IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 83,556

GERALD MURRAY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court
Duval County, Florida

REPLY BRIEF OF APPELLANT

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ARGUMENT

I.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE DEFENDANT'S OBJECTIONS TO THE STATE'S DISCRIMINATORY PEREMPTORY CHALLENGES OF THREE PROSPECTIVE JURORS

A. Appellant Did Not Waive Neil and Abshire Objection

In its Answer Brief the State attempts to avoid the trial court's failure to conduct a proper Neil and Abshire inquiry by incorrectly arguing that Mr. Murray has failed to properly preserve this issue for appeal. [Answer Brief of Appellee, 26]. In its flawed argument, the issues the State misconstrues the record and this Court's holding in Joiner v. State, 618 So.2d 174 (Fla. 1993) when it asserts that Mr. Murray waived this issue when he "accepted the final jury of twelve without any objection or reservation of his prior objection." [Answer Brief of Appellee, 26].

The State in its Answer Brief misleadingly claims that, pursuant to this Court's holding in Joiner, in order for Mr. Murray to have properly preserved this issue for appeal, he was required to renew his objection to the State's peremptory challenges prior to the jury being sworn. [Answer Brief of Appellee, 27]. In contrast to the State's assertions, this Court in Joiner held that a defendant does not properly preserve a Neil issue for review where the defendant affirmatively accepts the jury prior to it being sworn without reservation of his earlier made objection. Joiner, supra, at 176 (emphasis added). Nowhere in Joiner did this Court hold that a defendant must affirmatively renew his Neil objection to avoid waiver of the issue. Instead, what this Court

established in Joiner was that a defendant waives his Neil objection if he "affirmatively accepts" the jury prior to the jury being sworn without renewing his objection. Id.

Contrary to the State's inaccurate assertions, Mr. Murray did not affirmatively accept the jury prior to it being sworn. [Vol. XXXV, 903]. In fact, the record establishes that the trial court failed to inquire, prior to swearing the jury, whether or not Mr. Murray accepted the jury. [Vol. XXXV, 903]. Other than Mr. Murray's trial counsel's acknowledgment during jury selection that the court and counsel were on the same page as to which jurors had been seated at different stages during the jury selection process, there was no affirmative acceptance of the jury panel as a whole constituting any waiver of Mr. Murray's prior Neil and Abshire objection. [Vol. XXXV, 867], cf. Roberts v. State, 665 So.2d 333 (Fla. 5th DCA 1995).

The record establishes that jury selection began on February 28, 1994. [Vol. XXXIII, 469]. During the jury selection process on February 28, 1994, following the State's first three peremptory strikes, Mr. Murray properly raised his Neil and Abshire objections by demonstrating that the State's first three peremptory challenges were exercised to excuse three "black males." [Vol. XXXV, 858]. After the trial court incorrectly concluded that the three strikes did not appear to be racially motivated the jury selection process continued. [Vol. XXXV, 858-868]. At the completion of jury selection on February 28, 1994, the trial judge informed counsel that he was not going to swear the jury until the following morning

in order to allow counsel to address a suppression motion. [Vol. XXXV, 868]. Without being sworn, the jury was excused and directed to return the next morning on March 1, 1994. [Vol. XXXV, 872].

The following morning when the jury was called, the judge swore the jury in without making any inquiry of Mr. Murray whatsoever whether the jury was "acceptable." [Vol. XXXV, 903]. As such, the present case is clearly distinguishable from Joiner, for in the present case, Mr. Murray took no affirmative steps illustrating that he no longer stood by his earlier Neil and Abshire objection. As well, in contrast to the State's misplaced arguments, it is clear from the record that Mr. Murray was not sandbagging by "unqualifiedly accepting" the jury knowing that in the event of an unfavorable verdict he would hold a trump card entitling him to a new trial. The record refutes sandbagging, the policy basis upon which Joiner ultimately is grounded. Furthermore, since Mr. Murray never affirmatively accepted the jury, it cannot be reasonably assumed that Mr. Murray had abandoned his earlier Neil and Abshire objection nor that subsequent events had caused him to become satisfied with the jury about to be sworn. As such, the record is clear that Mr. Murray did not waive his Neil and Abshire objections.

B. The Trial Court Failed to Apply A Proper Legal Standard

Having failed in its attempt to establish that Mr. Murray had "affirmatively accepted" the jury panel and thus waived his Neil and Abshire objections the State in its Answer Brief attempts to validate the trial court's complete failure to conduct a proper

Neil inquiry. [Answer Brief of Appellee, 27]. This Court has established that once a Neil challenge is made the "trial judge must conclude that the proffered reasons are, first, neutral and reasonable and, second, not a pretext." State v. Slappy, 522 So.2d 18, 22 (Fla. 1988) (emphasis added); also see Stephens v. State, 559 So.2d 687, 689-90 (Fla. 1st DCA 1990) aff'd. 572 So.2d 1387 (Fla. 1991).

