Johnson v. State, 608 So.2d 4 (Fla. 1992), *cert. denied*, 113 S.Ct. 2366 (1993).

The exclusion of this presumptively admissible mental status mitigation evidence places the burden on the State to demonstrate harmless error beyond a reasonable doubt. Hitchcock v. Dugger, *supra*; Skipper v. South Carolina, *supra* (evidence that defendant had adapted well to prison life); Eddings v. Oklahoma, *supra* (evidence of 16-year-old defendant's troubled family history and emotional disturbance).

In the instant case, the Defendant was precluded from demonstrating a history of drug and alcohol abuse. The Defendant was precluded from showing the effect on his judgment of the excessive consumption of alcohol and drugs on the evening of the homicide; and how the consumption of these affected his judgment and understanding of the situation. The Defendant was precluded from showing the reasonableness, under the circumstances, of his belief that the victim was kidnapped for the purpose of releasing her a safe distance away, not to facilitate a murder. The Defendant was precluded from showing his remorse.[9]

The exclusion of mental status mitigation evidence precluded the jury from considering evidence to corroborate and explain the Defendant's previous statements. The exclusion of this mitigation was compounded by the refusal of the Court to allow

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[9] Regarding remorse, the trial court, also precluded evidence the Defendant's 13 year old son was killed by a careless driver on December 30, 1992, and the effect on the Defendant. *See* Point IX, *infra* (T855-61, R1997-2001).

impeachment of Michael Bryant regarding the Defendant's adoptive admission to having been the triggerman, as well as failure to instruct on the statutory mitigators. *See* Points III and IV, *infra*. Based on all of the information available at the trial and at the allocution hearing, Judge Walsh found that the State failed to prove that the Defendant was the triggerman. Consequently, the jury heard the worst evidence, which was rejected by Judge Walsh, and did not hear the good evidence which was excluded by Judge Walsh. Gore v. Dugger, 763 F.Supp. 1110 (M.D. Fla. 1989), *affirmed*, 933 F.2d 904 (11th Cir. 1991) (if excluded evidence has any mitigating value, there is no harmless error review and the case should be automatically reversed for resentencing); *see also*, Johnson v. State, 408 So.2d 813 (Fla. 4th DCA 1982) (exclusion of defense expert testimony reversible despite presence of other medical testimony that defendant was insane).

If the exclusion of mitigating evidence may have contributed to the jury's recommendation, the remedy is to reverse for a new sentencing before a jury. *See* White v. State, 616 So.2d 21 (Fla. 1993) (a sentence of death is not clothed with a presumption of correctness and the clear abuse of discretions standard does not apply).

POINT III

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON SIX STATUTORY MITIGATING FACTORS

The very terms of Section 921.141(2) require the advisory jury to determine the existence of mitigating circumstances and then to weigh any such mitigating circumstances against the aggravating circumstances. Here, the trial court derailed this process by failing to instruct the jury as to the applicability of six statutory mitigating factors (R1035-49).

The failure to properly instruct on the applicability of mitigating factors constitute fundamental error for which a new resentencing hearing is the only remedy.

At the simultaneously conducted allocution and hearing on the Defendant's Motion For New Trial, Judge Walsh justified the failure to instruct on the remaining statutory mitigating factors on the erroneous belief that the Defendant had not requested them (T1538-39). Judge Walsh found this "waiver" despite the fact that he had required a waiver of the Section 921.141(6)(a) mitigating factor be in writing and specifically acknowledged by the Defendant (T1418-20, 1438; R484). *Compare* Henry v. State, 613 So.2d 429 (Fla. 1992), *cert. denied*, 114 S.Ct. 699 (1994) (waiver of right to present mitigating evidence must be knowing and voluntary); *with* Hamblen v. State, 527 So.2d 800 (Fla. 1988) (Defendant may make knowing and intelligent waiver of right to counsel during penalty phase). *See* Maggard v. State, 399 So.2d 973 (1981), *cert. denied*, 454 U.S. 1059 (1981).

Contrary to the standard jury instructions, the trial court instructed the jury as to a single, non-statutory mitigating circumstance, to wit: "Any aspect of the Defendant's character or record, and any other circumstance of the offense" (R1038). Just as it is reversible error to restrict the jury's consideration to the statutory mitigating factors, Morgan v. State, 515 So.2d 975 (Fla. 1987), *cert. denied*, 486 U.S. 1036 (1988), it is reversible error to preclude jury consideration of the unwaived statutory mitigating factors. Maxwell v. State, *supra*, ("every mitigating factor apparent in the entire record before the court at sentencing, both statutory and non-statutory, must be considered and weighed in the sentencing process"). *See* Hitchcock v. Dugger, *supra* (reversible error not to allow

consideration of non-statutory mitigating factors); Gore v. Dugger, *supra*; *See also* Peek v. State, 395 So.2d 492 (Fla. 1980), *cert. denied*, 451 U.S. 964 (1981) (instruction on statutory mitigating factors is to direct jury attention to areas of mitigation considered vital by legislature).

In this case, the failure to instruct on statutory mitigating factors denied the Defendant a fair trial under the 5th, 6th, 8th, and 14th Amendments to the United States Constitution, and Article I, Sections 9, 16, and 17 of the Florida Constitution. Moreover, the improper instruction denied the Defendant the weighing process essential to the constitutionality of Section 921.141. Without the statutorily required weighing process, the death sentence would be imposed in an arbitrary and freakish manner contrary to Proffitt v. Florida, 428 U.S. 242 (1976). Indeed, this breakdown in the weighing process would violate the Florida Supreme Court's own holdings that the death penalty is constitutional. *E.g.*, Alford v. State, 307 So.2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912 (1976) (death penalty procedure controls and channels discretion until sentencing process becomes matter of reasonable judgment); Arango v. State, 411 So.2d 172 (Fla. 1982), *cert. denied*, 457 U.S. 1140 (1982); Peek v. State, *supra*.

Even if the improper instruction does not render the statute *per se* unconstitutional, applied to the facts of this case, the Defendant was denied a fair balancing process. Specifically, the jury may have found that the Defendant's role in the actual killing was relatively minor; that the Defendant's age, given his low I.Q., may have constituted a mitigating factor; and that the consumption of drugs and alcohol may have substantially impaired his ability to appreciate the criminality of his acts or to conform his conduct to

the requirements of law. Thus, the trial court improperly prevented the jury from finding mitigating factors for which there was supporting evidence. *See* Stewart v. State, 558 So.2d 416 (Fla. 1990); Floyd v. State, 497 So.2d 1211 (Fla. 1986).

Based upon the failure of the trial court to give a complete jury instruction on the unwaived statutory mitigating factors, the Defendant is entitled to a new resentencing proceeding. Franklin v. State, 403 So.2d 975 (Fla. 1981) (trial court has duty to give all instructions necessary to a fair trial of the issues). This improper instruction effectively directed a verdict against the Defendant on the six unwaived statutory mitigating factors. *See* Wright v. State, 586 So.2d 1024 (Fla. 1991) (an instruction was struck down which "told the jury to find as a matter of law that an essential element was proved").

