IN THE SUPREME COURT OF FLORIDA

KENNETH WAYNE HARTLEY,

Appellant,

v. CASE NO. 83,021

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 271543

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The prosecutor here said no truer words than when he told the jury "a crime planned and carried out in hell does not have angels as witnesses." (T 1621) Every witness it called to prove its case (except for the police and medical examiner) had significant felony records. Even friends of the victim had from two to six felony convictions. Witness credibility, always an issue at trial, became even more important in this case.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Duval County on July 25, 1991 charged Kenneth Hartley with one count of first degree murder with a firearm, armed robbery with a firearm, and kidnapping with a firearm (R 27-28). He pled not guilty to those offenses, and the case proceeded normally for matters of this sort. In particular, the defendant or the state filed the following motions or notices that have some relevance to this appeal:

1. Notice of other crimes, wrongs or acts evidence (R 41, 313).

2. Defendant's Second Motion in Limine (R 97). Hartley sought to prevent the state from introducing any evidence of the his "reputation for violence." Granted in part (R 317).

3. Motion in Limine to prevent the defense from making any reference to statements exculpating Hartley by a Ronald Wright (R 101) Granted (R 348, 363-69).

4. Motion to declare Section 921.141(5)(i) Florida Statutes unconstitutional (R 217). Denied (R 330).

5. Motion to prohibit instruction on aggravating factors 5(h) and 5(i) (R 273). Denied (R 335).

6. Notice of intent to classify defendant as a habitual violent felony offender (R 460).

Hartley was tried before Judge Hudson Olliff, and the jury found the defendant guilty as charged on all offenses (R 426-31). He proceeded to the penalty phase portion of the trial, and after the jury heard more testimony, argument, and instructions, it returned a death recommendation by a vote of

9-3 (R 458).

The court followed that recommendation and sentenced him to death. Justifying that sentence, it found in aggravation,

> 1. The defendant had been previously convicted of a felony involving the use of threat of violence.
>
> 2. The murder was committed during the course of a kidnapping.
>
> 3. The murder was committed to avoid or prevent a lawful arrest.
>
> 4. The murder was committed for financial gain.
>
> 5. The murder was especially heinous, atrocious, or cruel.
>
> 6. The murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 489-94)

In mitigation, the court found that Hartley was intelligent, mature, and had leadership qualities (R 497).

The state had filed a notice of intent to treat Hartley as an habitual violent offender, and the court accordingly found him such (R 460, 485-87). It sentenced him to two consecutive life sentences for the robbery and kidnapping convictions with the provision that he serve the minimum mandatory three years because he had used a gun in both crimes (T 475-78).

This appeal follows.

STATEMENT OF THE FACTS

Gino Mayhew was a seventeen year old high school student who carried a sawed off shotgun in the back seat of his "Blazer." He did so for good reason (T 2008-2009). He was a dope dealer (T 2069). On the evening of April 22, 1991 he parked his car in the Washington Heights apartments in Jacksonville, a particularly dangerous area of town, to sell crack cocaine (T 2069, 2106). Sidney Jones, 33 and a six time convicted felon, was his friend and was helping him sell the stuff by flagging down people who might be going to the other dealers that were also in the vicinity (T 2069-70). It was easy to sell for Gino because he had "big and better rocks to offer to the public." (T 2104) Jones had helped him several times before, and about 11:00 p.m. he decided to buy a "dime" of cocaine from him (T 2073). Gino gave him a rock for his services. After walking a short distance, Jones looked at it and discovered "it was really too small because that wasn't the deal we made the early part of the day." (T 2073).

As he returned to the vehicle, he saw Kenneth Hartley standing next to it, pointing a pistol at Mayhew (T 2075). The defendant told Jones to leave, and he moved off "very, very, very fast." (T 2075) He stopped and looked back at the Blazer. He saw Hartley get in the back seat and another man, Ronnie Ferrell, also climb in (T 2077). Yet a third person, Sylvester Johnson stood in front of the Blazer (T 2077). The car backed up then sped out of the apartment complex with Mayhew looking

very scared (T 2079). Two minutes later Johnson also left, going in the direction the earlier car had gone (T 2083)

As the group left, Juan Brown, a twice convicted felon (T 2131), saw Gino drive past him with "a light skinned male" sitting directly behind him (T 2137). Brown followed him in his car, but eventually lost him as he headed in the direction of Sherwood Park Elementary School (T 2141).

The next day Mayhew's body was found in the car at the school. The victim had been shot six times in the head (T 2038). Hartley, Johnson, and Ferrell were arrested about three weeks later.

The state presented five witnesses who gave the most damning testimony against Hartley. Two of them, Jones and Brown, we have already met. Because witness credibility is the key to this case, however, we need to briefly examine what they and the other men said as well as examine their "curriculum vitae."

SIDNEY JONES

After getting his rock of cocaine and seeing Hartley and two others take his friend away, Sidney Jones went to his apartment and smoked the crack (T 2110). He was unemployed and had been for at least two years (T 2094-95). Actually, he did work as a confidential informant for the police, and he was "investigating" Gino Mayhew (T 2120). The officer he reported to had given him a beeper number, but on the night Mayhew was murdered, Jones did not call it because "I was told by him do

not call on off duty hours." (T 2121)

Jones did not report what he knew about Mayhew's abduction and murder until some weeks later because he was scared, and after he had been arrested for a trespass charge. Once in the county jail he felt more secure (T 2090-91). Since his arrest, he had also been charged with armed robbery for which he received a year in prison from Judge Olliff (T 2094).

JUAN BROWN

Brown, as mentioned, had two prior felony convictions, and at the time of Hartley's trial, he was in jail because he had failed to appear for a pre-trial "preparation session" with the state attorney (T 2149). He also was scared to testify, and the police had to seek him out (T 2145). He had grown up with Ronnie Ferrell, and had known of Hartley for several years (T 2132, 2146). He never identified the person sitting behind Mayhew in the Blazer (T 2136-37).

ANTHONY PARKIN

Parkin had five felony convictions (T 2182), and he ran into the defendant in the latter part of May 1991 in the Duval County Jail (T 2185). This witness claimed he overheard Hartley say "I think I really fucked up this time by doing this with that mother fucker Ferrell. I think he's going to turn on me and testify against me when he's just as guilty in doing this as I am." (T 2187) At the time of trial he was awaiting sentencing for a violation of probation and for dealing in stolen property (T 2182). He tried to give himself an early

release from the county jail for which he had been charged with attempted escape (T 2192). While there, he broke several jail windows for which the state accused him of criminal mischief (T 2193, 2210).

A plea agreement provided that he would serve no more than 15 years in prison for the probation violation and the dealing in stolen property charges (T 2183), and significantly, he would not be classified as an habitual offender (T 2183). At the state's recommendation, he was also placed on home detention, but he had had problems with his grandmother, with whom he was living, and he turned himself in and returned to jail (T 2195).

RONALD BRONNER

Bronner had four felony convictions, and at the time of Hartley's trial he was awaiting sentencing for a cocaine trafficking conviction (T 2218-19). The state agreed that he would receive a 25 year prison sentence without being treated as an habitual offender if he testified truthfully against Hartley (T 2219-20). Bronner had known the defendant all his life and was friends with him (T 2221). He had asked Hartley about the shooting, and he purportedly said "the only reason they were saying that because I robbed him two days before he was killed." (T 2224) He also said that he had told Ferrell to "get out of the truck he said you know me, I left my trade mark, left no witnesses." (T 2229) The defendant, according to Bronner, also said he was going to shoot Johnson and Ferrell

because they were "acting so scared." (T 2230)

Bronner had not planned to go to the Sheriff's office with his information because Hartley was his friend (T 2231). He changed his mind when he realized "Gino was a little kid" and it was a cold blooded murder." (T 2231) Although this witness denied bargaining with the police (T 2232), he went to them shortly after he had received a notice of the state's intent to classify him as an habitual offender on the cocaine charge for which he could have received 60 years in prison (T 2238).

ERIC BROOKS

Brooks had two prior convictions, and at the time of the trial he was awaiting sentencing for an armed robbery. The state agreed that he would receive a sentence of no more than 30 years in prison, not be treated as an habitual offender, and not serve a three minimum mandatory sentence he apparently was entitled to (T 2255). In return he would testify truthfully about Hartley. While in the Duval County jail, he and the defendant discussed their cases. Hartley initially denied knowing Mayhew and being involved in his murder (T 2260). Later he told Brooks that he was afraid Ferrell was going to testify against him and "he explained to me what happened, who was involved." (T 2261). Like Bronner, he denied trying to negotiate with the police for a lighter sentence (T 2269), and it was pure coincidence that both men went to the sheriff about the same time with their evidence against Hartley (T 2273).

SUMMARY OF THE ARGUMENTS

Kenneth Hartley presents 11 issues (5 guilt and 6 penalty phase) for this court's consideration.

ISSUE I. The court allowed the state to introduce evidence that the police had asked Hartley if he knew Gino Mayhew and when he denied it, the officer said that was wrong because they knew he had robbed robbed Mayhew two days before he was killed. The state claimed it needed this evidence, not to show any motive for the murder, but to prove that the defendant knew the victim, and lied about that knowledge. The "fact" of the robbery, however, was irrelevant Williams Rule evidence first because it was merely an allegation of wrong doing. The state presented no proof of the robbery other than the policeman's claim that Hartley had robbed Mayhew. Second, if the evidence survives this initial hurdle, it has another major problem in that there are no significant, unusual similarities between the charged robbery/murder and the earlier robbery. Finally, the evidence of the earlier crime does not put the murder in context.