The complete failure of the trial court to make a finding that the proffered neutral reasons are not a pretext has been held to mandate reversal of a defendant's conviction. See Jones v. State, 640 So.2d 1161, 1163 (Fla. 1st DCA 1994) (although a trial court's determination as to the sufficiency of the State's reasons ordinarily will be accorded deference on appeal such deference cannot be shown where the finding of a lack of pretext was never made); Mansell v. State, 609 So.2d 679, 682-83 (Fla. 1st DCA 1992) (where the trial court has failed to make an inquiry as to pretext in addition to reasonableness, reversal is required).

Acknowledging that the trial court failed to make any finding that the State's justifications for striking the three black males was not pretextual, the State once again attempts to avoid the true issue by arguing that Mr. Murray failed to preserve this issue for appeal. [Answer Brief of Appellee, 29]. The State incorrectly argues that Mr. Murray waived this issue on the grounds that Mr. Murray never raised the pretext issue to the trial court. [Answer Brief of Appellee, 29]. Despite the State's reliance on Wilkins v. State, 659 So.2d 1273 (Fla. 4th DCA 1995), this Court has never

found that the trial court is relieved of its obligation of making a finding that the State's neutral reason is not a pretext simply because the defendant has only made a general Neil challenge. In contrast to the State's incorrect assertions that the burden is on the defendant to raise the pretext issue, this Court has consistently held that once a Neil challenge is made, the burden is on the trial court to critically evaluate the State's explanation to assure it is not a pretext for racial discrimination. Roundtree v. State, 546 So.2d 1042, 1045 (Fla. 1989); Slappy, supra, at 23 (an explanation offered by the State may appear reasonable, but may still be found upon critical examination by the trial court to be a pretext). As this Court held in Roundtree:

> The State must proffer reasons that are, first, neutral and reasonable and, second, not a pretext. Additionally, the trial judge cannot merely accept the proffered reasons at face value, but must evaluate those reasons as he or she would weigh any disputed fact.
>
> * * * *
>
> It is not sufficient that the State's explanation for its peremptory challenges are facially race neutral. The State's explanations must be critically evaluated by the trial court to assure they are not pretext for racial discrimination.

546 So.2d at 1044-45.

In the present case, it is clear that the trial court merely accepted the State's justifications at face value as being racially neutral and made no critical evaluation to determine if such neutral reasons were a pretext for racial discrimination. If the trial court had made a proper inquiry as to pretext, the record

would have revealed that the State's peremptory challenges were nothing more than a pretext for racial discrimination. As established in Appellant's Initial Brief at 23-25, the record is clear that the State's justification for striking Mr. John Bates was not supported by the record. Similarly, the record reveals that the State's justifications for striking Mr. Parker and Mr. Smith conflicted with how the State had treated other non-black jurors thus evidencing their pretextual nature. See, Slappy, supra at 22 (pretext may be shown where challenges based on reasons equally applicable to juror who was not challenged.) For the foregoing reasons it is clear that the trial court failed to fulfill its burden under Neil and its progeny by insuring that the State's asserted race neutral justifications were not pretextual, and appellant's convictions must be reversed.

C. The Trial Court Failed to Consider the Issue of Gender Discrimination

Finally, the State once again attempts to avoid the true issue when it alleges that Mr. Murray waived his claim that the trial court committed error when it failed to make any findings relating to his gender based objection to the State's peremptory strikes of three black males. [Answer Brief of Appellee, 29]. The State once again incorrectly infers that Mr. Murray has waived this issue for review because, other than his initial objection, he did not pursue his objection on gender basis. [Answer Brief of Appellee, 29]. In essence, the State in its Answer Brief infers that it is the defendant's burden to insure that the trial court conducts appropriate inquiry and that the trial court's failure to fulfill

its burden denies Mr. Murray his right to relief on appeal. Contrary to the State's assertions, all that is required of the defendant is that he properly raise his gender based objection in order to trigger the Neil/Abshire inquiry. Abshire v. State, 642 So.2d 542, 544 (Fla. 1994); State v. Johans, 613 So.2d 1319 (Fla. 1993).

The record is clear that Mr. Murray carried his burden by challenging the State's systematic strike of "three black males." This Court in Abshire v. State, 642 So.2d 542, 544 (Fla. 1994) extended the procedural safeguards set forth in State v. Johans, 613 So.2d 1319 (Fla. 1993), to gender based peremptory challenges. In Johans, this Court held that "a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner." 613 So.2d at 1321, 1322. As such, once an Abshire objection is made that jurors are being struck on a gender basis, the court is obligated to undertake a Neil inquiry as modified under Johans. Abshire, supra, 544.