POINT IV

THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE EXTENSIVE RESTRICTIONS ON HIS RIGHT TO CROSS-EXAMINATION AND HIS RIGHT TO PRESENT A DEFENSE

A. THE DEFENDANT WAS PRECLUDED FROM CONFRONTING MICHAEL BRYANT WITH EVIDENCE OF HIS THEN PENDING CRIMINAL CHARGES[10]

Although the identification of the triggerman was an obvious issue, the 1982 prosecution team was unaware of any evidence identifying the triggerman. In fact, the prosecution did not become aware of this evidence until just before the retrial in 1993. Bryant presented the only evidence to suggest that the Defendant was the actual triggerman (T571-72). Restrictions on the ability to expose Bryant's bias denied the Defendant a fair trial in violation of the 5th, 6th, 8th and 14th Amendments to the United States

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[10] Neither the burglary charge nor the escape was pending at the time of the first trial, but both charges were pending when Bryant was cooperating with the prosecutor.

Constitution, and Article I, Sections 9, 16, and 17 of the Florida Constitution.

The trial court refused to allow the Defendant to show that Bryant was in the Martin County Jail, at the time of the alleged statement, because of a burglary charge (T574, 607-08); and that, during the time Bryant was incarcerated in the Martin County Jail in 1982, he was charged with attempted escape. Although he was awaiting transfer to Broward County on the burglary charge, and although he was charged with escape, Bryant was released from the Martin County Jail without having to post a bond. Ultimately, the escape charge was dropped (T589-96, R1934-35). Just before the original 1982 trial, Bryant plead no contest to the Broward County burglary charge; adjudication of guilt was withheld and he was placed on straight probation (R1931-33). The Defendant was prevented from confronting Bryant with the apparent benefit he derived on the burglary and escape charges (T607-08). *See* Sarmiento v. State, 371 So.2d 1047 (Fla. 3rd DCA 1979), *approved*, 397 So.2d 643 (Fla. 1981) (cross-examination of charges proper although "dropped" against witness before trial).

In front of the jury, Bryant falsely denied that he attempted to escape from the custody of the Martin County Jail in July, 1982. The Defendant was precluded from following up on this false statement and was instructed not to ask any more questions about the escape charge. The jury was instructed to disregard this question and answer (T610-11).

The refusal to allow questioning regarding the burglary and escape charges which were pending during the essential time period deprived the Defendant the right of confrontation and, consequently a fair trial. In Lewis v. State, 623 So.2d 1205 (Fla. 4th

DCA 1993) *(en banc)*, the court addressed a similar situation where criminal charges were not pending against a witness because they had been nolle prossed before trial; and where there was no evidence of an agreement between the State and the witness to drop the pending charges in exchanges for the testimony.[11] After determining that the witness provided the only direct testimony incriminating the accused, the *Lewis* court found harmful error applying the standard described in Delaware v. Van Arsdall, 475 U.S. 673 (1986).

In Douglas v. State, 627 So.2d 1190 (Fla. 1st DCA 1993), a State's witness had recently plead to and been sentenced on five felony charges. Adjudication was withheld on each of the felony charges. At the time of the Douglas' trial, there were still two pending misdemeanor battery charges. The trial court had restricted Douglas from asking questions relative to these charges, except the general question, "Were you in any trouble back in January of 1992?" *Id.* at 1191. After reviewing the applicable cases, *Douglas* concluded that it was reversible error to preclude cross-examination relative to the substance and treatment of the prior charges. *Id.* at 1192. *See* Morrell v. State, 297 So.2d 579 (Fla. 1st DCA 1974) (absolute right to bring out actual or threatened criminal investigation); Watts v. State, 450 So.2d 265 (Fla. 2nd DCA 1984) (defendant entitled to inquire on cross about witness probationary status).

In view of the contradictory evidence as to when and to whom Bryant first provided information concerning the admission, the refusal to allow exploration of the criminal

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[11] Although there was no evidence of an agreement to drop the escape charge and for a favorable disposition of the burglary charge, Bryant may have been motivated by a subjective expectation which, was confirmed by subsequent events. Fannin v. State, 581 So.2d 974 (Fla. 1st DCA 1991).

charges pending in July, 1982 cannot be harmless beyond a reasonable doubt.

B. THE DEFENDANT WAS PRECLUDED FROM CONFRONTING MICHAEL BRYANT WITH INCONSISTENT STATEMENTS AND EVIDENCE, AND FROM OFFERING SUCH EVIDENCE DURING HIS CASE IN CHIEF

The Defendant was precluded from questioning Bryant about his claim that he had never been in trouble in Okeechobee County; about his civil suit against the Martin County Sheriff's Department; and about his claim that the Defendant posted prohibited pictures in his jail cell. The exclusion of this evidence precluded the Defendant from demonstrating bias and inconsistent facts which denied him a fair trial in violation of the 5th, 6th, 8th, and 14th Amendments to the United States Constitution, and Article I, Sections 9, 16, and 17 of the Florida Constitution.

During his deposition, Bryant claimed that he had not been in any trouble in Okeechobee County. In fact, Bryant had been arrested in Okeechobee County for both battery and violation of a civil restraining order (T578, 599, R1938-34). The Defendant was precluded from asking Bryant about these Okeechobee arrests (T607).

Because of the injuries allegedly inflicted by Defendant, Bryant claimed to have filed suit against the Martin County Sheriff's Department (T578). The Defendant was prohibited from asking Bryant about this civil suit (T618-620). *See* Cox v. State, 441 So.2d 1169 (Fla. 4th DCA 1983); Webb v. State, 336 So.2d 416 (Fla. 2nd DCA 1976).

The Defendant was precluded from asking Bryant about contraband pictures which he claimed were prominently posted by the Defendant in his cell. During a proffer, Bryant said that he reported these pictures to jail administrator Art Jackson (T692-96). During another defense proffer, Jackson said such photographs would have been considered

contraband. Jackson had no recollection of Bryant reporting any such pictures or of confiscating any such pictures from the Defendant's cell (T688-91).

In response to the Defendant's challenge to Bryant's testimony, the State called Jackson to testify as to a statement obtained by Bryant on July 21, 1982. Jackson said that Bryant told him about the admission supposedly made by the Defendant (T625-27). On cross-examination, Jackson admitted that his reports made no mention of Cave's admission to being a triggerman (T637-38); and that he did not bring the alleged admission to the attention of either the police investigators or the prosecutors in the case (T639, 830, 836, 844, 853). Jackson did not mention the triggerman admission in 1989 testimony in a federal habeas corpus proceeding (T639-41, R1953-68).

Bryant claimed that he told prosecutor Robert Stone about the Defendant's admission when both were in St. Petersburg during the Defendant's December, 1982 trial (T612-13, 618). However, Stone denied meeting with Bryant in St. Petersburg during December, 1982 and denied then being aware of any jailhouse confessions reportedly made by the Defendant to Bryant (T853).

Bryant claimed that Bush and Cave both had access to the same "day room" (T620). However, Jackson denied that Bush had access to the same day room (T641). This inconsistency rendered Bryant's scenario impossible.

Restrictions on cross-examination are fundamentally unfair especially where, as here, there was conflicting testimony and the excluded evidence could have affected the outcome. Davis v. Alaska, 415 U.S. 308, 316 (1974). Because of their importance, it is "not necessary that matters tending to show bias, prejudice or improper motive be within the scope of

direct for such questioning for such proper cross-examination". Nelson v. State, 602 So.2d 550, 552 (Fla. 2nd DCA 1992), *review denied*, 606 So.2d 1166 (Fla. 1992). In Mendez v. State, 412 So.2d 965, 966 (Fla. 2nd DCA 1982), the Court said:

> Whenever a witness takes the stand, he ipso facto places his credibility in issue. Cross-examination of such a witness in matters relevant to credibility ought to be given a wide scope in order to delve into a witness' story, to test a witness' perceptions and memory, and to impeach that witness. Limiting the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on trust worthiness of crucial prosecution testimony is improper, especially where the cross-examination is directed at a key prosecution witness. The right of full cross-examination is absolute, and the denial of that right may easily constitute reversible error. Most important, a defendant should be afforded wide latitude to demonstrate bias or a possible motive of the witness to testify as he has (citations omitted).