ISSUE II. Before trial, defense counsel had learned that a Hank Evans had confessed to a Ronald Wright that he had killed Gino Mayhew. He had also sent him a letter that could be viewed as confirming that earlier admission. At the state's instigation the court suppressed any evidence that Evans had admitted committing the crimes for which Hartley had been charged. That was error of constitutional dimension because

Wright's testimony was corroborated by the letter, and as important, Evans was available to deny he had confessed to Wright.

ISSUE III. During the state's opening statement, the prosecutor told the jury that Hartley "was the area tough guy, people in the area where this occurred were afraid of him." Even though the court twice sustained the defendant's objection to the repeated reference to his character, it should have declared a mistrial. First, the state made an issue that the defendant was the neighborhood bully when he had never made any claim that he was some sort of latter day Saint Nicholas. Second, even though several witnesses said they were afraid to testify, such fear was never explicitly linked to Hartley. Sidney Jones, for example, continued to be afraid to talk, even though Hartley had been in jail for 18 months. The fear he and others may have had was never linked to this defendant, so any reference to him being the "area tough guy" only unfairly introduced his bad character.

ISSUE IV. Sidney Jones presented the most damning evidence against Hartley. He saw him put a gun to Mayhew's head, climb in the car with him, and take him away. Yet, his story of what he did afterwards is so incredible that one must wonder about the truth of his entire testimony. He claimed to have been a police informant actively seeking to bust drug dealers. Obviously his "good friend" Gino Mayhew was one because Jones helped him hawk his crack cocaine. He even was "paid" for it

with one rock of crack. Even though Jones claimed to have witnessed the abduction of Mayhew he never reported it until his arrest some two weeks later. At trial when defense counsel questioned him about his undercover work, Jones refused to give the name of the police officer who was his contact. The court sustained that refusal, yet it was error because all Hartley wanted to do was test the validity of this witness' testimony. If Jones admitted he had no police point of contact then, bingo, his credibility, already weak, would have been destroyed. On the other hand, if he had said that he worked with say, an Officer Smith, Hartley could have checked with him to confirm his dealings with Jones. Because evidence of the latter point would have directly contradicted Jones' testimony, it was relevant.

ISSUE V. During jury selection Hartley challenged the state's peremptory excusal of a black woman, Mrs. Theresa Sanford. When the court asked for the reason he had excused her, the prosecutor said initially that she was against the death penalty. He later said, however, the primary reason was that she was a psycho-therapist, and "I'm concerned she's too forgiving because of her line of work and understanding of human frailties." The court erred in sustaining the state's use of the peremptory challenge, first because there was scant evidence Ms. Sanford was opposed the death penalty. To the contrary, she said she could recommend capital punishment if the aggravating factors outweighed the mitigation. Second, the

state could point to no record evidence that this prospective juror was in any way a closet Mother Teresa. Without such support, it could not justify the use of the peremptory challenge.

ISSUE VI. The court, over defense objection, instructed the jury on the cold, calculated, and premeditated aggravating factor using the instruction this court had disapproved in Jackson v. State, 648 So. 2d 85 (Fla. 1994). Given the weak credibility of the state's witnesses such error could not be harmless. Moreover, as recent the United States Supreme Court has ruled in a similar issue, the harmless error analysis cannot be applied when the court gives an incorrect jury instruction on a key issue at trial.

ISSUE VII. The court, in sentencing Hartley to death, found that he had committed the murder in a cold, calculated and premeditated manner. It erred in doing so because it relied on evidence not admitted at Hartley's trial and for which the defendant had no notice of or opportunity to review. Additionally, if Hartley killed Mayhew to prevent a "pre-emptive" strike that certainly was a pretense of moral justification.

ISSUE VIII. The court found that Hartley committed the murder for pecuniary gain and during the course of a kidnapping. Finding both factors was an impermissible doubling because they focussed on the same aspect of the crime and the only reason for the kidnapping was to rob Gino Mayhew. There was no

"broader purpose" behind the abduction, and because there was not, the court improperly found both aggravators applied in this case.

ISSUE IX. The court also found Hartley committed the murder in an especially heinous, atrocious, or cruel manner. The only evidence supporting that aggravator was the court's finding that during the trip to the school Mayhew may have realized that the defendants planned more than a robbery. But, the court supported those findings in its sentencing order with few facts presented at trial, and what it did provide does not prove this aggravator existed beyond all reasonable doubts. There was no evidence of sufficient magnitude to prove Hartley mentally tortured the victim before his death for any significant period.

ISSUE X. The court also instructed the jury on the especially heinous, atrocious, or cruel aggravator. Even though the guidance given was more complete than that disapproved by the United States Supreme Court in Espinosa v. Florida, 505 U.S. ___ (1992) it still had the same problems as the former, unconstitutional instruction. Namely, the additional language provided no inherent restraint on the jury's discretion to recommend a life or death sentence. A juror could have reasonably believed every murder was "unnecessarily torturous" and concluded that all such crimes had an unnecessary amount of human suffering.

ISSUE XI. Finally, during jury selection, prospective juror

Goldman said he was doubtful he could recommend a death sentence. The court granted the state's cause challenge and excused him. That was error because although he may have been reluctant to return a death recommendation, he never said he would always support life regardless of the facts or the law. The evidence showed only that it would have been difficult for him to vote for death. That is very much different from saying he could never do so. Because he could vote for death, albeit reluctantly, the court erred in excusing him from sitting as a juror in this case.

ARGUMENT

ISSUE I

THE COURT ERRED IN ADMITTING THE STATEMENT OF A POLICE OFFICER THAT HE KNEW HARTLEY HAD ROBBED THE VICTIM TWO DAYS BEFORE THE MURDER AND THAT THE DEFENDANT HAD DENIED KNOWING GINO MAYHEW, IN VIOLATION OF HARTLEY'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The state filed a notice that it intended to introduce evidence that on April 20, 1991 (two days before the murder) Hartley had robbed Gino Mayhew (R 41, 313). At trial, the state sought to introduce the testimony of Quinn Baxter, a police officer, that he had arrested the defendant and Ronnie Ferrell for the April 22, 1991 murder of Mayhew. When Hartley denied knowing Mayhew, the detective told him that "we knew that on the Saturday, two days prior to the murder of Gino Mayhew that Mr. Hartley had robbed Gino Mayhew that was on April 20th, 1991, therefore we knew that he knew Gino Mayhew." (R 2172).

Defense counsel objected to introducing this testimony, and the state, arguing for its admission, said, "I'm introducing the evidence of Williams rule on the issue of credibility of this defendant to show that he was lying." (T 2158) He also said "I will concede motive is not the sole rationale, it's not the rationale for introducing Williams' rule, it is on the issue of knowledge." (T 2161) The court overruled Hartley's objection, finding that "the evidence in toto as summarized by [the prosecutor] is relevant and I think it comes within the purview of the William's Rule 90.404." (T

2166) The court erred, however, in that ruling because the evidence was, first, not Williams Rule evidence, and if it was, it lacked any similarities with the charged crime to make it sufficiently similar to justify its admission.

1. The evidence of the earlier robbery was not Williams Rule evidence.

The relevant portion of section 90.404 the court relied on provides:

> (2) Other crimes, wrongs, or acts.--
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

For this portion of Hartley's argument, the key phrase is "similar fact evidence of other crimes." Here the state presented only Detective Baxter's allegation that "we knew that on the Saturday, two days prior to the murder of Gino Mayhew that Mr. Hartley had robbed Gino Mayhew." (T 2172) It presented an inadmissible allegation, not "similar fact evidence." Thus, for at least that reason, the court erred in not requiring at least some further evidence beyond a mere allegation that the defendant had robbed the Mayhew previously. Several cases with facts very similar or less egregious to those in this case support Hartley's argument.

In Dibble v. State, 347 So. 2d 1096 (Fla. 2d DCA 1977), a

Detective Herold arrested Dibble after she and a companion had tried to take money from him as the officer posed as a drunken derelict. While making the arrest, he told the defendant, "that this happens all the time on the street, people getting robbed, but this time I was a police officer, and 'You just all hit the wrong guy this time.'" Id. at 1097. Admitting that statement at trial, the Second District held, was error. It implied that Dibble had previously robbed someone, but there was no proof of such a crime, or that she had done it. Because the comment was "highly prejudicial," the court ordered a new trial.

In Jackson v. State, 451 So. 2d 458 (Fla. 1984), the defendant was charged with two counts of first degree murder, and during the state's case, one witness said that Jackson had told him that he was a "'thoroughbred killer' from Detroit." This court held that admitting that statement created reversible error because "the boast neither proved that fact, nor was that fact relevant to the case sub judice." Id. at 461.

In Finklea v. State, 471 So. 2d 596 (Fla. 1st DCA 1985), the state charged Finklea and his co-defendant with two counts of robbery with a firearm. The key witness against the defendant, when cross-examined by the co-defendant, tried to clarify his testimony by claiming Finklea took him by a car lot on Friday, not Tuesday or Wednesday. Significantly, this later time referred to two uncharged robberies. Even though the

court sustained Finklea's objection and gave a cautionary instruction, the "introduction of a prior unrelated criminal act is too prejudicial for the jury to disregard." Id. at 597.

Finally, although there are other cases supporting this point[1], in Jackson v. State, 627 So. 2d 70 (Fla. 5th DCA 1993) , the detective investigating the robbery Jackson was eventually charged with committing testified that he had first learned of a possible suspect when another policeman told him "that an individual had been taken in on another charge and he fit the description that been issued. . . of the suspect of the case." Id. at 70. All this evidence did, the Fifth District held, was demonstrate the defendant's bad character or propensity to commit crime. Id. at 71. Thus, unsubstantiated allegations the defendant committed other crimes generally have no relevance to prove the charged crime. Admitting such claims not only is error, it is error requiring a new trial.