The record in the present case reveals that a proper objection was made by Mr. Murray to gender discrimination and that the trial court failed to conduct a Neil inquiry on gender based grounds or to make any finding that the State's proffered justifications were gender neutral and not pretextual. Although the State proffered reasons to illustrate that the challenges were race neutral, the trial court erroneously never required the State to proffer neutral reasons that the challenges were not gender based, and the State offered no such proffer. The fact that the court failed to conduct

a Neil/Abshire inquiry on gender grounds, after Mr. Murray had objected to the State's use of three peremptory challenges to strike three black men, constitutes reversible error, Id.; Smith v. State, 661 So.2d 358, 361 (Fla. 1st DCA 1995); Thompson v. State, 648 So.2d 323 (Fla. 3d DCA 1995); Ponder v. State, 646 So.2d 286, 287 (Fla. 2d DCA 1994); Drawdy v. State, 644 So.2d 593, 594 (Fla. 2d DCA 1994). Accordingly, this Court is bound to reverse Mr. Murray's conviction.

II.

A SEARCH WARRANT WAS ISSUED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION, AS WELL AS UNITED STATES v. LEON EXCEPTION TO THE GOOD FAITH RULE, IN THAT THE AFFIDAVIT DID NOT INCLUDE A MAJOR INGREDIENT NOR DID IT FOCUS UPON THE REAL AND INTENDED MATTER SUBJECT TO SEARCH AND SEIZURE: HAIR

The State improperly argues that this issue was not preserved for appeal for lack of an objection at the time that the evidence was offered. However, on January 28, 1994, Mr. Murray moved to suppress evidence of any tests conducted from Mr. Murray's blood, saliva, or hair, based on a faulty search warrant. [Vol. I, 119]. Subsequently during trial, defense counsel renewed the issues raised in his motion. [Vol. XXXVIII, 1507]. The State inappropriately contends that defense counsel was merely renewing the issues raised in his motion to suppress statements. However, defense counsel stated, "I previously filed a pretrial motion to suppress and I wanted the record to show that those were denied and

if you would allow me to have a standing objection as to all issues raised by the motion." [Vol. XXXVIII, 1507] (emphasis added). The trial judge responded, "I understand the objection. The Court's ruling stands." [Vol. XXXVIII, 1507]. The record demonstrates that defense counsel was renewing his motion to suppress and lodging a contemporaneous standing objection to the introduction of the fruits of seizure. Indeed, the fact that the grounds for both motions to suppress were subsequently raised in Mr. Murray's motion for new trial show that defense counsel was preserving both suppression motions for appeal. [Vol. III, 405]. The State's argument to the contrary is belied by the record.

Nonetheless, an objection need not be made exactly at the moment of impermissibility to be contemporaneous. See Jackson v. State, 451 So.2d 458, 461 (Fla. 1984); Sharp v. State, 605 So.2d 146, 148 (Fla. 1st DCA 1992). To be contemporaneous, the objection must be timely and "sufficiently specific to appraise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." Jackson, supra at 461, citing, Castor v. State, 365 So.2d 701, 703 (Fla. 1978). Defense counsel in the instant case renewed the previous continuing objected during further direct examination of Detective T. C. O'Steen, following FBI Agent Daniel Nippes' testimony regarding the comparison of Mr. Murray's hair to the hairs found at the crime scene. Accordingly, the objection was contemporaneous because it was made during the line of questioning regarding the hair samples which were the basis for the motion to suppress.

Additionally, defense counsel in making his objection referred to the suppression motions which apprised the trial judge of the putative error. Indeed, the trial judge acknowledged, "I understand the objection. The Court's ruling stands." [Vol. XXXVIII, 1507]. The State's assertion that defense counsel failed to preserve this issue for appeal is factually incorrect.

The State next argues that appellant voluntarily consented to the search. However, the State confuses freely and voluntarily given consent with submission to lawful authority. It is clear from the record that Mr. Murray merely submitted to apparent authority of a law enforcement officer, which does not render an action voluntary within the constitutional meaning. See Washington v. State, 653 So.2d 1362 (Fla. 1995); Reynolds v. State, 592 So.2d 1082 (Fla. 1992); State v. Hall, 537 So.2d 171, 172 (Fla. 1st DCA 1989). Mr. Murray was incarcerated at Montgomery Correctional Institution on unrelated offenses when he was taken to the Police Memorial Building at the downtown Jacksonville Sheriff's Office and interrogated regarding the death of Ms. Alice Vest. [Vol. XXX, 272-275]. During or immediately following the interrogation, Detective O'Steen requested consent from Mr. Murray for blood, saliva, and hair samples. [Vol. XXX, 272-275].[1] At the Duval County Pre-Trial Detention Facility medical clinic, before samples were taken, defendant requested to see a search warrant and one was