As has been shown, there were distinct inconsistencies in Bryant's testimony and in the "corroborating" testimony of Art Jackson. The precluded cross-examination was relevant for these reasons:

1. Bryant's claim that he had never been in trouble in Okeechobee County was evidence that he was susceptible of making broad, sweeping, categorical statements which were demonstrably false;[12]

2. Bryant's claim that a civil suit was filed against the jail was, likewise, demonstrably false. No such civil suit had been filed and, it may be supposed, that Bryant's motive for making the claim was self-aggrandizement. Further, a civil suit arising out of the circumstances would have, no doubt, exposed the claimed jailhouse admission

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[12] Notably, Bryant described an attempt to burn the victim with a cigarette butt (T571-72) for which there was no corroborating physical evidence. *See* Dr. Wright's testimony (T429-30).

that was made by the Defendant. Bryant may have falsely reported the battery as part of a scheme to recover money damages.

3. Bryant's claim that the Defendant posted contraband pictures in his cell was inconsistent with the testimony of Art Jackson. Bryant's motive in this was to retaliate against the Defendant for the beating which Bryant says he received.

In his findings of fact, Judge Walsh rejected Bryant's testimony as not being proven beyond a reasonable doubt (T1536-37; R1589, 1594). If Judge Walsh, after hearing the relevant evidence, rejected Bryant's testimony, how can we say that the jury would not have likely rejected the testimony if similarly informed?

C. THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW EVIDENCE THAT ART JACKSON HAD AN OPPORTUNITY TO REPORT THE DEFENDANT'S ALLEGED ADMISSION, BUT DID NOT

During his case in chief, the Defendant called witnesses close to the 1982 investigation and trials for the purpose of demonstrating a lack of knowledge of Bryant's triggerman testimony. These witnesses included two of the prosecuting attorneys, the lead State Attorney investigator, and the detective supervisor of the Martin County Sheriff's Department investigation. All of these witnesses were motivated to discover and use evidence pointing to the identity of the triggerman. The trial court erroneously precluded the defense from demonstrating that Art Jackson failed to report the triggerman information despite a timely opportunity to do so.

While admitting that he had extensive contact with Art Jackson concerning the Michael Bryant incident in July, 1982, prosecutor Phoebus denied having an independent recollection of defense Exhibit "12", a cover sheet from the State Attorney file dealing with

the battery investigation (T841-42, R1991-92). The following notation appeared on Exhibit "12": "Talked to Art Jackson -V(ictim) out of jail. Told Art when (I) saw him to get him up here for SA." (R1992). The trial court precluded the Defendant from asking Phoebus, "As indicated on the piece of paper, did you speak with Art Jackson on July 23, 1982?" (T842).

Outside the presence of the jury, the Defendant made an offer of proof during which Phoebus admitted speaking with Jackson during July 23-26, 1982 concerning the battery investigation. Although Phoebus had no recollection of the triggerman information, Phoebus admitted that identifying the actual triggerman would have been of absolute importance. The trial court refused to allow the evidence (T843-48).

In front of the jury, Phoebus admitted that triggerman evidence would have been extremely important and that he had no recollection of such evidence (T848-49). In rebuttal, the State suggested that a major law enforcement problem was the "failure to communicate information either within the department or throughout different department". The State further suggested that a breakdown in communication should not be considered evidence that Jackson did not possess the triggerman information during July, 1982 (T849-50). At a bench conference, the Defendant renewed his request to question Phoebus whether Jackson had an opportunity to report the information.

Judge Walsh should have allowed prosecutor Phoebus to be questioned about defense Exhibit "12" which was clearly relevant on the issue of a timely report by Jackson of the triggerman testimony. The fact that Phoebus may have had no present recollection of Exhibit "12" is not important in a death penalty proceeding because hearsay is admissible

provided that there is a fair opportunity for rebuttal. Exhibit "12" was not hearsay because it constituted past recollection recorded under Section 90.803(5). Since Exhibit "12" was created by prosecutor Phoebus, it was clearly a matter over which he once had knowledge and which memorialized information soon after it was learned. Even if not initially admissible, Exhibit "12" and the questioning of prosecutor Phoebus should have been allowed after the State had opened the door on cross-examination by suggesting a lack of opportunity for Jackson to have reported the information. Exhibit "12" and the proffered testimony would have demonstrated that there was no lack of communication. Independently, Exhibit "12" was admissible as either a business or public record, Fla. Stat. 90.803(6) and (8), or as an absence from a public record or entry, Fla. Stat. 90.803(10). These restrictions deprived the Defendant of a fair trial under the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

POINT V

THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL DUE TO "BRUTON" REFERENCED TO CONFESSION OF NON-TESTIFYING CO-DEFENDANT

The improper references to Bush's confession were improper, prejudicial and denied the Defendant his right to confrontation in violation of the 5th, 6th, 8th and 14th Amendments to the United States Constitution, Article I, Sections 9, 16 and 17 of the Florida Constitution, and Section 921.141. This error entitles the Defendant to a new sentencing proceeding. Walton v. State, 481 So.2d 1197 (1985); Engle v. State, 438 So.2d 803 (Fla. 1983), *cert. denied*, 465 U.S. 1074 (1984).

The Defendant complains about the following two "Bruton"[13] problems:

1) During the State's opening argument, the prosecutor said "...and after the Defendant heard the statement of John Earl Bush he too confessed to the murder, the kidnapping and robbery". The court denied the Defendant's Motion For Mistrial, but instructed the jury to disregard "any reference that was made in regard to what any other person said" (T237-57);

2) Detective Lloyd Jones testified he "obtained a confession" from Bush. The Defendant's Motion For Mistrial was denied, but the jury was instructed to disregard what they had just heard (T536-37).

These references to Bush's confession were especially prejudicial because of the State's reliance upon an alleged statement overheard by Michael Bryant. *Supra*, Point IV. Bryant's claim to have overheard a conversation between the Defendant and Bush presupposed that Bush actually knew who pulled the trigger. Notably, the Defendant did not confess to being the triggerman. Instead, Bush made the statement that the Defendant pulled the trigger. The Defendant's failure to timely deny this statement may constitute an adoptive admission.

Since no other evidence was introduced to directly implicate Bush, the reference to Bush's "confession" had the direct effect of buttressing Bryant's testimony. Since Bryant's testimony was the only basis upon which the jury may have concluded that Cave was the triggerman, the *Bruton* references are prejudicial and should constitute reversible error. Applying the harmless error rule in this context, the State is unable to establish beyond a

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[13] Bruton v. United States, 391 U.S. 123 (1968).

reasonable doubt that the error did not contribute to the verdict. State v. Clark, 614 So.2d 453 Fla. (1992).

POINT VI

THE CCP JURY INSTRUCTION WAS DEFECTIVE AND UNCONSTITUTIONAL

In Jackson v. State, 19 FLW, S 215 (Fla. April 21, 1994), the CCP instruction was held to be unconstitutionally vague. Based on this precedent, the Defendant is entitled to a new sentencing hearing in which the jury will be properly instructed on the CCP aggravating factor.