So, here, Detective Baxter's "knowledge" that Hartley had robbed Mayhew two days before the latter's death only established Hartley's bad character. The state presented no clear and convincing evidence that he had committed an earlier robbery as it was required to do, and the allegation he had committed the earlier robbery damaged the fairness of his

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[1]Malcolm v. State, 415 So. 2d 891 (Fla. 3rd DCA 1982) (new trial for sale and possession of drugs required when the court admitted evidence of Malcolm's involvement in another unrelated sale); McClain v. State, 516 So. 2d 53 (Fla. 2d DCA 1987) (New trial in a sexual battery case required when the court admitted testimony of the victim/baby sitter who told the defendant that "You probably did that to [appellant's five-year old stepdaughter], too.")

trial. Chapman v. State, 417 So. 2d 1028, 1031 (Fla. 3rd DCA 1982).

Because the accusation of the prior robbery was "highly prejudicial" or was "presumptively prejudicial" this court must reverse Hartley's convictions and remand for a new trial.

2. The evidence shared no unusual similarities with the charged crime to justify its admission.

If this court can get beyond the problem just raised, it will have to deal with the "similarity" requirement "Williams Rule" evidence must have. State v. Williams, 110 So. 2d 654 (Fla. 1959). That is, in Drake v. State, 400 So. 2d 1217 (Fla. 1981) this court required collateral crime evidence have an unusual similarity to the charged offense in order to be admitted at the defendant's trial. "A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations." Id. at 1219. The collateral crime, in short, must have a "signature" like similarity with the charged offense.

> To minimize the risk of a wrongful conviction, the similar fact evidence must meet a strict standard of relevance. The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offenses.

Heuring v. State, 513 So. 2d 122, 124 (Fla. 1987).

At most, all we have in this case are general

similarities: a robbery and the same victim. The latter fact does not make the collateral crime "strikingly similar" to the charged offense because Mayhew was a dope dealer, and violence permeates the world such people inhabit. It is one where robberies must have been seen as a risk inherent in the trade. Afterall, Mayhew was back on the street two days after the first robbery still dealing the stuff, apparently no worse for the experience. The collateral crime evidence simply had none of the striking similarities with the murder this court has required for it to have been admissible at Hartley's trial.

3. The evidence had no relevance other than to show Hartley's bad character.

Of course, if relevancy is the criteria for admitting evidence, Ruffin v. State, 397 So. 2d 277, 279 (Fla. 1981), then the Williams Rule analysis need not be used if the robbery had some pertinence to the state's case other than to show the defendant's bad character. That is, for example, evidence of other crimes is relevant if it puts the charged offense in "context." Smith v. State, 365 So. 2d 704, 707 (Fla. 1978) (charged murders occurred during one evening of prolonged criminal activity.) It also may be relevant if the collateral crime provides a motive for the defendant to commit another criminal act. State v. Richardson, 621 So. 2d 752 (Fla. 5th DCA 1993). For example, in Heiney v. State, 447 So. 2d 210 (Fla. 1984), the defendant was charged with committing a

murder. At trial, the court properly admitted evidence to show that Heiney had murdered another person a day or so before the Florida homicide. This court approved that decision because the earlier murder established not only the "entire context" of the criminal episode; it also tended to show that Heiney committed the Florida robbery/murder to avoid apprehension for the first killing. Other murder cases followed the Heiney rationale. Caruso v. State, 645 So. 2d 389 (Fla. 1994) (Caruso's prior drug activities relevant to provide a reason for breaking into the victims' house to look for money and then killing them when discovered.); Brown v. State, 611 So. 2d 540 (Fla. 3rd DCA 1992)(girl friend said that Brown had threatened to kill her if he found her with another man. Threat was relevant to explain why the defendant tried to kill her.)

Perhaps Sweet v. State, 624 So. 2d 1138 (Fla. 1993) comes closest factually to Hartley's case. There, the state had the problem of proving why the defendant would break into Marcine Cofer's apartment and spray it with bullets, killing a 13 year old visitor. It solved that difficulty by introducing evidence that three weeks earlier Sweet had robbed her, and that the defendant could have reasonably believed she had reported it to the police. Hence, like Heiney, Sweet had to kill Cofer to prevent her from putting him in prison.

In this case, unlike in Sweet, the state presented no evidence linking the April 20th robbery (assuming there was one and Hartley did it) to the murder two days later, other than

the officer's allegation. Realizing the weakness of motive as a reason to admit the earlier crime, the prosecutor said he had another reason for introducing the earlier robbery of Mayhew. "Your honor, I will concede motive is not the sole rationale, it's not the rationale for introducing William's Rule, it is on the issue of knowledge." (T 2161) Specifically, "We have a direct statement to a law enforcement officer that he does not know Gino Mayhew yet the statements that he gave to these two other individuals clearly show that he knew Mayhew." (T 2161) "[T]he relevance here, that is, shows the defendant lied to this detective regarding his knowledge of Gino Mayhew. "[Y]et we've got him making these statements that clear show his knowledge of Gino Mayhew and that's the focal issue." (T 2165-66)

Knowledge, as used in section 90.404, refers to an awareness that is linked to the crime charged. For example, evidence that the defendant offered a bribe to hide some crime is relevant to prove the defendant's guilty knowledge. Dawson v. State, 401 So. 2d 819 (Fla. 1st DCA 1981). Proof that the defendant had stolen property other than that with which he had been charged with possessing tends to refute a defense that he did not know it was stolen. Parnell v. State, 218 So. 2d 535 (Fla. 3rd DCA 1969). See, Ehrhardt, Florida Evidence, 1994 edition, Section 404.13.

In this case, the evidence the defendant lied to the police officer only introduced Hartley's bad character. That

he knew Mayhew, but denied such knowledge, showed only that he was a liar but that fact had no relevance to the murder.[2]

As the state said in its closing argument:

> The only reason that series of questions was allowed was to show that this defendant is not being truthful when he was questioned by Detective Baxter as to whether he knew Gino Mayhew. . . . The reason that the robbery evidence was presented to you or facts about it is to show this defendant, I would submit to you from the evidence, was not being truthful with the detective when he told him he didn't know Gino, he was trying to distance himself from Gino Mayhew and from this murder as much as he could.

(T 2374-75).

The court erred in admitting Baxter's allegation Hartley had robbed Mayhew two days earlier.

4. Admitting this evidence was sufficiently prejudicial to warrant a new trial.

Finally, the court's error requires this court remand for a new trial. The harmless error rule has no application, and it does not for two reasons. First, errors of this sort or inherently prejudicial and unamenable to correction by way of a cautionary instruction. Finklea v. State, 471 So. 2d 596, 597 (Fla. 1st DCA 1985).

Second, the only real issue in this case was the

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[2]Hartley's lawyer, succinctly noted what the state here was doing. "Your honor, I think what I'm hearing is that if I want to get in a William's Rule crime that I accuse the defendant of it and when he denies it then I can put on evidence of it to impeach him to show that he is lying." (T 2160-61)

credibility of the state's witnesses.[3] If the jury believed them, Hartley murdered Mayhew. If not, he did not. But, the state had a problem. Everyone who had any knowledge about the crime, except the police officers and the medical examiner, had a motive to lie and a felony record that evidenced a moral character on the level of a hyena.

Consider first, Sidney Jones, the 33 year old man who said he saw the defendant put a gun to Mayhew's head and drive off with him sitting behind the victim. Jones, who is no novice to the criminal justice system with six felony convictions (T 2061), had not worked for two years, but he evidently ate well enough. Actually, he did work for the police as a confidential informant and was "investigating" Mayhew at the time of his death (T 2120). Apparently he did this by soliciting people to buy Mayhew's cocaine (T 2070). This was the same person Jones said was a friend of his, that Jones' life had been changed by Mayhew's death, yet on the night his friend was murdered, after seeing Hartley kidnap Mayhew and take him away at gun point, he could only go home and smoke the crack his good buddy Mayhew had given him (T 2110). Even though when last seen Mayhew was "very, very scared and frightened" (T 2076) Jones never called the police because, as he claimed, the police officer who had

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[3]The court used this earlier robbery in its sentencing order to justify finding that the murder was cold, calculated and premeditated. "The defendant planned to kidnap, rob and murder the 17 year old Mayhew so he could not retaliate for defendant's earlier robbery of him and so there would be no witness to the present robbery." (R 494) There is no evidence to support those claims.

given him a beeper number told him "not to call on off duty hours." (T 2121)

Well if he did not call him that night, perhaps he would do so the next morning. No, he waited until the police had arrested him two weeks later for trespassing and had put him in jail (T 2090). He hesitated, he again claimed, because he felt safer in jail, although he was back on the streets in 10 days (T 2092). Of course, he had since then also been charged with robbery for which this six time loser was serving only a nine month sentence in the Duval County jail (T 2093).

Juan Brown, perhaps the most reputable of the lot, had only two felony convictions, but he never saw the defendant with Mayhew. As he sped by him at 11 p.m., he only saw a light skinned black person sitting behind the victim in the Blazer (T 2136-37). At the time of trial, he was in jail because he had failed to appear for a pre-trial "preparation session" with the state attorney (T 2149).

Anthony Parkin testified that Hartley essentially admitted committing the murder (T 2187). Parkin had five felony convictions, and when he heard the defendant confess, he was in the Duval County Jail (T 2185). At the time of trial he was awaiting sentencing for violating his probation and for dealing in stolen property (T 2182). He had also tried to escape from the jail and had smashed several of its windows (T 2192-93, 2210). He had negotiated a plea agreement with the state that he would serve only fifteen years in prison for the probation

violation, and significantly, he would not be classified as an habitual offender, which had he been so found, would not only have significantly lengthened his sentence, but it would also have limited the amount of prison gain time he could have earned.