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[1] Although defendant stated, "[G]o ahead . . . . You won't find nothing," to Detective O'Steen, any consent was revoked when Mr. Murray subsequently demanded to see a search warrant. [Vol. XXX, 306-308].

produced, although invalid. [Vol. XXX, 306-308]. Defendant allowed the samples to be taken as a search warrant had been presented. As such, defendant submitted to apparent authority; he did not voluntarily consent to the search.

In light of a search warrant being presented to him following an interrogation, defendant, as any reasonable person, believed he had no choice but to allow the taking of the samples. There was no voluntary consent, only the pressure and coercion of a search warrant, albeit invalid. Search warrants are by nature coercive. Those who are subjected to a search warrant do not have a choice to refuse. Accordingly, the threat of obtaining a search warrant as in Powell v. State, 332 So.2d 105 (Fla. 1st DCA 1976), or even worse, the actual receipt of a search warrant would obviously coerce one to submit. Therefore, there was no voluntary consent to authorize the search and seizure.

The State further improperly cites Johnson v. State, 660 So.2d 637 (Fla. 1995). In Johnson, this Court held that the language of the search warrant, i.e., "fiber . . . of forensic comparison value," was sufficiently precise to include unstained clothing, and thus was directly authorized by the search warrant. Id. at 644. Any other evidence collected which was not authorized was not used at trial against the defendant and thus this Court did not render a decision regarding such evidence. Id. The State places too much reliance on the following statement:

> American courts have permitted a warrant to include some items not specifically addressed in the affidavit that the overall circumstances of the crime are sufficiently

> established and the items added are reasonably likely to have evidentiary value with regard to the type of crime.

Johnson, supra at 644 (emphasis added). The State would have this Court read this one sentence to mean that search warrants need not list the evidence to be seized.

However, the State misreads the Johnson decision. In that case, the Court was presented with the issue of a search warrant which generally stated that fibers were to be collected. The defendant in that case objected when unstained clothing was seized. This Court nonetheless allowed the seizure on the basis that the affidavit and search warrant had generally requested "fiber . . . of forensic comparison value." Such language was specific enough to include clothing. Under the State's erroneous argument, an affidavit could merely relay the nature of a crime and then be used to authorize a warrant for any evidence which would be helpful including hairs, fibers, blood samples, fingerprints, saliva samples, clothing, and other physical evidence. Accordingly, the State reads the Johnson case too broadly and out of context.

In the instant case, unlike the Johnson facts, the affidavit does not even mention the need to collect hair samples. Although the "fibers" in the Johnson case were not "specifically addressed," the affidavit was specific enough that it was clear fiber samples were "reasonably likely to have evidentiary value." Johnson, supra at 644. However, in the instant case, there was no mention of the need for any hair in the supporting affidavit.

Further, Detective O'Steen in his affidavit requested blood to determine blood type and saliva to determine if Mr. Murray was a secretor. [Vol. XXX, 264]. However, no reason was offered, and thus no probable cause could exist, for the taking of hair samples. Accordingly, hair samples were not "reasonably likely to have evidentiary value."

In essence, the State would have this Court validate the issuance of a general warrant. This Court has specifically rejected such warrants:

> The particularity requirement of warrants is a two-fold purpose. Perhaps the most frequently quoted statement in this regard is that of Justice Butler in Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927):
>
> > The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.
>
> Thus, the particularity requirement stands as a bar to exploratory searches by officers armed with a general warrant. Andresen v. Maryland, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976).

Carlton v. State, 449 So.2d 250, 251-52 (Fla. 1984); see also Sims v. State, 483 So.2d 81 (Fla. 1st DCA 1980). A search warrant must remain within the confines of an accompanying affidavit, especially where no corrective communication occurs between the officer and the court, as in the instant case. Whiteley v. Warden, 401 U.S. 560 (1971). Accordingly, when flaws are detected, it is the duty

of defense counsel to challenge an affidavit which is insufficient on its face. Franks v. Delaware, 438 U.S. 154 (1978).

The record in the present case supports the conclusion that the motion to suppress on behalf of Mr. Murray should have been granted as the affidavit fails to specify an area of search under investigation, to wit, the hair of appellant. [Vol. I, 119]. Therefore, this Court should reverse the trial court's denial of Mr. Murray's motion to suppress evidence as there was no factual basis in the affidavit to support the need for hair samples. The search warrant was issued without probable cause and the trial court erred in denying the motion to suppress evidence.