As in *Jackson*, the Defendant specifically preserved his objection to the standard CCP instruction by the filing of a written objection (R1017-20) and by moving to declare the aggravating factor unconstitutionally vague and overbroad (R201-14 [Defendant's Pretrial Motion #13]). In fact, the written objection included a proposed instruction which eliminates the vagueness criticized in *Jackson* and in Espinosa v. Florida, 112 S.Ct. 2926 (1992) (Striking down the HAC instruction based on vagueness). The Defendant both directly objected to the State's proposed jury instruction relative to CCP (T885), and moved pre-trial to change or declare it unconstitutional. *See* Notice of Objection to the Standard Jury Instruction Re: The Cold, Calculated and Premeditated Aggravating Circumstance Based Upon Chapter 921.141(5)(i)/Motion To Modify The Cold, Calculated, and Premeditated Aggravating Circumstance Jury Instruction (R1017-20).

A key issue in weighing the CCP factor concerns whether the Defendant was the triggerman. The Defendant hotly disputes that he was the triggerman. Moreover, the trial

court could not make a finding of fact that the Defendant was the triggerman. In view of these factual disputes, as well as restrictions on the ability of the Defendant to challenge certain State evidence relative to this factor, the State cannot show beyond a reasonable doubt that this improper instruction did not affect the jury's decision. Stringer v. Black, 112 S.Ct. 1130 (1992).

For the reasons set forth in the *Jackson* decision, the Court should reverse this case for a new sentencing hearing where the jury would be properly instructed on the CCP aggravating factor. *See* Sochor v. Florida, 112 S.Ct. 2114 (1992); Hodges v. Florida, 113 S.Ct. 33 (1992); Henry v. Florida, 112 S.Ct. 3021 (1992).

POINT VII

THE TRIAL COURT SHOULD HAVE PRECLUDED THE STATE FROM SEEKING TO IMPOSE A DEATH PENALTY FOR FAILURE TO HOLD A NEW SENTENCING HEARING WITHIN NINETY DAYS OF ENTRY OF ORDER OF UNITED STATES DISTRICT COURT

United States District Court Judge William J. Castagna entered an order, in Cave v. Dugger, Case No. 88-977-Civ-T-15B(M.D. Florida) which provided in relevant part:

> Petitioner's Petition For Habeas Corpus Relief is granted as to Petitioner's claim of ineffective assistance of counsel during the sentencing phase of his trial. Respondent, the State of Florida, is directed to schedule a new sentencing proceeding at which Petitioner may present evidence to a jury on or before ninety (90) days from the date of this order. Upon failure of the Respondent to hold a new sentencing hearing within said ninety (90) day period without an order from this Court extending said time for good cause, the sentence of death imposed on the Petitioner will be vacated and the Petitioner sentenced to life in prison.

Judge Castagna's Order was appealed by the State and cross-appealed by the Defendant. *See* Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992). Fifty-three days

elapsed between the rendition of the August 3, 1990 Order and the entry of a stay on September 25, 1990 (R415-27). On August 26, 1992, the 11th Circuit Court of Appeals affirmed the decision of the district court in granting a new sentencing hearing and denied the Defendant's cross-appeal. The 11th Circuit's mandate was filed with the Clerk of the United States District Court on September 21, 1992 (R1164-65).

Considering the elapse of time before the entry of the stay, the State failed to bring the Defendant to trial within the period mandated by the Writ of Habeas Corpus. Even if the period before the issuance of the stay is not considered, the State never moved, or attempted in any way, to obtain an extension of time as provided in Judge Castagna's order. Under the specific terms of the order, the Defendant is entitled to a life sentence.[14]

The only Florida court addressing this issue has agreed with the Defendant's position:

> [W]e hold that where a habeas corpus proceeding grants a retrial, the time for such retrial is not governed by the speedy trial rule; instead, the time stated in the court's order controls, and in the absence of a stated time, the constitutional reasonableness standard applies.

Beckam v. State, 397 So.2d 449, 451 (Fla. 3rd DCA 1981)

It should be noted that the *Beckam* court refused to grant relief because the federal habeas corpus order simply required that the Defendant be afforded a new trial within a reasonable period of time. In contrast, the Defendant's trial was to commence within a specified period. *See* Burkett v. Cunningham, 826 F.2d 1208 (3rd Cir. 1987) (Where a

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[14] On or about April 16, 1993, the Defendant filed a Motion For Enforcement of Writ of Habeas Corpus in the District Court, *sub nom.*, Cave v. Singletary, Case No. 88-977-Civ-T-15B(M.D. Fla.). This matter is still pending before Judge Castagna.

court order has denied discharge on the condition that a lesser remedy be granted, but that order has gone unfulfilled, discharge is indeed appropriate); Hammontree v. Phelps, 605 F.2d 1371 (5th Cir. 1979); Jones v. Smith, 685 F.Supp. 604 (S.D. Miss. 1988) (Writ issued requiring imposition of life sentence).

This Court should enforce Judge Castagna's order against the State by ordering the Defendant's sentence to be reduced to life.

POINT VIII

THE COURT ERRONEOUSLY ADMITTED THE STATE'S "STAGED" RE-ENACTMENT

A videotaped re-enactment was introduced as State Exhibit 43. Even if the depictions on the tape were marginally relevant, the tape should not have been admitted as being unduly prejudicial under Rule 90.403.

The video in question shows the most direct route of travel from the kidnapping site to the murder scene (T664). Although the proffered purpose was to demonstrate the terrain, the video was created at night so that little could be seen. The alternative basis for admission of the video was to "mark time" as to how long the trip lasted (T665-69).

This video was cumulative to other persuasive evidence which had already established both the estimated time of the trip and the geography of the route leading to the murder scene. Already, it had been established that the body had been found along State Road 76 approximately 12-13 miles west of Stuart (T270-71; 370-73) in a sparsely populated area consisting of mostly cattle, ranches, and citrus groves (T287-91); and that it took approximately 17 minutes to drive at the legal speed limit from the convenience store to the murder scene (T293). Aerial photographs of the murder scene were introduced into

evidence as well as a full diagram of the murder scene (T318-24). Pottgen v. State, 589 So.2d 390 (Fla. 1st DCA 1991) (error to admit inflammatory video when other substantial reliable evidence on issue was offered). Aetna Casualty & Surety Company v. Cooper, 485 So.2d 1364 (Fla. 2nd DCA 1986) (whether inflammatory evidence is cumulative held to be important factor).

Although the video was represented to the Court as showing the path of travel and the length of travel, and although Crowder represented that the audiotrack did not contain "much other than the clicking noise which is the sound of the camera mechanism itself" (T671), the tape ended with a loud gunshot. According to the prosecutor, the purpose of the gunshot was to "simulate the point where the murder may have occurred". After the gunshot, according to the prosecutor, the video showed what the victim saw as the car pulled away (T673-74). The Defendant's renewed objection to the video and motion to strike it were denied (T674, 687).

It is axiomatic that videotapes are admissible on the same basis as still photographs. A foundation must first be laid that a video is a fair and accurate representation of the material fact or issue, then that the probative value is not outweighed by the danger of unfair prejudice or misleading the jury. Ehrhardt, *Florida Evidence*, Sections 401.2-401.3 (1994 Ed.)

The concluding gunshot, followed by the sound of closing cardoors and a view of a car pulling away into the darkness, was relevant neither to "mark time", nor to re-enact the victim's experience. Since the evidence shows that death was instantaneously caused by the gunshot, there was no possibility that the victim would see or hear the gunshot, or

see the car pull away. The video "re-enactment" was a purely theatrical production intended to inflame the jury. The video was so shockingly realistic that the prosecutor, over objection, played it in it's entirety during summation with the gunshot acting as a climactic conclusion to both the video and to the summation.