Ronald Bronner had four felony convictions, and was awaiting sentencing for a cocaine trafficking conviction at the time of Hartley's trial (T 2218-19). Like Parkin, he received a good deal from the state. He also would not face habitualization and instead would serve a 25 year prison term it he testified truthfully against Hartley (T 2219). Again, like Parkin, Brannen claimed Hartley admitted killing Mayhew (T 2229). Although this witness denied making any bargain with the state (T 2232), he showed up on its doorstep as soon as he found out the state intended to classify him an habitual offender on the cocaine charge. He could have gotten a sixty year prison term, and that would probably have meant he died in prison, a decidedly unpalatable future (T 2238).

Finally, Eric Brooks had only two felony convictions, and at the time of trial, he was awaiting sentencing for an armed robbery conviction. Like it had done with the other witnesses it called, the state agreed that Brooks would serve a term of years in prison but it would not seek to habitualize him. It sweetened the deal by also waiving the three year minimum mandatory sentence that apparently would have applied (T 2255). In return, Brooks would testify truthfully, and that testimony,

like the others, implicated Hartley in the murder (T 2261).

Now the state was absolutely correct when it told the jury during voir dire that a "crime planned and carried out in hell does not have angels as witnesses." (T 1621) But if it relied almost entirely on a pack of devils to prove Hartley's guilt, then Baxter's testimony fatally damaged the fairness of the trial. The claim that "they" knew Hartley had robbed Mayhew two days before killing him was, in comparison to the testimony of the other witnesses, unimpeachable. It gave the state's case against the defendant a credibility it desperately needed. The court's error simply could not have been harmless, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN EXCLUDING THE TESTIMONY OF A RONALD WRIGHT THAT ONE HANK EVANS WROTE HIM A LETTER CONFESSING TO THE MURDER OF GINO MAYHEW, IN VIOLATION OF HARTLEY'S DUE PROCESS RIGHT TO A FAIR TRIAL.

As is evident from the last issue, most of the state's witnesses who testified against Hartley had the morals of hyenas, and they pounced on the defendant when he appeared at the Duval County Jail. Sidney Jones' testimony was almost laughable. He was Gino Mayhew's good friend, yet when he claimed to have seen Hartley and two others drive the victim away, he could do nothing more than go home and smoke his crack cocaine. This police informant did nothing because the officer he reported to told him not to use the beeper given to him. He even did not call the next day during normal work hours to report what he had seen. He waited two weeks and then he did not come foreword until he had been arrested.

Similarly, the jail house snitches all gave uncorroborated stories that Hartley had confessed to them, and they, in a fit of righteous citizen outrage, ran to the prosecutor (almost together) to report what he had said. Of course, that they got sweetheart deals in their own cases was merely coincidental, and had no bearing on the truth of their testimony.

Obviously witness credibility became the crucial issue the jury had to resolve, and the court was faced with what should have been a simple problem when the state sought to exclude the testimony of one Ronald Wright whom the defendant wanted to

call as his witness at trial (R 101). A Hank Evans had confessed to Wright that he (Evans) had killed Gino Mayhew, and in a letter to Wright, he implied as much (R 1315-17, SR 99). Wright gave the letter to his lawyer, an Assistant Public Defender, and he in turn turned it over to Hartley's counsel (T 1444). The state wanted Wright's testimony and the letter suppressed because there was nothing to corroborate what Evans had said (R 101, T 1425-26).

The court held a pre-trial hearing on the matter, and the state produced Evans to explain what he had sent Wright. In it he had written "You was my home-boy and I never told you a thing about that Sherwood Blazer tip until we got to Lake Butler and shit had cleared up." (R 1387) Evans clarified that sentence at the hearing by testifying:

> Okay. What I meant, I was using this Sherwood Blazer tip as an example. When I was in the county jail, like during the time from May 25th, from November 1st, the rumors that I heard, I never went to the authorities trying to get a less, you know, a lenient sentence, you know, on my behalf, you know, going to the authorities with this information, trying to help myself.

(T 1387). He further said that Wright may have involved him in the Mayhew murder to retaliate against Evans' implicating Wright in an armed robbery (T 1389).

The court granted the state's motion, finding that neither the hearsay exception allowing declarations against penal interest, section 90.804 Fla. Stats. (1992), nor Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)

justified admitting this evidence (R 363-68). The court's conclusion regarding the evidence code was correct.[4] It erred, however, in ruling that Chambers provided insufficient support for Hartley's contention that he could use Wright's testimony.

There are admittedly and deservedly rare instances when the strict requirements of the evidence code must give way to the demands of simple justice. The United States Supreme Court in Chambers recognized this necessity, and it used that case to guide lower courts when presented with evidence that valid state procedural rules excluded from being presented to the jury but that common sense justice said should be admitted. Mississippi's hearsay rule precluded Chambers from calling three witnesses who would have testified that another person admitted killing the victim the defendant was charged with murdering. The nation's high court, rejecting that harsh result, used a flexible, fairness standard to allow the admission of evidence in those rare instances when state law could not bend to accommodate the needs of basic justice. The court never intended their decision to become a strict rule to replace those it said were too demanding. "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may

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[4]Malcolm v. State, 415 So. 2d 891 (Fla. 3rd DCA 1982) (new trial for sale and possession of drugs required when the court admitted evidence of Malcolm's involvement in another unrelated sale); McClain v. State, 516 So. 2d 53 (Fla. 2d DCA 1987) (New trial in a sexual battery case required when the court admitted testimony of the victim/baby sitter who told the defendant that "You probably did that to [appellant's five-year old stepdaughter], too.")

not be applied mechanistically to defeat the ends of justice." Id. at 302. Instead, the fundamental criteria of trustworthiness and necessity applied. Id. at 302. The evidence Chambers wanted admitted bore signs of reliability, and it was necessary to his defense.

In this case, simple, equal fairness should have compelled the court to admit Ronald Wright's testimony of Evans' confession. Hartley produced Ronald Wright who said that Evans had confessed to murdering Gino Mayhew. He also had a damning letter implying as much and which Evans only weakly explained away.

Moreover, his claim that Wright fabricated his story to get back at him falls flat. If Hartley's witness had such a motive it would not have arisen until February 1992 when Evans became willing to testify against Wright (T 1390). Significantly, however, Wright had contacted the Assistant Public Defender in November 1991, months before Evans had decided to testify against him (T 1396-97).

The court in this case relied on this court's decision in Hill v. State, 549 So. 2d 179 (Fla. 1989) to justify excluding Wright's evidence. The facts of that case differ so markedly from those of this one that this court's legal conclusions have no strong hold here.

> Appellant next argues that the court erred in not admitting the testimony of a co-worker (A) that a second co-worker (B) told him (A) that a third co-worker (C) admitted committing the murder. Neither B nor C was available to testify.

Id. at 181.

The trial judge properly excluded hearsay couched within hearsay. It did so because, as this court found, "there is no due process right to present uncorroborated and untrustworthy evidence to the trier of fact from witnesses who cannot be cross-examined because they have no knowledge of the substantive truth of their testimony." Id. at 182. The state also had abundant physical evidence such as finger and shoe prints plus an inculpatory statement from the defendant to prove he had murdered the victim.[5] But the primary reason for exclusion was the inability of the state to conduct meaningful cross-examination.

In this case, Hartley's evidence was not like the hearsay wrapped inside hearsay the court excluded in Hill. Instead both Wright and Evans were available for examination and cross-examination.

Moreover, the state had no physical evidence such as that admitted in Hill to link the defendant to the murder. There were no fingerprints or shoe prints left at the crime scene. No hairs similar to Hartley's were found, nor were any other fibers discovered that could have been connected to the defendant. Unlike Hill, the state had only largely uncorroborated statements from witnesses who had a stake in seeing Hartley convicted.

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[5]The state might argue that Hartley's and the others' "broader purpose" was to hide the murder by taking Mayhew away from the Washington Heights Apartments. If so, the court then doubled the kidnapping aggravator with the "Avoid Lawful Arrest" factor (R 490).

Indeed, the reason the court excluded the hearsay in Hill, i.e. the inability of the state to conduct meaningful cross-examination, is noticeably absent here. The state found Evans and had him testify that he had never admitted killing Mayhew. Thus, the problems the courts in Hill had with the state's inability to cross-examine hearsay declarants were solved in this case. Not only was Wright available for cross-examination, Evans, the one who made the damning statement, was available to deny ever making it.

Moreover, unlike the facts in Hill, those in this case only weakly point to Hartley as Mayhew's killer. The state's case, as has been repeatedly emphasized, hinged exclusively on the testimony of men who had the credibility of used car salesmen. Contrary to what the court found in its order denying admission of Wright's testimony (R 368), Hartley had no defense other than attacking the credibility of the state's key witnesses. He presented no alibi defense. Wright's testimony, thus, was an essential and necessary part of the defendant's case.

The state, dangling the cheese of good deals and threats of long sentences before the inmates of the Duval County Jail, found two rats, Bronner and Brooks. They scurried to the State Attorney's office with vague and unverifiable tales that Hartley had told to them that he had killed the victim in this case. The court, demanded no corroboration of their hearsay, yet found it sufficient to find this defendant guilty of first

degree murder and worthy of a death sentence.

On the other hand, Evans corroborated his confession to Wright in the letter he had written to him. Admittedly the admission could have been stronger, yet his statement confirmed that he knew about the Mayhew murder, and that he was worried about it to not mention it until things had cooled down.