It is significant that the State conveniently overlooks Schmerber v. California, 384 U.S. 757 (1966). In Schmerber, the United States Supreme Court required that a heightened standard of probable cause must be met in order to justify a search beyond the body's surface. Id. at 768-70. No facts were presented in the detective's affidavit in the instant case which would satisfy the normal standard of probable cause, let alone the heightened showing required by Schmerber. The evidence seized as a result of the search warrant and any tests conducted on any such evidence should have likewise been excluded. Wong Sun v. United States, 371 U.S. 471 (1963). Accordingly, as a result of the facially invalid search warrant, this Court should reverse the trial court's denial of Mr. Murray's motion to suppress evidence.

III.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE TO EXCLUDE NOVEL SCIENTIFIC EVIDENCE

In its brief, the State correctly cites the four-step inquiry to apply to determine the admissibility of expert opinion testimony of novel scientific principles/methods. See Ramirez v. State, 651 So.2d 1164, 1166 (Fla. 1995). However, the State wrongly applies this test.

First, the State fails to carry its burden of demonstrating that PCR profiling is a scientific principle which has obtained general acceptance by the relevant scientific community. See id. at 1168 (burden is on proponent of evidence to prove general acceptance of both scientific principle and the testing procedures used to apply that principle). The State heavily relies on the responses of its "expert," Daniel Nippes, to establish general acceptance of PCR profiling. At trial, Mr. Nippes stated, "There is no question about that," in response to whether PCR DNA test results are generally accepted as reliable. [Vol. XXXVII, 1276-1277]. When asked if there was a conflict among scientists concerning DNA profiling, Mr. Nippes replied, "Not forensic scientists and not the majority of scientists." [Vol. XXXVII, 1288].

However, all that Mr. Nippes was able to prove, if anything, was that DNA profiling is generally accepted by forensic scientists. The State was unable to produce any witness who could testify that PCR DNA profiling was generally accepted by the

relevant scientific community. The relevant scientific community is not limited to forensic scientists, as stated by Mr. Nippes, but rather it includes "those whose scientific background and training are sufficient to allow them to comprehend and understand the process and form a judgment about it." Vargas v. State, 640 So.2d 1139, 1146 n.10 (Fla. 1st DCA 1994) (quoting United States v. Porter, 618 A.2d 629, 634 (D.C. App. 1992)), vacated on other grounds, 20 F.L.W. S594 (Fla. 1995). Accordingly, the State has failed to satisfy the general acceptance prong of the Ramirez test.

Further, the trial court erred by allowing in the PCR evidence because it found questions raised by the defense to be matters of weight and not admissibility. That finding regarding both the declaration of a match and the application of probability statistics to a declaration is contrary to this Court's precedent. In Hayes v. State, 660 So.2d 257 (Fla. 1995), this Court excluded DNA profiling evidence which did not satisfy the Frye test.

Indeed, the underpinning of the Frye test and general acceptance is based on barring the jury from making the type of determination it was asked to make in this case. See also Vargas v. State, 640 So.2d 1139, 1150 (Fla. 1st DCA 1994) (holding probability calculations applied to DNA profiling evidence were not generally accepted and were accordingly not admissible), vacated on other grounds, 20 F.L.W. S594 (Fla. 1995); United States v. Porter, 618 A.2d 629, 640 (D.C. App. 1992) (finding, "[S]ince the probability of a coincidental match is an essential part of the FBI's calculation, we decline to hold that the defense objections

to that precise calculation go only to its weight."); People v. Barney, 10 Cal. Rpt.2d 731 (Cal. App. 1st Dist. 1992) (concluding, "To end the Kelly-Frye inquiry at the matching step, and leave it to jurors to assess the current scientific debate on statistical calculation as a matter of weight rather than admissibility, would stand Kelly-Frye on its head."). Accordingly, this Court should hold that the trial court erred in allowing the PCR DNA profiling evidence because the court applied an incorrect legal test of admissibility.

Second, the State likewise failed to carry its burden of producing an expert witness sufficiently qualified to render an opinion of PCR DNA profiling. Mr. Nippes had no knowledge of how the Hillmuth Study Database, which he used for his calculations, was assembled. [Vol. XXXVII, 1302]. Further, Mr. Nippes did not have any doctorate degrees in science. [Vol. XXXVII, 1287]. In essence, Mr. Nippes was a criminalist only. See Jesus v. State, 565 So.2d 1361, 1362 (Fla. 4th DCA 1990). Thus, the State also failed to satisfy the third prong of the Ramirez test.