Although the admission of a video re-enactment is subject to the trial court's discretion, the inappropriate admission of a video will be reversed when the depiction is inflammatory or graphic. Pausch v. State, 596 So.2d 1216 (Fla. 2nd DCA 1992). Although the improper admission of a video re-enactment is subject to the harmless error rule, an important consideration is whether the video presentation has been "inflammatory or exaggerated". Dowell v. State, 516 So.2d 271, 274 (Fla. 2nd DCA 1987), *review denied*, 525 So.2d 877 (Fla. 1988).

In *Dowell*, the avowed purpose of introducing a video re-enactment was to establish time periods. Although the *Dowell* court wondered "why the witness could not simply have testified as to the re-enactment without the video", no reversible error was found because of the relatively straightforward and unexaggerated video presentation. Nonetheless, the *Dowell* court cautioned that "this case should by no means be taken as a general approval of the use of that type of evidence to buttress a witness' testimony". *Id.* at 274.

The video re-enactment was prejudicial evidence and should not have been admitted. Especially in light of the other error in this case, it cannot be said that the erroneous admission of the video re-enactment, either separately or cumulatively, did not affect the jury's recommendation. *See* State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT IX

THE TRIAL COURT ERRONEOUSLY EXCLUDED MITIGATING EVIDENCE CONCERNING THE DEATH OF THE DEFENDANT'S SON

Evidence concerning the affect of the sudden, accidental death of his 13 year old upon the Defendant was admissible as a non-statutory mitigating factor. The Defendant's ability to maintain close familial relationships despite being incarcerated, his ability to suffer and grieve as a result of a loved one's death, and the ability to more fully understand the impact of the consequences of his own criminal actions are aspects of the Defendant's character which are admissible in a penalty proceeding. The exclusion of this evidence denied the Defendant a fair trial in violation of the 5th, 6th, 8th and 14th Amendments to the United States Constitution, and Article I, Sections 9, 16, and 17 of the Florida Constitution. Eddings v. Oklahoma, *supra*; Hitchcock v. Dugger, *supra*; Skipper v. South Carolina, *supra*; Lockett v. Ohio, *supra*.

The rule for the admission of mitigating evidence was stated in *Lockett* that the trial court must:

> ...not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death....Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases.

438 U.S. at 604-605 (Emphasis in original, footnote omitted).

The rule for the admission of mitigating evidence was further refined in Eddings v.

Oklahoma:

> [J]ust as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence....The sentencer, and the court of criminal appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

455 U.S. at 114-115 (emphasis in original). *See* Skipper v. South Carolina, *supra* (Evidence of defendant's conduct awaiting trial held to be admissible mitigating evidence); Campbell v. State, 571 So.2d 415 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).

The exclusion of evidence concerning the death of the Defendant's son and the effect of it upon the Defendant was not harmless. Although evidence was adduced regarding the Defendant's relationship to his son before his incarceration in 1982, there was no evidence regarding the nature of the continued relationship from 1982 up until the time of the trial. Evidence regarding the father/son relationship under these difficult circumstances does shed light on the Defendant's character. Moreover, the impact of the sudden, unexpected death is relevant to the Defendant's capacity to grieve and understanding of the harm inflicted upon the victim's surviving family. Based upon the exclusion of this mitigating evidence, this court should reverse and remand for a new sentencing hearing.

POINT X

THE TRIAL COURT ERRED IN NOT FINDING MITIGATING FACTORS

The uncontroverted evidence established the following mitigating factors in addition to those found by Judge Walsh:

1. The Defendant saved his cousin from drowning. Fuente v. State, 549 So.2d 652 (Fla. 1989);

2. The Defendant worked steadily and helped to support his son. Smalley v. State, 546 So.2d 720 (Fla. 1989).

The trial court erred in failing to find these mitigating factors because they were reasonably established by the evidence. Since there is no presumption of correctness accorded the Defendant's death sentence, White v. State, *supra*, this court should remand with instructions to conduct a new sentencing hearing during which the jury will be properly instructed on all statutory mitigating factors as well as the ability to consider any other aspect of the Defendant's character or record or circumstance of the offense. Moreover, the failure to consider these mitigating factors violates the balancing required by the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. *See* Parker v. Dugger, 111 S.Ct. 731 (1991) (Reviewing court must not ignore evidence of mitigating circumstances).

POINT XI

THE EVIDENCE DOES NOT SUPPORT THE CCP AGGRAVATING FACTOR

The evidence failed to establish that the Defendant intentionally participated in the killing. With the exception of the testimony of Michael Bryant, the record is devoid of evidence demonstrating either heightened premeditation or circumstances under which the Defendant may be held vicariously accountable for the actions of his co-defendants. Notably, the evidence given by Michael Bryant was rejected by Judge Walsh and should not form an independent basis for finding the CCP factor.

The evidence fails to support the finding that the victim was kidnapped in order to murder her in a remote location (R1591). The Defendant submits that the evidence is not inconsistent with Cave's claimed belief that the victim would be released in a remote location in order to facilitate their escape. Apart from Michael Bryant's testimony, there was no evidence that the Defendant personally shot or knifed the victim. Additionally, there was no evidence that the Defendant agreed that the victim should be murdered. It is axiomatic that aggravating factors must be proved beyond a reasonable doubt. Robertson v. State, 611 So.2d 1228 (Fla. 1993). Before CCP can be found as to the Defendant, the State must demonstrate a basis for holding him vicariously liable for the actions of Parker and/or Bush. It has been expressly held that an aggravating factor cannot be vicariously applied unless the State shows that the Defendant directed or knew the victim would be killed. Williams v. State, 622 So.2d 456 (Fla. 1993); Omelus v. State, 584 So.2d 563 (Fla. 1991). Since the vicarious liability was not proved beyond a reasonable doubt, the CCP factor should not have been found. *See* Robertson v. State, *supra*.

The evidence also failed to show the "heightened premeditation" necessary to support the CCP factor. In Rogers v. State, 511 So.2d at 533, it was held that "calculation" consists of a careful plan or prearranged design. In the case at bar, the State wishes to draw the inference that the kidnapping was in furtherance of a murder scheme, but this inference is neither compelling nor the only reasonable inference. Another equally reasonable inference, which is consistent with the Defendant's statements, is that the victim was being transported to an isolated area to be released unharmed in order to facilitate the escape. *See* Clark v. State, 609 So.2d 513 (Fla. 1992) (heightened premeditation not

established where evidence consistent with the lack of preplanning).[15]

Based on the lack of sufficient evidence to base a finding of heightened premeditation and a vicarious liability, the CCP finding violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. Due to the cumulative error in this case, especially the failure of the trial court to consider or to instruct the jury on six statutory mitigating factors, the unconstitutionally vague jury instruction on CCP, and the failure of the court to weigh several established non-statutory mitigating factors, this case should be reversed and remanded for a new sentencing proceedings before a jury.