Thus, this is one of those rare instances when the guiding philosophy of Chambers should have allowed the jury to hear Hartley's proffered evidence. It had some corroboration, the state's case was weak, and it was essential to Hartley's defense. The trial court erred in excluding it. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THE COURT ERRED IN DENYING HARTLEY'S MOTION FOR MISTRIAL MADE DURING THE STATE'S OPENING STATEMENT WHEN THE PROSECUTOR SAID THAT THE DEFENDANT WAS "THE AREA TOUGH GUY," A COMMENT ON HIS CHARACTER WHEN IT HAD NOT BEEN INTRODUCED AND A DENIAL OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

At the very beginning of its opening statement to the jury, the prosecutor told the jury:

> The evidence will present the story of how this defendant Kenneth Hartley kidnapped, robbed, and then murdered a 17 year old boy and he did it in such a way that there would be no witnesses to the robbery. He did so, the evidence will show, he did so thinking that he would get away with this.
>
> Now, you may as why? And the answer is because he believed no one would dare to be a witness against him. You may ask why did he believe that? I submit to you the evidence will show that he was the area tough guy, people in the area where this occurred were afraid of him.
>
> MR. WILLIS [defense counsel] Objection.
>
> THE COURT: All Right. I sustain the objection, counsel, don't make closing argument, is that your objection, counsel?

(T 1913)(Emphasis supplied.)

At the bench, counsel moved for a mistrial because "in his opening first breath [the prosecutor] is trying to bring in the reputation of this man and character of this man's propensity for violence." (T 1914) The court denied the motion, and when the state resumed its opening it said,

> The evidence in this case is going to show that the defendant counted on witnesses not coming forward because he believed that they were going to be afraid to testify against

him.

MR. WILLIS: Your Honor, I would object again directly --

THE COURT: That's the same thing I sustained a moment ago, Mr. Bateh, strike that remark, disregard that, members of the jury.

(T 1916)

The court should have granted Hartley's motion for mistrial because the prosecutor had commented on the defendant's character when it had not been made an issue. The mistake became reversible error because the evidence of the defendant's guilt, considering the credibility of the state's witnesses, is far from overwhelming.

First, the law in this area is simple and straightforward. Section 90.404(1) Fla. Stats. (1994) provides:

> Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except:
> (a) Character of accused,- Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the trait.

Thus, the state cannot refer to a scar on the defendant's neck only for the purpose of insinuating that the defendant has a violent character. Von Carter v. State, 468 So. 2d 276, 279 (Fla. 1st DCA 1985). Nor can a co-defendant tell the jury that the defendant threatened to kill him if the former went to the police. Fasenmeyer v. State, 383 So. 2d 706, 708 (Fla. 1st DCA 1980). Unless the defendant introduces the issue of his good character or makes that trait an issue, the state cannot

produce evidence of it or comment about it. Jordon v. State, 107 Fla. 333, 144 So. 669 (1932).

In this case, Hartley never presented any evidence of his character. Even if he had, claiming that he terrorized his neighborhood had no justification because the state made that assertion during opening argument and before Hartley had had his turn to say what he thought the evidence would show. He certainly opened no doors for the state's claim that he was a thug. Morgan v. State, 603 So. 2d 619 (Fla. 3rd DCA 1992)("The defense counsel's opening statement invited the State's inquiry as to why Stewart left town and did not immediately come forward.") Id. at 620.

But, the state could say (as the court found in Morgan) that it needed to explain that its witnesses had refused to come forward because they were afraid. Hartley would be hard pressed to deny that was a valid reason for admitting this evidence. That is, he would agree with the state except for one tiny requirement: the prosecutor must show the witnesses had stayed home because they were afraid of the defendant. Because Hartley had made some threats, one or more of the state's witnesses were afraid. The need to establish a link between the village bully and his neighbor's terror undoes the state's case here because it never presented any evidence Hartley created the fear that at least two men said they felt.

Sidney Jones admitted the Washington Heights area was "pretty rough, and "it's very, very dangerous for new people

but not for a person like me." (T 2106) He also revealed that several people besides himself were standing around the night of the abduction and apparently saw what he saw (T 2114). They had not come forward, as he had, however, because they were very, very, scared (T 2114). Significantly, he also admitted that the fear remained even though Hartley had been in jail for 18 months (T 2115). Indeed, he was afraid of "Duck" Johnson (T 2004), not Hartley:

> Well, knowing Washington Heights and the people that hang around Washington Heights and the people that hang together, I would know if I would have said something that several people that I know would have told Duck that I told, and I wouldn't think that I would be sitting here today in trial telling this jury about what happened to Gino if I would have said something to these people up front about what was going on in the first lane with Gino.

(T 2117-18).

Juan Brown was also scared, but primarily for his family. "[A]t that time I felt what I saw wasn't relevant to the case because they didn't give a time of death, and I was scare for my family. . . . I was scared they might react or do some harm to my family, so I kept my mouth closed until I found out more." (T 2142, See also T 2145)

Thus, the state never linked either Jones' or Browns' fear to Hartley. Indeed, Jones apparently was afraid of "Duck" Ferrell, and neither Jones or Brown mentioned any fear of Hartley. The state, therefore, never connected whatever trepidation these witnesses had with the defendant. It never

substantiated its remark about Hartley being the "area tough guy," and all it did was impugn his character.

Of course, the state could admit everything the defendant has argued, but claim that any error was harmless. Au contraire. The states stellar cast of witnesses included thugs, muggers, and assorted riff raff, all familiar with the criminal justice system and all willing to cut deals with the state for their testimony implicating Hartley. Credibility was the key issue here, and for the state to poison the juror's minds from the very start was such a serious error that the court's curt "strike that remark, disregard that, members of the jury" could not have removed the taint (T 1916). Instead, the court should have affirmatively rebuked "the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by the improper comment." Deas v. State, 119 Fla. 839, 845, 161 So. 729 (1935); Williamson v. State, 459 So. 2d 1125 (Fla. 3rd DCA 1984).[6]

This court should reverse the trial court's judgment and sentence and remand for a new trial.

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[6]This court has, in any event, recognized the anemic effectiveness of curative instructions, particularly ones like the court gave here to simply "disregard" what the prosecutor said. Geralds v. State, 601 So. 2d 1157 (Fla. 1992).

ISSUE IV

THE COURT ERRED IN EXCLUDING AS IRRELEVANT THE NAME OF THE POLICE OFFICER SIDNEY JONES REPORTED TO AS A CONFIDENTIAL INFORMANT, IN VIOLATION OF HARTLEY'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The state presented five "stellar" citizens of the community to implicate Hartley in the murder of Gino Mayhew. The key witness was Sidney Jones because he was the only one who claimed to have seen Hartley put the gun to Mayhew's head and then climb in the victim's car (T 2074). The others either could not identify the defendant (Brown) or had such weak credibility that the state had to present a bunch of them with the hope that sheer numbers would overwhelm the jury's skepticism about what they said.

Jones, however, had plenty of credibility problems himself besides being a six time convicted felon. His story was almost laughable. He witnessed a kidnapping, and saw that his "good friend" and dope dealer Gino Mayhew was "very, very scared" as he was taken away, yet he did nothing. Well actually he did: he went home and smoked the crack cocaine Mayhew had given him for his services (T 2090). One would have thought he would have at least called the police since Mayhew was obviously in danger (T 2076).

This belief would have become stronger with this witness' revelation that he worked for the narcotics division of the

Sheriff's Office as a confidential informant (T 2097).[7] He had a beeper number for a police officer, but the latter had told him not to call him when he was off duty (T 2121). Defense counsel, justifiably skeptical, wanted to test this incredible story. Jones, however, refused to reveal this policeman's identity when counsel asked the officer's name:

> Q. When you saw this that night you were working as an informant for the vice squad you told us that, right?
>
> A. Right.
>
> Q. And who was your supervising officer at that time, Mr. Jones?
>
> A. Well, I rather not answer that because I mean, I don't know, I rather not call it --the officer's name in court because he wouldn't do it to me and I don't think I would want to do it to him.
>
> MR. BATH [THE PROSECUTOR]: Your Honor, I'm going to assert the privilege and object on the grounds of relevancy.
>
> MR. WILLIS: What privilege?
>
> THE COURT: Mr. Willis.
>
> MR. WILLIS: There is no privilege me asking him who was his supervising officer, he's the only one that would have the privilege.
>
> MR. BATEH: I'm going to object on the grounds of relevancy.
>
> THE COURT: What say you?
>
> MR. WILLIS: The relevancy is his ability to make contact with the police department even in a discrete station [sic] and that's why it is important that this jury understand

[7]In fact, he admitted then denied he was investigating his good friend Mayhew so he could put him in jail (T 2119).

that relationship.

THE COURT: All right. I think they understand, I don't know if it's relevant. I sustain the objection.

(T 2120).

The court erred in sustaining the objection. It ruled, in effect, that because the jury understood the relationship between Jones and the police there was no need for them to know the identity of the officer Jones could contact. Yet necessity is not the basis for admitting evidence, relevancy is. Ruffin v. State, 397 So. 2d 277, 279 (Fla. 1981). If the evidence tended to prove or disprove a material fact the court should have admitted it.[8]

Here, Hartley wanted to show that Jones was as honest as Connie Chung. Had the court allowed the question, and had he conceded that well, no, he reported to no one, his credibility would have been virtually destroyed, having been caught in an obvious lie. On the other hand, if he had given a name, Hartley's counsel could have called the officer to contradict Jones' claims regarding working for the police and the use of the beeper number. Such proof would have directly contradicted this witness' testimony and was therefore relevant. Gelabert v. State, 407 So. 2d 1007, 1009 (Fla. 5th DCA 1981)(Evidence not collateral if it discredits a witness by pointing out a bias or corruption.)

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[8]Materiality, as used in this sense, includes within its scope proof that attacks the credibility of the witness. Rice v. State, 564 So. 2d 598 (Fla. 2d DCA 1990).

Who Jones reported to, thus, was relevant, and the trial court should not have excluded it. Such an incorrect ruling created reversible error because Jones provided key evidence linking Hartley to the murder of Mayhew, and his credibility, already weak, could not have withstood much more abuse from the defense. This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT ERRED IN FINDING THAT THE STATE HAD A RACE NEUTRAL REASON FOR EXCUSING PROSPECTIVE JUROR STANFORD, IN VIOLATION OF HARTLEY'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND IN DEROGATION OF HIS RIGHTS UNDER ARTICLE I SECTION 16 OF THE FLORIDA CONSTITUTION.