Moreover, the State makes the desperate argument that defense counsel's argument relating to the application or nonapplication of the ceiling principle was not preserved for review. However, it is clear from the initial brief, that the purpose of discussing the ceiling principle was to highlight which novel scientific process was generally accepted by the relevant scientific community at the time of Mr. Murray's trial. See State v. Vandebogart, 652 A.2d 671, 676-77 (N.H. 1994) (holding probability calculations made use

of the interim ceiling principle were admissible under the Frye test); United States v. Porter, 1994 W.L. 742297 (D.C. Superior Ct. 1994) (holding probability calculations using the interim ceiling principle where admissible). Accordingly, the State's attempt to divert this Court's attention from the real issue should be ignored. The State has failed to carry its burden on at least two of the Ramirez prongs and therefore defense counsel's motion in limine to exclude the DNA testing should have been granted. Mr. Murray's convictions should be reversed.

IV.

THE TRIAL COURT ERRED BY PERMITTING THE ADMISSION OF HAIR EVIDENCE DESPITE INDICATIONS OF PROBABLE TAMPERING OR ALTERING

The State improperly attempts to mislead this Court into believing that the evidence technician David Chase was unsure as to how many hairs he had collected from off the victim's body. Although the evidence technician had stated he had collected "some hairs" from the left leg and chest area of the victim, [Vol. XXXVI, 1017], it is clear upon cross-examination of the witness that he was certain:

> Q: Do you recall--I believe that envelopes has hair from victim's leg and chest. Do you recall how many pieces of hair do you remember collecting?
>
> A: Yes, sir, I think it was one from the left leg and one from the chest.
>
> Q: So it would be a total of two?
>
> A: Yes.

[Vol. XXXVI, 1019]. The evidence technician was positive as to the two hairs. If he was not, he could have stated that he did not remember the number of hairs in the envelope. However, Evidence Technician Chase answered in the affirmative twice that there were two hairs.

At the crime scene, Evidence Technician Chase collected the two hairs with tweezers and placed them in a manila envelope which was then placed in the evidence room of the Jacksonville Sheriff's Office. [Vol. XXXVI, 1018]. Joseph Dizinno, a hair and fiber expert for the Federal Bureau of Investigation, testified that when he tested the hairs, he found several Caucasian head hairs, several Caucasian body hairs, and a Caucasian pubic hair. [Vol. XXXVII, 1360]. Mr. Dizinno affirmatively stated that there were certainly more than two hairs in the envelope. [Vol. XXXVII, 1360]. Defense counsel then objected to the admissibility of the hairs and moved to have the hairs excluded on the basis of probable tampering. [Vol. XXXVII, 1362]. The trial court denied the motion, leaving the discrepancy to be argued to the jury. [Vol. XXXVII, 1363].

Based on this record evidence indicating probable tampering, the physical evidence was inadmissible and should not have been allowed. Peek v. State, 395 So.2d 492 (Fla. 1981); see Helton v. State, 424 So.2d 137 (Fla. 1st DCA 1982). The State improperly relies on the prosecutor's argument made at the time of defense counsel's objection that there were actually three hairs and two "other things" in the envelope. [Vol. XXXVII, 1363]. However, despite the prosecutor's unsupported contention at trial, it is

clear that only two hairs were sealed in the manila envelope by the evidence technician. [Vol. XXXVI, 1018]. Any evidence that there were three hairs as offered by the prosecutor at trial or five hairs as testified by Daniel Nippes, demonstrate that there was probable tampering and thus, such evidence should not have been admitted.

The State inconceivably maintains that there was no prejudice despite the probable tampering.[2] The State makes the cliche and inapplicable argument that based on other evidence presented, there is no reasonable probability that the verdicts would have been different. However, the other evidence relied upon by the State is the very evidence which is being attacked on appeal. Indeed, without the hair evidence suggesting that Mr. Murray was at the crime scene, the other physical evidence collected at the scene indicates that he was not there. There were no identifiable fingerprints found of Mr. Murray on any of the evidence seized from the crime scene. [Vol. XXXV, 1185-1187]. Likewise, seminal stains found on the victim's blouse and bed comforter were consistent with Steven Taylor, but not Mr. Murray. [Vol. XXXVII, 1252-1254]. Indeed, Mr. Murray was eliminated as the donor of all blood and semen samples found. [Vol. XXXVII, 1260]. As such, the use of the collected hairs, despite the evidence of probable tampering, did in fact prejudice Mr. Murray's defense. The State has not met its

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[2] It should be noted that although the State has couched its argument in terms of a chain of custody argument, Mr. Murray has raised on appeal the issue of probable tampering, not chain of custody.

burden of establishing that the error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986).