POINT XII

THE EVIDENCE DOES NOT SUPPORT THE HAC AGGRAVATING FACTOR

The evidence failed to establish that the Defendant should be held vicariously liable for the suffering or anguish necessary to establish the HAC aggravating factor consistently with the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

As set out in Point XI, *supra*, the mere participation or presence of an accused does not establish vicarious liability for an aggravating factor. For example, in Omelus v. State, *supra*, HAC was found to be inappropriate in a murder for hire prosecution where the procurring defendant had stipulated that the hit man use a firearm. Instead of using the agreed firearm, the hitman killed with a knife, inflicting at least 19 wounds, including

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[15] CCP was not found by the trial court during the course of the 1982 trial. *See* Cave v. State, 476 So.2d 180 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986).

defensive wounds, on the victim. The *Omelus* court held that HAC should not have been submitted to the jury:

> Nowhere in this record is it established that Omelus knew how Jones would carry out the murder of Mitchell and, in fact, the evidence indicates that Jones was supposed to use a gun. There is no evidence to show that Omelus directed Jones to kill Mitchell in the manner in which the murder was accomplished. Under these circumstances, where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously.

584 So.2d at 566. Even though the *Omelus* trial judge did not find the existence of HAC, the sentencing jury was instructed on the HAC factor. Finding that the jury should not have been so instructed, and applying a *DiGuilio* analysis, the error could not be found harmless and the case was reversed for a new sentencing proceeding. As in *Omelus*, the sentencing jury was erroneously instructed in the case at bar on the applicability of the HAC factor. *See also* Williams v. State, *supra*, ("We have expressly held that this aggravating factor (HAC) cannot be applied vicariously, absent a showing by the State that the Defendant directed or knew how the victim would be killed").

As indicated in Point XI, *supra*, the testimony of Michael Bryant should be ignored because it was rejected by Judge Walsh. Without Bryant's testimony, there was no direct evidence that the Defendant kidnapped the victim for any reason other than, as he maintained in his statements, to release her unharmed in a remote location. While an inference may be drawn that the Defendant kidnapped the victim with intent that she be or knowledge that she would be murdered, such an inference is neither compelling nor proof beyond a reasonable doubt. *See* Robertson v. State, *supra*. Since the Defendant's

claim of lack of intent or knowledge that the victim be murdered was not contradicted, such proof must be accepted as establishing, at least, a reasonable doubt.

While the victim was en route, the evidence shows that the victim pleaded for her life, cried and pulled her hair out (T507-17, 537-41, 825-26). As indicated by Judge Walsh in his findings in support of HAC (R1588), it may be inferred that the victim knew that she was about to be murdered. However, this inference is not supported by direct evidence until Bush or Parker said they didn't want to leave any witnesses (T512-17). Cave's belief that the victim would be released unharmed is supported by Parker's testimony that Bush told her to "just be quiet, won't nothin' happen to you" (R2114). According to Johnson, Cave told the victim that she would be released unhurt (R2405). Consequently, until Bush said the victim would have to be killed (R2114-15), there was no direct evidence from which to conclude that the victim knew she was about to be killed in advance of the fact.

As the precise timing of Bush's statement was not established, the evidence failed to establish the length of time that the victim was aware of her impending death. Also relevant is the failure of the evidence to establish that Cave still had the gun at the time Bush made the threatening statement. *Compare* Robinson v. State, 574 So.2d 108 (Fla. 1991), *cert. denied*, 112 S.Ct. 131 (1991) (HAC inapplicable where kidnapped murder victim was assured that she would be released and not killed) *with* Preston v. State, 607 So.2d 404 (Fla. 1992), *cert. denied*, 113 S.Ct. 1619 (1993) (HAC found proper with kidnapped victim, in addition to driving to a remote location, was forced to walk at knifepoint through a dark field, to disrobe and then killed via multiple stab wounds).

Because the vehicle used had only two doors, and because the victim was seated in

the back between Cave and Johnson, it was necessary for Cave to exit the vehicle first. The victim then was removed from the car. While the circumstances of the removal remain vague, Judge Walsh found that the victim's head hair was "forcibly removed" and, therefore, was subsequently found during a microscopic examination of the rear area of the passenger compartment. Judge Walsh supposed that the hair was removed by the victim as she pled for her life or as she was pulled out of the car by her hair (R1589).[16]

While criminalist Nippes said that the victim's hair found in the rear area of the car had been "forcibly extracted in some form from the scalp" (T659-60), he did not suggest that the hair was removed as the victim was being dragged or pulled from the backseat area. The only direct evidence on this issue suggested that the victim may have pulled her own hair out (T512-17). Consequently, the evidence does not support Judge Walsh's alternative supposition that the victim was pulled from the backseat by her hair. After receipt of the sentencing order, the Defendant promptly moved for reconsideration of this point, but the request was denied (R1637-48, 1636). *See* Point XVIII, *infra*.

Although the evidence established that the victim was stabbed in the stomach, the efficient and instaneous cause of death was a single gunshot to the back of the head. According to Dr. Wright, there would have been no pain associated with the gunshot (T419-31). The statements of the various defendants, the only direct sources of information relative to the timing of the stab wounds, suggest that the period of time between the stabbing and the gunshot was quite brief (T537-41, 549, 818; R2117, 2374-75, 2393-95,

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[16] The original finding of HAC was approved, in part, because the victim had involuntarily released her bladder and because of a defensive wound incurred in attempting to avoid the stabbing. This evidence was not established at the resentencing and Judge Walsh made no finding of such. *See* Cave v. State, 476 So.2d at 188.

2405-08).

Based upon the lack of evidence regarding the timing of the stab and gunshot wounds, the evidence failed to establish torture or physical suffering. *Compare* Nibert v. State, *supra* (victim remained conscious while being stabbed 17 times and there were several defensive wounds) *with* Maggard v. State, *supra*, (HAC improper in execution-style murder where victim is unaware of impending death). In Lewis v. State, 398 So.2d 432, 438 (Fla. 1981), it was said:

> [A] murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious or cruel.

See also McKinney v. State, 579 So.2d 80 (Fla. 1991) (HAC not shown where victim received multiple gunshot wounds and evidence did not show the defendant intended to torture the victim); and Menendez v. State, 368 So.2d 1278 (Fla. 1979) (HAC not found where victim shot twice with arms in submissive position).

Also in support of HAC, Judge Walsh suggested that Cave was "clearly the leader or co-leader" of this criminal activity (R1590). This finding is not supported by the evidence. While the prosecutor suggested that Cave must have been a leader because he was in the front passenger seat of the car when it was stopped by Deputy Bargo (T970-971), the State sang a different song in the Parker prosecution when Parker was placed in the front passenger seat (R2235). In the findings supporting the death penalty against Parker, Judge Nourse specifically found that Cave sat in the backseat (R2317). In the Bush case, the prosecutor, likewise, placed Cave in the backseat and Parker in the front passenger seat (R2331). Similarly, Johsnson's statement showed that Parker was in the front passenger

seat (R2412), as did Parker's statement (R2102, 2158, 2190). According to Parker, Bush ordered Cave to put the girl in the car, after which Bush received the gun from Cave (R2113).[17] Any "finding" that Cave was a leader is based on speculation and not supported by the evidence.

As the factual determinations underpinning the HAC finding are not clothed with a presumption of correctness, White v. State, *supra*, this court must independently evaluate the existence of the aggravating factor. In light of the inappropriate finding of HAC, as well as other cumulative error, this case should be reversed and remanded for a new sentencing hearing before a jury.