A Mrs. Theresa Stanford was called as one of the prospective jurors in this case (T 1504). She was an Afro-American who worked for Lutheran Social Services, and had done so for seven months. She served as its program director, and she also had a private practice in psycho therapy. She had a master's degree in counseling psychology (T 1542). When asked about her views on the death penalty, she said, "Well, my thoughts are I'm against it, I think a person can be rehabilitated in some other form." (T 1543)

She later clarified that position, however. When asked by the prosecutor if she could convict Hartley, knowing that it would subject him to a death sentence, she said, "Yes, I could objectively look at the facts without putting my personal judgment in it because that's what I do everyday, I have to objectively weigh what people tell me." (T 1662-63) When pressed about whether she could recommend death, she replied, "I couldn't say yes or no. I would have to clearly see the evidence. It would be hard for me to objectively say what I would do at this point because I haven't heard the evidence." (T 1663) After a side bar conference, the prosecutor asked her "if at the end of all the evidence if the aggravating factors

outweigh the mitigating factors and the Judge told you that that was the test that was to apply in Florida, would you be able to recommend a sentence of death?" (T 1667) Ms. Stanford simply replied, "Yes." (T 1667)

Later, the state peremptorily challenged Ms. Stanford, but defense counsel objected to its summary excusal of this member of the venire (T 1887). At the court's prompting, the prosecutor said

> I challenged Miss Stanford because she stated that she was personally opposed to the death penalty but she felt she would be able to set aside her personal feelings and follow the law. My concern is that her feelings opposed [sic] to the death penalty are adverse to the State's position in this case, also I am concerned about her field of work--that's my primary reason but I'm also concerned with psycho therapist, I'm concerned she's too forgiving because of her line of work and understanding human frailties.

(T 1887).

The court found the reasons "racially neutral." (T 1888) That was error.

The law regarding the use of peremptory challenges is contained primarily in this court's decisions in State v. Neil, 457 So. 2d 481 (Fla. 1984); State v. Slappy, 522 So. 2d 18 (Fla. 1988); and State v. Johans, 613 So. 2d 1319 (Fla. 1993). Neil, of course, established the procedure that must be followed when a party claims that the opposition has used a peremptory challenge to excuse a prospective juror solely on account of that person's race. Even though the court should

presume the challenge was made for nondiscriminatory purposes, Neil at 486, it can be attack if done in a timely manner. Additionally, the moving party must show the juror was a member of a distinct racial group, and there was a strong likelihood that he or she was excused solely because of his or her race. Id.

In Johans, this court dropped this last requirement. Now, it need only be alleged that the challenge was used in racially discriminatory manner. Id. at 1321.[9] Once a party has made that claim, the court must inquire about the motives the other side had in peremptorily excusing a particular juror.

Slappy dealt with this last issue. In that case, the state excused two members of the venire because "they're both teachers, assistant teachers, and both of them at elementary schools. That to me indicates a degree of liberalism that I prefer not have [sic] on a jury." Id. at 19. This court, while accepting "liberalism" as a valid reason to excuse members of the jury panel, nevertheless reversed Slappy's conviction and remanded for a new trial. It did so because the prosecutor had provided no record support for its challenge.

> [W]e cannot accept the state's contention that all elementary school assistants, and these two in particular, were liberal. If they indeed possessed this trait, the state could have established it by a few questions taking very little of the court's time.

Id. at 23 (footnote omitted.)

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[9]This court also declared the change to have only prospective application. This case is covered by the law announced in Johans.

In this case, the defense, court, and prosecutor followed the procedure established in Neil and modified by Johans. The only issue is whether the state, as Slappy requires, provided any record support for its reasons for excusing Ms. Stanford.

First, as to her opposition to the death penalty, this prospective juror responded initially that "Well, my thoughts are I'm against it, I think a person can be rehabilitated in some other form." (T 1543) Yet, that was not really her position because when questioned further, she unequivocally declared she could recommend death if the aggravating factors outweighed the mitigation. Contrary, to the state's claim that she was opposed to capital punishment, she was not. Hence, the record provided no support for the state's peremptory challenge.

Second, it similarly provided no record support that because Mrs. Stanford was a psycho-therapist, "she's too forgiving . . . and understanding human frailties." (T 1887) If anything, she possessed those traits the prosecutor should have sought in a juror. "Yes, I could objectively look at the facts without putting my personal judgment in it because that's what I do everyday, I have to objectively weigh what people tell me." (T 1662-63) None of her responses show her as a "liberal" or Mother Teresa. Instead, psycho-therapists probably are like school teachers. Some cheer Hilary Clinton. Others watch Rush Limbaugh. Whatever traits the state thought Mrs. Stanford possessed, it could have established them in

short order by asking a few questions. It did not, and this court, therefore, must reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VI

THE COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR BECAUSE THAT GUIDANCE, AS THIS COURT HAS DECLARED, WAS UNCONSTITUTIONALLY VAGUE, A VIOLATION OF HARTLEY'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

At the penalty phase charge conference Hartley objected to the standard instruction on the cold, calculated, and premeditated aggravating factor (T 2571). Actually, he had raised the issue pre-trial when he filed a "Motion to Prohibit Instruction on Aggravating Factors 5(h) and 5(i)." (R 273) The court, however, refused to recognize the validity of his complaint (R 335, T 2574). That was error.

In Jackson v. State, 648 So. 2d 85 (Fla. 1994), this court found that the standard jury instruction on the cold, calculated, and premeditated aggravating factor was unconstitutionally vague.

> Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in Espinosa, Maynard, and Godfrey-the description of the CCP aggravator is "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S.Ct. at 2928.

Jackson, at 19 Fla. L. Weekly S217.

In this case the court gave the jury the same instruction on the CCP aggravator as the court in Jackson had read. The result should, therefore, be the same. The court erred, and this case should be remanded for a new sentencing hearing.

Ah, but what about finding the error harmless? This court refused to do so in Jackson, noting that the trial court found only two aggravators and several nonstatutory mitigators in sentencing the defendant to death. "[W]e cannot say beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." Id.

This court has had no similar qualms in affirming death sentences in three other cases that have raised the same issue.

In Fennie v. State, 19 Fla. L. Weekly S370 (Fla. July 7, 1994); Walls v. State, 641 So. 2d 381 (Fla. 1994); and Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) this court recognized that the trial courts had given the unconstitutional instruction to the juries, and the various defendants had properly preserved the issue. Nevertheless, in each case the courts' errors were harmless. The reasons for these conclusions were obvious. In each case, unlike Jackson, the court found several other aggravators besides CCP. In Fennie, for example, the sentencer concluded that 1) the murder was committed while engaged in the commission of a kidnapping; 2) the crime was committed to avoid arrest; 3) the crime was committed for financial gain; 4) the crime was heinous, atrocious, or cruel, and 5) the crime was cold, calculated and premeditated. Fennie, 19 Fla. L. Weekly at S370. The court also found some minor, nonstatutory mitigation. Finally, the

jury in that case, as in Walls and Wuornos, unanimously recommended death.

This court in Fennie, Walls, and Wuornos, also analyzed the evidence in those cases and concluded that had the jury been properly instructed it would have found the CCP aggravator applicable. While Hartley argues below that is the wrong analytical approach, using it only fortifies the conclusion that the evidence does not prove beyond all reasonable doubt that he plotted the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The evidence, while arguably showing a coldly premeditated desire to murder on Hartley's part, could have been disregarded by the jury. Except for one jail house snitch's testimony precious little evidence exhibits Hartley's intentions on the night of the murder. Sylvester Johnson originally planned to rob some "dreads" (i.e. Jamaicans), but that idea collapsed, and he, Ferrell, and Hartley robbed Mayhew instead (T 2227). No one ever said the trio coldly plotted the drug dealer's execution. Instead, the evidence shows only that Mayhew had misfortune to be at the wrong place at the wrong time.

The jury nevertheless could have believed that Hartley coldly, with calculation and premeditation planned the robbery. Then using the CCP definition given by the court (R 454), it could have concluded that because the robbery was cold, calculated, and premeditated, the murder was also. Such logic,

while perhaps sufficient to support a conviction for guilt under a felony murder theory, could not have carried the day with the CCP aggravator. As this court held in Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984), a planned robbery does not mean the resulting murder was also sufficiently premeditated for the CCP aggravator to apply. Thus, had the jury been properly instructed, it may not have concluded this factor applied. Given the weak credibility of the state's witnesses, this court cannot say beyond a reasonable doubt that at least three of the jurors who voted for death would have remained steadfast in their opinion without the cold, calculated aggravating factor.

Such reasoning, however, goes against what the United States Supreme Court has determined the proper harmless error analysis should be for jury instruction issues. Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993). In Sullivan, the trial court gave the jury an unconstitutional reasonable doubt instruction. The issue facing the nation's high court was whether that error was harmless. A unanimous court not only said that it was reversible error, it also concluded that the mistake was not amenable to a harmless error analysis.

The court's rationale focussed on two constitutional guarantees: 1) The defendant has the right to have his guilt determined beyond a reasonable doubt, and 2) the jury is the one to make that decision. If the trial court instructed them

on reasonable doubt using an unconstitutional instruction, "there has been no jury verdict within the meaning of the Sixth Amendment." Id. at 189. If the jury has not validly determined the defendant's guilt, a reviewing court cannot substitute its judgment for the body that has the constitutional obligation to do so under the guise of a harmless error analysis.

> There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt-not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been absent the constitutional error. That is not enough. . . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual finding of guilty.

Id. at 190 (cites omitted. emphasis in opinion.)