V.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTIONS FOR CONTINUANCE OF THE TRIAL AND THE PENALTY PHASE

The trial court abused its discretion in denying defense counsel's motions for continuance of the trial and the penalty phase. The right to counsel guaranteed by the Sixth Amendment to the United States Constitution, and Article I, Section 16, of the Florida Constitution is the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). This right can be violated when a request for a continuance in order for counsel to prepare adequately is denied. See Holly v. State. 484 So.2d 634, 636 (Fla. 1st DCA 1986). In such a case, the trial court has the discretion to grant or deny the continuance. Core v. State, 599 So.2d 978 (Fla. 1992); Wike v. State, 596 So.2d 1020 (Fla. 1992). However, the court cannot abuse that discretion. Echols v. State, 484 So.2d 568 (Fla. 1985); Jackson v. State, 464 So.2d 1181 (Fla. 1985).

Factors to consider in determining whether a denial of a continuance is an abuse of discretion include time available for preparation, likelihood for prejudice from the denial, defendant's role in shortening the preparation time, complexity of the case, availability of discovery, adequacy of counsel actually provided, and skill and experience of chosen counsel. McKay v. State, 504

So.2d 1280, 1282 (Fla. 1st DCA 1986). Based on these factors, the trial court abused its discretion when it denied defense counsel's motion for a continuance.

Defense counsel had less then two months to prepare for the capital murder case. This time was actually even shorter in light of the fact that defense counsel was unable to secure the files of Mr. Murray's previous defense attorneys until late January. [Vol. XXXII, 430, 431]. Prior to trial, defense counsel informed the trial court of the substantial amount of preparation that remained in Mr. Murray's capital case. Defense counsel needed time to prepare cross-examination for the State's expert, to gather impeachment materials of State witnesses, to be intelligently briefed by Mr. Murray's own DNA expert, and to prepare adequately for the penalty phase. [Vol. XXXII, 433-446]. Without the continuance, Mr. Murray's case was severely prejudiced.

Mr. Murray had no role in shortening the preparation time despite the State's argument that he had caused the withdrawal of three attorneys prior to his trial. No testimony was offered at trial or before for the specific reasons that Mr. Murray's previous defense attorneys had withdrawn. More significantly, Mr. Murray's case was an extremely complex first degree murder case with a possibility of imposition of the death penalty. Also, the case was even more complex as the State intended to rely on DNA testing. Further, there is nothing in the record to indicate that the continuance was a means of undue delay or requested in bad faith. Indeed, the continuance was requested to provide defense counsel

with sufficient time to prepare adequately, not only for the guilt phase but also the penalty phase. See United States v. Warden, Pontiac Correctional Center, 545 F.2d 21, 25 (7th Cir. 1977) (despite good faith efforts, there was an inability to prepare adequately). These factors all favor the granting of the continuance. Accordingly, the trial court abused its discretion when it denied the requested continuance, both of the trial and of the penalty phase.

VI.

THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO INTRODUCE EVIDENCE REGARDING COLLATERAL CRIMES TO SHOW BAD CHARACTER OR PROPENSITY TO COMMIT BAD ACTS

Appellant relies on the arguments made in the Initial Brief of Appellant.

VII.

THE TRIAL COURT ERRED IN EXCLUDING THE APPELLANT'S STATEMENTS TO OTHERS AS TO HIS STATE OF MIND REGARDING HIS ESCAPE

The State improperly attacks Mr. Murray's arguments regarding his state of mind on the grounds that his statements to others constituted hearsay and lacks any trustworthiness. In an attempt to do so, the State inappropriately distinguishes this Court's decision in Downs v. State, 574 So.2d 1095 (Fla. 1991). In Downs, the defendant made statements to several individuals before murdering his wife. Such statements were relevant to the issue of

state of mind of the defendant and thus admissible. Id. at 1097. Despite the State's vain attempt to distinguish Downs, Downs is on point.

In the instant case, four individuals testified on proffer outside of the jury's presence that Mr. Murray said he had escaped in November 1992 because he had become frustrated with the judicial system. [Vol. XXXIX, 1755, 1790-1792, 1798; Vol. LX, 1807-1809]. Each of the individuals had been informed by Mr. Murray of his state of mind either before the escape or during the time that he had escaped. Under the Florida Evidence Code, statements of the declarant's then-existing state of mind is admissible as a hearsay exception when offered to prove declarant's state of mind when either as an issue of the action or offered to provide or explain acts of subsequent conduct of the declarant. Section 90.803(3)(A), Fla. Stat. (1993). As the State intended to rely on Mr. Murray's escape as proof of his consciousness of guilt, Mr. Murray's statements to others before the escape, as well as during the escape, went to his then-existing state of mind and were admissible. [Vol. XXXIX, 1750]. The State has failed to show any reason why the testimony is not trustworthy. Indeed, following the Downs decision, the fact that the statements of Mr. Murray as to his state of mind which were made prior to the actual event of escape indicate that they were trustworthy. Accordingly, it was error for the trial court to exclude Mr. Murray's statements as they constitute an exception to the hearsay rule.