POINT XIII

THE EVIDENCE DOES NOT SUPPORT THE WITNESS ELIMINATION AGGRAVATING FACTOR

Judge Walsh erroneously found that the murder was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escaped from custody. While the evidence clearly establishes the Defendant's involvement in the underlying felonies, the evidence fails to establish beyond a reasonable doubt Cave's vicarious liability for this "witness elimination" aggravating factor. This finding violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

Since the Defendant did not personally kill the victim, he cannot be held vicariously liable for an aggravating factor unless he actually intended for the facts underlying the

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[17] On the other hand, Johnson said that Parker retrieved the gun from Cave after the girl was removed from the car (R2374-75, 2393-95).

aggravating factor to occur. *See* Omelus v. State, *supra*; Williams v. State, *supra*. *See also* Points XI and XII, *supra*. In light of the absence of direct evidence relative to Cave's intent to eliminate a witness, the existence of the aggravating factor must be established via circumstantial evidence. The circumstantial evidence rule requires that all reasonable inferences, consistent with the circumstantial evidence, be drawn in favor of the accused. Simmons v. State, 419 So.2d 316 (Fla. 1982). This reviewing court should reverse the aggravating factor if it is not inconsistent with any other explanation. Jackson v. State, 599 So.2d 103 (Fla. 1992), *cert. denied*, 113 S.Ct. 612 (1992) (circumstantial evidence insufficient).

Judge Walsh made a finding that the "evidence clearly reflects a conscious, pre-planned, previously agreed upon motive of eliminating Frances Julia Slater..." (R1586). As there was no direct evidence of Cave's agreement, the Court justified this finding based upon inferences drawn from the following facts:

1) That the victim was the only identification witness;

2) That no masks were worn during the course of the robbery;

3) That the store and the prospective victim had been "cased out" in advance of the actual robbery;

4) That Bush said "contemporaneous to the crime that he did not want any witnesses"; and

5) That the victim was transported to a location where she was ultimately killed (R1586-87).

During his several statements, Cave maintained his belief that the girl would be

transported to an isolated location and released unharmed, and denied the existence of any pre-agreed plan to kill the victim (T549-56, 818-19). Some time during the ride, Bush declared that the victim would be killed in order to avoid an identification (T512, 517, 2114-15). The exact time of this announcement was never established, but it was not made until after the robbery had been completed and the victim placed into the backseat of the car. The circumstantial evidence is consistent with the explanation that Bush made a unilateral decision, perhaps together with Parker, to kill the victim. This scenario is not inconsistent with Cave's resitation of the events and does not establish an agreed upon plan to eliminate a witness.

The failure to attempt a concealment of identity may be explained by stupidity, by impairment due to the consumption of alcoholic beverages and use of marijuana, or by an intention to kidnap the victim for the purpose of releasing her unharmed where a prompt report would not be possible. Although lack of concealment is also consistent with an intent to eliminate the witness, the circumstantial evidence rule mandates acceptance of any reasonable inference consistent with the inapplicability of the aggravating factor. Simmons v. State, *supra*.

The fact that the store and the victim had been "cased out" is consistent with a pre-planned robbery and kidnapping with intent to release the victim unharmed. The trial court interpretation of this would imply that no robbery is pre-planned unless there is an intent to kill. The trial court's assumption is speculative and should be rejected. Scull v. State, 533 So.2d 1137 (Fla. 1988), *cert. denied*, 490 U.S. 1037 (1989) ("mere speculation" will not substitute for evidence that witness elimination was dominant motive behind

murder).

The mere fact that the victim was killed, after being transported to a remote location, does not necessarily establish a previous plan of witness elimination. While such evidence is consistent with a pre-agreed plan to kill the victim, it is also consistent with Cave's explanation.

Before the witness elimination factor may be found, "the State must show beyond a reasonable doubt that the defendant's dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness". Robertson v. State, 611 So.2d at 1232. *See* Riley v. State, 366 So.2d 19 (Fla. 1978). In Hansbrough v. State, 509 So.2d 1081 1086 (Fla. 1986), it was said that "the mere fact that the victim may have been able to identify her assailant is not sufficient to support finding this factor".

As the factual determination underpinning the witness elimination finding is not clothed with a presumption of correctness, White v. State, *supra*, this court must independently evaluate the existence of the aggravating factor. As the evidence does not prove this aggravating factor beyond a reasonable doubt, and in light of other cumulative error, this case should be reversed and remanded for a new sentencing hearing before a jury.

POINT XIV

THE EVIDENCE DOES NOT SUPPORT THE PECUNIARY GAIN AGGRAVATING FACTOR

Since the robbery had already been completed, the pecuniary gain aggravating factor was not established. In Rogers v. State, 511 So.2d at 533, it was held that the pecuniary gain factor is not supported when "the killing occurred during flight and thus was not a

step in furtherance of the sought-after gain". This finding violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

While the underlying robbery was committed for pecuniary gain, there is no evidence that the assailants would profit further from the victim's death. For example, there is no indication that property was stolen from the victim during the course of the robbery, nor was there evidence of a ransom demand. Consequently, the evidence did not support the pecuniary gain factor. *See* Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988), *cert. denied*, 488 U.S. 871 (1988) (pecuniary gain applies only where "the murder is an integral step in obtaining some sought-after specific gain").

Based upon the improper finding of the pecuniary gain factor, as well as the cumulative error in this case, this court should reverse and remand for a new sentencing hearing before a jury.

POINT XV

THE HAC JURY INSTRUCTION WAS DEFECTIVE AND UNCONSTITUTIONAL

In Espinosa v. Florida, *supra*, the HAC instruction was struck down as unconstitutionally vague. Even before the United States Supreme Court compelled it, Florida amended its definition of HAC. Florida Jury Instructions, 579 So.2d 75 (Fla. 1991). The Defendant submits that the new HAC instruction, as given in the case at bar, is likewise constitutionally defective and violative of the 5th, 6th, 8th and 14th Amendments to the United States Constitution, and Article I, Sections 9, 16 and 17 of the Florida Constitution. *See* Defendant's Motion To Declare HAC Unconstitutional (R175-92 [Pretrial

Motion #12]), and his Notice of Objection to the Standard Jury Instructions Relating to the Heinous, Atrocious, or Cruel Aggravating Circumstance Based on Chapter 921.151(5)(h)/Motion To Modify Standard Jury Instruction For Heinous, Atrocious, or Cruel (HAC) (R1011-16).

The jury instruction utilized in the case at bar begins with the very words condemned as meaningless and applicable to all first degree murders. Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987) [*en banc*], *affirmed* in Maynard v. Cartwright, 486 U.S. 356 (1988); Shell v. Mississippi, 498 U.S. 1 (1990). The instruction does not describe conscienceless or pitiless crimes which are unnecessarily tortuous to their victims as a *limit on HAC*, but merely as a "kind of crime intended to be included" as HAC. Florida's new HAC instruction is no better than the old instruction.

Even if the last sentence of the new HAC instruction were read to *limit* the jury's discretion, the jury might well believe it means a "conscienceless" crime, even one not "unnecessarily tortuous", would be HAC. Such an instruction provides no guidance defining HAC because "conscienceless" is a "catch-all" subjective aggravating factor. It places complete, effectively unreviewable, discretion in the hands of the sentencer, contrary to the 8th Amendment.

The use of the phrase "unnecessarily tortuous", without further definition, is confusing and invites a subjective response. The inconsistency of appellate decisions applying HAC demonstrate that further definition is needed. *See* Burns v. State, *supra* (if crime is not committed for purpose of causing unnecessary suffering, HAC should not be found); Hallman v. State, 560 So.2d 223 (Fla. 1990) (In shooting case, HAC not found

because defendant "did nothing to increase or prolong" suffering); Cheshire v. State, 568 So.2d 908 (Fla. 1990) (HAC is proper only in tortuous murders that "evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of suffering of another"). No guidance is given to distinguish between "necessarily" and "unnecessarily" tortuous crimes.