Sullivan, because it dealt with a reasonable doubt instruction, has obvious limitations when applied to this case. The fundamental rationale of that opinion, however, is directly relevant and pertinent. That is, any defendant facing a death sentence has 1) the right to have a jury (in Florida) recommend whether he should live or die, and 2) each aggravating factor must be proven beyond a reasonable doubt.

In this case, as with the defendant's guilt in Sullivan, the jury could not determine if Hartley had committed the murder in a cold, calculated, and premeditated manner because of the defective instruction on that point. There was,

therefore, no valid death recommendation, and this court can only speculate about the jury's action had it been given proper guidance. As the nation's high court in Sullivan noted, however, appellate courts cannot do such crystal ball gazing. Here, as in Sullivan, the error remains harmful, and this court must remand for a new sentencing hearing.

ISSUE VII

THE COURT ERRED IN FINDING HARTLEY COMMITTED THIS MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court found that Hartley murdered Gino Mayhew in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. It made three factual determinations to support finding this aggravator:

> 1. Hartley killed Mayhew to prevent the latter from retaliating for the defendant's robbing him two days earlier.
>
> 2. There was a heightened level of premeditation as evidenced by the planning that the defendant and his cohorts used to plot the robbery of Mayhew.
>
> 3. Mayhew was killed in execution style.

(R 494).

A. Facts not in the record.

In finding the murder to have been committed in a cold, calculated, and premeditated manner, the court said,

> The defendant planned to kidnap, rob and murder the 17 year old Mayhew so he could not retaliate for defendants earlier robbery of him and so there would be not witness [sic] to the present robbery. From the inception the defendant, Hartley, planned to execute Mayhew.

(R 494, emphasis supplied.)

There is no evidence that Appellate Counsel can find in this record to support the emphasized portion of the court's finding. To the contrary, the plan to rob Mayhew apparently arose only when the original scheme, i.e. to rob some "dreads"

fell through (T 2227). Mayhew simply happened to be at the wrong place at the wrong time.

Apparently, there was a robbery of Mayhew on April 20th by Hartley and a Deatry Sharp, at the behest of Ronnie Ferrell (T 2156) (See Issue I). The murder of Mayhew, at least according to the state's theory in the cases of the other defendants, was, as defense counsel understood, that the murder of Mayhew arose, "in the nature of preemptive strike and I don't mean that sarcastically but apparently by what means they got some belief or knowledge or whatever that Mayhew may have been contemplating getting back at him, retaliating and so the theory when that the reason that Mayhew was killed was because they wanted preemptive strike." (T 2156) However valid that approach may have been in the other cases, the state presented no evidence in this one to support it. Instead, as mentioned, it sought to establish that Hartley, Johnson, and Ferrell robbed Mayhew simply because they wanted to rob someone, and he happened to be the someone they chose (T 2157).

In Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994), this court refused to consider the mitigating evidence that the defendant had presented in another case.

> The entire reason for having a trial in a court of record is so that the appellate courts of Florida may review questions of law based on a true transcript of what occurred. What judicial notice of other proceedings certainly is permissible in some instances, it is not proper when the party in effect is asking that we use a wholly separate proceeding to establish a mitigating factor that was not asserted at

any time in the proceeding below.

Id.

The same reasoning should apply here. At no time had the state presented any evidence the defendant killed Mayhew to prevent any retaliation. The court unfairly used that "fact" without giving the defendant any notice of its intent to do so. See, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977) (Court cannot used undisclosed evidence in a pre-sentence report to justify a death sentence.)

B. The facts found do not support the court's finding of this aggravator.

Indeed, if that was Hartley's motive then he had at least a pretense of legal justification. If Mayhew planned to retaliate, the defendant could have protected himself by this "pre-emptive strike". C.f., Christian v. State, 550 So. 2d 450 (Fla. 1989) (Defendant killed a prison inmate who had tried to kill him once and had been taunting him for weeks before he was killed.) If that was Hartley's motive, it was a colorable claim, and hence the cold, calculated, and premeditated aggravator would find no application in this case. Wuornos v. State, 644 So. 2d 1000, 1008 (Fla. 1994).

The court, in its next finding of fact said, no, the heightened premeditation came from Hartley's group's plan to rob Mayhew of his drugs and money (R 494). That finding contradicted what the court had just said about Hartley's pre-emptive strike motive. Nevertheless, if that was the

defendant's real reason for killing Mayhew, it arose when the original plan, to rob some "dread," fell through. But, if the intent was simply to rob someone, the court could not use that motive to somehow infer not only that Hartley had a desire to kill Mayhew but a heightened level of premeditation to do so. See, Hardwick v. State, 461 So. 2d 79 (Fla. 1985) (A premeditated intent to rob does not infer a premeditated intent to murder.)

Thus, without more evidence of a heightened premeditation to kill, the mere fact that Mayhew was murdered execution style cannot by itself support the cold, calculated, and premeditated aggravator. Wyatt v. State, 641 So. 2d 355, 359 (Fla. 1994). This court should, therefore, reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE VIII

THE COURT IMPERMISSIBLY DOUBLED THE AGGRAVATING FACTORS, "FOR PECUNIARY GAIN," AND "DURING THE COURSE OF A KIDNAPPING," VIOLATING HARTLEY'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Among the aggravating factors the court found in justifying sentencing Hartley to death were that the murder was committed while he was engaged in the commission of a kidnapping, and it was committed for financial gain.

> 2. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF THE CRIME OF KIDNAPPING.
>
> FACT:
> The kidnapping was an integral part of the defendant's plan to rob and murder Gino Mayhew.
>
> CONCLUSION:
> This is an aggravating circumstance and I assign it great weight.
>
> 4. THE CRIME FOR WHICH DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR FINANCIAL GAIN.
>
> FACT:
> The defendant was convicted of armed kidnapping, armed robbery and first degree murder of Gino Mayhew. The gain of drugs and money was an integral part of defendant's plan. The co-defendant Ferrell confirmed that Mayhew had both money and drugs and reported this to the defendant Hartley before the kidnap, robbery and murder plan went forward.
>
> CONCLUSION:
> This is an aggravating circumstance to which I assign great weight.

(R 491-92).

The court erred in finding both these aggravating factors

because they refer to the same aspect of the murder. Provence v. State, 337 So. 2d 783, 786 (Fla. 1977). In Green v. State, 641 So. 2d 391, 395 (Fla. 1994), this court refused to find that the trial court had doubled the same two aggravating factors as the court in this case found. This court did so because "The indictment, however, also has the option that the kidnapping was done with the intent to terrorize." Significantly, the per curiam opinion said by way of dicta that "If the sole purpose of the kidnapping had been to rob [the victims], we would resolve this issue differently." Id. But, because the kidnapping in that case had a broader purpose than to rob (i.e. to also terrorize), the trial court had not impermissibly doubled the two aggravating factors. Such cannot be said here.

The only reason Hartley kidnapped Mayhew was to rob him. As the state's witness, Ronald Bronner, said, "The plan was to rob some dreads. . . But the plan fell through." So "Duck said let's get Gino." (T 2227-28). Indeed, as the court found, "The kidnapping was an integral part of the defendant's plan to rob and murder Gino Mayhew." (R 490) Further, the indictment itself said Hartley committed the kidnapping "with the intent to commit or facilitate the commission of a felony: to wit robbery or murder." (R 28) Unlike Green, the defendant here had no broader purpose here in kidnapping Mayhew than to rob and murder him. The trial court, therefore, erred in finding that the defendant committed the murder for pecuniary gain and

during the course of a kidnapping.[10] This court should reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury. Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).[11]

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[10]The state might argue that Hartley's and the others' "broader purpose" was to hide the murder by taking Mayhew away from the Washington Heights Apartments. If so, the court then doubled the kidnapping aggravator with the "Avoid Lawful Arrest" factor (R 490).

[11]The court also never instructed the jury on the "doubling" instruction this court required "when applicable." Castro v. State, 597 So. 2d 259 (Fla. 1992).

ISSUE IX

THE COURT ERRED IN FINDING THAT HARTLEY COMMITTED THIS MURDER IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER, A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In finding that Hartley murdered Mayhew in an especially heinous, atrocious, or cruel manner, the court made the following findings of fact:

> 1. The record allows for some reconstruction of Mayhew's fears before he was murdered.
>
> 2. Mayhew appeared very frightened when the defendant pointed a gun at his head.
>
> 3. When the victim left the Washington Heights area, Hartley had a gun pointed at his head.
>
> 4. During the trip to the school, he may have realized the defendants intended more than a robbery.
>
> 5. The ride changed Mayhew's "fear to sheer animal terror. This was physical and cat and mouse psychological torture of Mayhew by defendants."
>
> 6. The victim was killed in a torturous manner.

(R 493).

Three points of law about the especially heinous, atrocious, or cruel (HAC) aggravating factor apply here. First, the facts supporting it must be proven beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1 (Fla. 1973). Second, in order for the HAC aggravator to apply, "the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim." Richardson v. State, 604 So. 2d 1107

(Fla. 1992) (emphasis in opinion). Third, killings accomplished by shootings normally do not fit the HAC mold unless the state has presented other evidence to show some physical and mental torture of the victim. Id. Teffeteller v. State, 495 So. 2d 744 (Fla. 1986).

As to this last point, the court said Mayhew was first shot through the eye, and that wound was not fatal. He then was shot in the shoulder nonfatally. The final two shots to the head were fatal. The medical examiner, however, could not determine the order in which the shots had been fired (T 2045), so the court is merely speculating about the first one being through the victim's glasses. It is also merely guessing it was nonfatal. Even if it was, there is no evidence Hartley deliberately shot Mayhew to cause him unnecessary suffering. To the contrary, the evidence shows the murder was quickly done, and hence not especially heinous, atrocious, or cruel. Brown v. State, 473 So. 2d 1260 (Fla. 1985) (The killing of a police officer who had been shot once, and who begged for his life, was not especially heinous, atrocious, or cruel.)

If the HAC aggravator applies it does so because of the ride from Washington Heights to the school grounds, but even that "fact" has problems. First, the state presented no evidence that the school grounds were in an isolated area, as the court found. Second, there is no evidence "Mayhew's fear [changed] to sheer animal terror." (R 493) Murders, such as this, even though quickly done can be especially heinous,

atrocious, or cruel because of the prolonged mental suffering the victim may have suffered before he or she was killed. For example, victims who were kidnapped from a convenience store, taken to a remote location, then made to walk across a field before being executed usually suffer enough mentally before their deaths for them to have been especially heinous, atrocious, or cruel. E.g. Preston v. State, 607 So. 2d 404 (Fla. 1992). But if the time from the abduction to the killing is short then the victim's emotional suffering is also relatively short. Hence, the sentencing court cannot say the defendant clearly and beyond a reasonable doubt intended to create a "sheer animal terror" in the victim.

Here, the time between the kidnapping and Mayhew's death must have been short. As the court mentioned in its sentencing order, "Mayhew was forced to drive out of the project area at a high speed and run a red light." (R 492) The state also presented no evidence that Hartley taunted Mayhew or otherwise inflicted some form of mental torture on the boy. For all we know, the defendant may have killed Mayhew as soon as he stopped the car.

The court, in short, had to engage in speculation to create the scenario it described. Yet, such cannot support a finding of this aggravating factor, and Hartley asks this honorable court to reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE X

THE COURT ERRED WHEN IT CONCLUDED THAT THE JURY INSTRUCTION USED IN THIS CASE, WHICH WAS BARELY MORE THAN WHAT THE UNITED STATES SUPREME COURT DISAPPROVED IN ESPINOSA V. FLORIDA, ADEQUATELY INFORMED THE JURY WHAT THE AGGRAVATING FACTOR, "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" MEANT, A VIOLATION OF HARTLEY'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

By way of a pretrial motion "to prohibit instruction on aggravating factors 5(h) and 5(i) and during the penalty phase charge conference, Hartley objected to the court instructing the jury on the standard instruction on the especially heinous, atrocious, or cruel aggravating factor (R 273, T 2571) The court denied the request (R 335), and gave them the following standard guidance:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(R 454).

Reading that instruction was error.

Florida is known as a "weighing" state when it sentences a person to death. That is, at the sentencing phase of a defendant's capital trial, the jury is presented with evidence

to justify recommending a punishment of life in prison or death. The proof is not allowed to wander about unchecked because Section 921.141 Fla. Stats. (1992) limits what the state can use to justify that punishment. That law provides a host of aggravating factors, one of the most important of which is that the murder was "especially heinous, atrocious or cruel." Section 921.141(5)(h). The jury then weighs whatever aggravating factors it may have found against the mitigation presented. Based on which way the scales tip, that body will recommend the appropriate punishment. The trial judge, giving that verdict "great weight," will impose sentence.

This issue questions the effectiveness of the trial court's efforts to adequately instruct the jury on the "especially heinous, atrocious, or cruel" aggravator. Although this court approved this guidance in Hall v. State, 614 So. 2d 473 (Fla. 1993), several cases from the United States Supreme Court give a dim prognosis that the trial court's instructions will survive constitutional scrutiny.

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the court disapproved Georgia's aggravator which permitted a death sentence to be imposed if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." It held the application of this aggravator unconstitutional because:

> There is nothing in these few words, standing alone, that implies any inherent

> restrain on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." . . . These gave the jury no guidance concerning the meaning of any of [the aggravator's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation.

Id. at 428-29.

Eight years later, the nation's high court examined Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance, and found that it had the same deficiencies as the Georgia aggravator had in Godfrey. Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

> [T]he language of the Oklahoma aggravating circumstance at issue --"especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey.

Florida's "especially heinous, atrocious, or cruel" aggravator, like Oklahoma's, provided insufficient guidance to a jury. In Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 854 (1992), the supreme court disapproved a jury instruction regarding this aggravator because it merely told juries that it applied if they found the murder to have been "wicked, evil, atrocious, or cruel." It rejected the state's contention that the trial court would correct vague jury instructions because they had the independent duty to determine the aggravation and mitigation present, give them whatever

weight they deserved, and then impose death or life in prison. Instead, it found that Florida law required the sentencing judge to give great deference to the jury's recommendation. Such respect for that verdict showed that the jury played a key role in the sentencing process. Thus, it could no more consider an invalid or vague aggravating factor than the trial court, which actually sentenced the defendant.

In Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1991) the court rejected an even more detailed Mississippi guidance on their similar "heinous, atrocious, or cruel" aggravator. In that state, the jury was told

> [T]he word heinous means extremely wicked or shocking evil; atrocious means outrageous wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

In this case, the only difference between the instruction in this case and that in Shell is the last sentence. Specifically, this aggravator applies if "additional acts show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." (R 454) By what measure, however, does the jury determine if the acts in this case were sufficiently egregious to distinguish them from the ordinary first degree murder. The United States Supreme Court approved our death penalty in part scheme because judges typically had far more experience in sentencing defendants who have committed serious crimes. Proffitt v. Florida, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Jurors have no

similar experience. For them to have received no guidance or definition of what was "unnecessarily torturous" was error because it forced them to rely on their unchanneled imagination to fashion a definition for that phrase. They should not have had such discretion, however.

Additionally, the language of this last sentence has the same problem as the instructions in Espinosa, Maynard, and Shell.

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as `outrageously or wantonly vile, horrible and inhuman'. . . . These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation.

Maynard at 363, quoting from Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

To say that a murder may have been "conscienceless," "pitiless" and "unnecessarily torturous" provides as much guidance to the jury as the instruction in Espinosa, that this aggravator had to be "especially wicked, evil, atrocious or cruel" to apply to a particular homicide. A juror could reasonably believe every murder was "unnecessarily torturous" concluding that no murder has a necessary amount of human suffering.

The United States Supreme Court has consistently rejected

state supreme courts' efforts to adequately define or limit jury instructions on their "especially heinous, atrocious, or cruel" aggravating factors. The trial court tried to do so here, but it failed, and this court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE XI

THE COURT ERRED IN EXCUSING FOR CAUSE PROSPECTIVE JUROR GOLDMAN BECAUSE HE WAS AGAINST IMPOSITION OF THE DEATH PENALTY FOR "PRACTICAL PURPOSES," IN VIOLATION OF THE DEFENDANT'S EIGHTH AMENDMENT RIGHTS.

During jury selection, the state challenged prospective juror Goldman because "he said it would be extremely difficult [that he could recommend death] but he was doubtful he could do it." (T 1847) In response to further questioning he said "I don't want to violate the law, if it comes down to violating the law but I don't if the choice for me to make I would--I doubt that would want to choose the death penalty if it comes to that. . . . I probably would not want to vote for the death penalty." (T 1851) Finally, he said

> On a private person in private person manner, I can't see it a situation where I would feel--I don't --I could perceive of a situation where I would feel that the death penalty is appropriate. . . . I guess if there is some real--I don't know, somebody turns a lion loose on a baby, maybe I could get emotional enough to feel, I don't know, but my reaction, my general sense is I can't imagine what it would be that I would personally feel justifies it. . . . I can't imagine a situation where I would be convinced.

(T 1854-55).

The court excused for cause prospective juror Goldman (T 1856). That was error.

The court's ruling raises the question of whether, under federal constitutional law, the court erred in excusing this member of the venire because, even though he would follow the

law, he would be very reluctant to recommend a death sentence. Did the court err in excusing a law abiding prospective juror who would have a hard time recommending a death sentence?

The law in this area is simple. In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court adopted language from its decision in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), concerning the standard courts should apply in excusing for cause death scrupled prospective jurors:

> We therefore that this opportunity to clarify our decision in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and to reaffirm the above quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that in dispensing with Witherspoon's reference to "automatic" decision-making, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."

Witt, at 424 (footnote omitted).

Applied to this case, the question is whether prospective juror Goldman's views would have substantially interfered with his determination of the proper sentence. His death penalty views would not have affected his decision regarding Hartley's guilt (T 1672).

The court excused Mr. Goldman because he was reluctant to vote for a death sentence, but he never said that he would

always recommend life regardless of the facts or the law, he merely said that he it would be very difficult for him to vote for death. That is different than saying that he could never recommend death, thereby disregarding his oath as a juror to follow the law as instructed by the court. He simply would not have given very much weight to the aggravating factors. But giving them little weight is not the same thing as refusing to give them any weight. Doing that would be a substantial impairment of a juror's duties. Mr. Goldman wanted to obey the law, and he could conceive of a situation, admittedly rare, where he could recommend death (T 1850-51, 1855), and there is no evidence he would have disregarded his oath as a juror.

There was, in short, no evidence that his views on the death penalty would have substantially impaired his duties as a juror, and the court erred in excluding prospective juror Goldman for cause. This court should reverse the court's judgment and sentence and remand for a new trial.

CONCLUSION

Based on the arguments presented here, Kenneth Hartley respectfully asks this court for the following relief: 1) Reverse the trial court's judgment and sentence and remand for a new trial. 2) Reverse the trial court's sentence and remand for a new sentencing hearing before a new jury. Or, 3) reverse the trial court's sentence and remand for a new sentencing hearing.

Respectfully submitted,

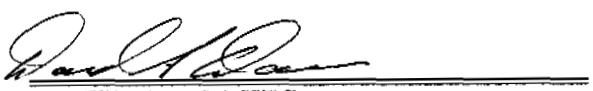
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 271543
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, KENNETH WAYNE HARTLEY, #318987, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 12th day of June, 1995.



DAVID A. DAVIS