Absent specific guidance, this phrase does not cure the catch-all nature of the vague language which invites the jury to impose death in an arbitrary and inconsistent manner. The HAC instruction, as given, violates the constitutional requirement that the death penalty not be inflicted in an arbitrary and capricious manner. *See* Proffitt v. Florida, *supra*; Hodges v. Florida, *supra.*

POINT XVI

THE WITNESS ELIMINATION INSTRUCTION WAS DEFECTIVE AND UNCONSTITUTIONAL

In Espinosa v. Florida, *supra*, Hodges v. Florida, *supra*, and Jackson v. State, 19 FLW, S 215 (Fla. April 21, 1994) the instructions pertaining to CCP and HAC were struck down because the instructions did not adequately explain the law. For this reason, the instruction pertaining to witness elimination is, likewise, defective and unconstitutional.

The following standard jury instruction was given pertaining to witness elimination:

> Aggravating circumstance number 2, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(T988). *See* Fla.Stat. 921.141(5)(e). This instruction fails to explain the parameters of the witness elimination aggravating factor as it has been interpreted by the Florida Supreme

Court. In particular, the standard jury instruction is defective because it fails to advise the jury that "the State must show beyond a reasonable doubt that the defendant's dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness. Robertson v. State, 611 So.2d at 1232. *See* Point VIII, *supra* and cases cited therein.

The Defendant timely objected to the constitutionality of the aggravating factor and the instruction in his Pretrial Motion #9. *See* Motion To Declare Section 921.141 and/or 921.141(5)(e), Fla. Stats. and/or the Standard (5)(e) Instruction Unconstitutional Facially and As Applied and to preclude its use in the instant case (R150-60). The Defendant additionally objected to the standard jury instruction by the filing of a Notice of Objection to Jury Instruction Relating to Aggravating Circumstance in Chapter 921.141(5)(e)/Motion To Amend Standard Jury Instructions Relating to the Witness Elimination Aggravating (circumstance in which the Defendant sought a proper instruction consistent with applicable Florida law (R1006-07). Perry v. State, 522 So.2d 817, 819-20 (Fla. 1988); Riley v. State, *supra*; Clark v. State, 443 So.2d 973 (Fla. 1983), cert. denied, 467 US 1210 (1984); Hansbrough v. State, *supra*.

The witness elimination instruction was unconstitutionally vague in violation of the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution. In view of the cumulative error in this case, as well as the evidence in mitigation, it cannot be said that the defective witness elimination instruction did not affect the jury's weighing process beyond a reasonable doubt. Stringer v. Black, *supra*. The remedy is to reverse and remand for a new sentencing before a jury.

POINT XVII

THE PECUNIARY GAIN JURY INSTRUCTION WAS DEFECTIVE AND UNCONSTITUTIONAL

In Espinosa v. Florida, *supra*, Hodges v. Florida, *supra*, and Jackson v. State, 19 FLW, S 215 (Fla. April 21, 1994) the instructions pertaining to CCP and HAC were struck down because the instructions did not adequately explain the law. For this reason, the instruction pertaining to pecuniary gain is, likewise, defective and unconstitutional.

The following standard jury instruction was given pertaining to pecuniary gain:

> Number 3, the crime for which the defendant is to be sentenced was committed for financial gain.

(T988). *See* Fla.Stat. 921.141(5)(f). This instruction fails to explain the parameters of the pecuniary gain aggravating factor as it has been interpreted by the Florida Supreme Court. In particular, the standard jury instruction is defective because it fails to advise the jury that the factor applies only where "the murder is an integral step in obtaining some sought-after specific gain". Hardwick v. State, 521 So.2d at 1076. *See supra*, Point XIV; Rogers v. State, 511 So.2d at 533 (murder during flight does not constitute "a step in furtherance of the sought-after gain").

The Defendant timely objected to the constitutionality of the aggravating factor and the instruction in his Pretrial Motion #10. *See* Motion To Declare 921.141 and/or Section 921.141(5)(f) and/or the (5)(f) Standard Jury Instruction Unconstitutional as applied (R161-167). The Defendant additionally objected to the standard jury instruction by the filing of a Notice of Objection to the "Pecuniary Gain" Aggravating Circumstance based upon Chapter 921.141(5)(f)/Motion To Modify Standard Jury Instruction Relating to the

"Pecuniary Gain" Aggravating Circumstance (R1008-10). *See* Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988) ("While it is true that Scull took Villegas' car following the murder, it has not been shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain").

The pecuniary gain instruction was unconstitutionally vague in violation of the 5th, 6th, 8th, and 14th Amendments to the United States Constitution, and Article I, Sections 9, 16, and 17 of the Florida Constitution. In view of the cumulative error in this case, as well as the evidence in mitigation, it cannot be said that the defective pecuniary gain instruction did not affect the jury's weighing process beyond a reasonable doubt. Stringer v. Black, *supra*. The remedy is to reverse and remand for a new sentencing hearing before a jury.

POINT XVIII

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR RECONSIDERATION

As described in Point XII, *supra*, the trial court supported its HAC finding with evidence that the victim's head hair had been "forcibly removed". Judge Walsh supposed that the hair was removed by the victim as she plead for her life or as she was pulled out of the car by her hair (R1589). Upon receiving the Court's written findings, the Defendant promptly filed a Motion For Reconsideratin which was denied without a hearing (R1636-46). This factual determination is not supported by the evidence and the Defendant did not have a fair opportunity to rebut the finding in violation of Florida Statute 921.141, the 5th, 6th, 8th and 14th Amendments to the United States Constitution, and Article I, Sections 9, 16 and 17 of the Florida Constitution.

The Sentencing Order states:

> The evidence reflects that the victim's head hair was forcibly removed from her head and remained in the rear of the vehicle. The evidence reflects that either the victim herself removed her own hair as she plead for her life in desperate frustration, or equally feasible is the premise that she was forcibly removed by her head hair and dragged, pulled or carried to an area...

(R1589). *See* Point XII, *supra*.

The refusal to reconsider this evidence denied the Defendant a fair opportunity to rebut the evidence. Fla. Stat. 921.141(1). As there was no particularized evidence from which Judge Walsh could have drawn this conclusion, the Defendant was not on reasonable notice that it was or would be an issue at the resentencing proceeding. As soon as the Defendant received the sentencing order, the Defendant moved for reconsideration so that the trial court would have access to all appropriate information relative to the issue of premature removal of hair (R1637-48).

The Defendant submits that the Court abused its discretion in refusing to consider other equally feasible explanations for the premature removal of the hair found by the criminalist. As is indicated in an article appearing in *The Journal of Forensic Sciences*, Vol. 33, No.1 (January 1988):

> Considerable caution regarding interpretations that a hair was "forcibly removed" must be observed. There are numerous ways in which an anagen hair can be removed in normal activities which do not involve a "struggle".

(R1643).

In order to conduct an independent review of the aggravating and mitigating circumstances, this reviewing court must have a complete record. *See* Lucas v. State, 417

So.2d 250 (1982). To perform this duty, this reviewing court should remand for additional consideration of the Defendant's Motion For Reconsideration.

CONCLUSION

Based on the foregoing citation of authority and argument, the Defendant, ALPHONSO CAVE, requests the Court to grant him a new resentencing hearing before a jury.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Sara Baggett, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, on this 25th day of August, 1994.

By: _____
Jeffrey H. Garland, Esquire