VIII.

THE STATE'S COMMENTS DURING CLOSING ARGUMENT CONSTITUTE REVERSIBLE ERROR BECAUSE THE PROSECUTOR INTENTIONALLY INVOKED AN EMOTIONAL RESPONSE FROM JURORS

The State improperly argues that the prosecutorial error is not so basic to a fair trial to warrant reversal of the conviction. See State v. Murray, 443 So.2d 955 (Fla. 1984). However, in this case, the error was basic to a fair trial. During the State's rebuttal closing argument in the guilt phase of the trial, the prosecutor stated:

> Mr. Arias [defense counsel] says, well, we're showing you these pictures [of the victim] just for shock value and I apologize if you think that, but this is righteous indignation is what I would term it. You have the right to look at this and be angered by the senseless, brutal nature of the murder . . . and this speaks for itself.

[Vol. LXI, 2058-2059] (emphasis added). The natural effect of such an improper argument is to create hostile emotions by the jurors toward the accused. See Brown v. State, 593 So.2d 1210, 1211 (Fla. 2d DCA 1992). Accordingly, since having an unbiased and neutral jury is basic to any fair trial, the prosecutorial misconduct prejudiced Mr. Murray. Defense counsel's motion for a mistrial should have been granted and this Court should reverse the conviction.

IX.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT GERALD MURRAY OF THE OFFENSES CHARGED

The State cites to numerous record references for its argument that the record supports Mr. Murray's convictions. However, the

record, even examined in whole, does not support the convictions for a first degree murder, burglary with an assault, and sexual battery.

First of all, the State inappropriately relies on the fact that Mr. Murray and Steven Taylor were dropped off by James Taylor around midnight on the night of the murder down the street from the victim's home. [Vol. XXXVI, 1102-1106]. Also, Juanita White saw Mr. Murray and Mr. Taylor run from her back yard to the front of her house around 12:40 a.m. on the night of the murder. [Vol. XXXVI, 1115-1118]. However, the State fails to mention the fact that Ms. White testified that Mr. Murray grew up in the neighborhood. [Vol. XXXVI, 1116]. Furthermore, Ms. White did not live near the victim, but rather lived two miles south. [Vol. XXXVI, 1115]. Accordingly, the fact that Mr. Murray was dropped off in the same neighborhood as the victim's house does not support the convictions.

The State next relies on the fact that the victim had been stabbed repeatedly, beaten, bludgeoned, and strangled and that a vaginal swab indicated the presence of semen. [Vol. XXXVI, 1049-1098]. However, the semen samples found as well as the blood samplings at the crime scene were not consistent with Mr. Murray. [Vol. XXXVII, 1252-1254]. Indeed, Mr. Murray was eliminated as a donor of all blood samplings found. [Vol. XXXVII, 1260].

The State next relies on the hairs found on the victim's body and a white shirt in the victim's bathroom which were characteristically similar to Mr. Murray's hair. [Vol. XXXVII,

1367]. However, the expert who compared the hairs found at the scene with Mr. Murray's seized pubic hair, admitted that hair comparisons were not a means of absolute positive identification such as fingerprint identification. [Vo. XXXVII, 1377]. The expert was further unable to say what specific characteristics were similar between the hair found at the scene and the pubic hair samples taken from Mr. Murray. [Vol. XXXVII, 1380]. Likewise, no identifiable fingerprints were found of Mr. Murray on any of the evidence seized at the crime scene. [Vol. XXXV, 1185-1187]. Besides, the hair seized from Mr. Murray which was used for a comparison, should have been suppressed due to an illegal search warrant. See, supra, Issue II.

Moreover, the DNA testing of one of the hairs found on the white shirt is not evidence to support Mr. Murray's convictions as DNA testing used in this case has not been generally accepted by the relevant scientific community. See, supra, Issue III. Finally, the State inappropriately relies on the testimony of three inmates, all of whom were rewarded for their testimony with leniency. [Vol. XXXVIII, 1524-1529, 1542-1546, 1559-1561, 1573-1579; Vol. XXXIX, 1654-1657].

For the foregoing reasons, the State has failed to prove a prima facie case as to the essential elements of the offenses charged. Accordingly, the trial court's error in failing to grant his motions for judgment of acquittal requires that Mr. Murray's convictions be reversed.

X.

THE TRIAL COURT ERRED IN FINDING THE ESPECIALLY HENIOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCES

The State totally ignores the issue raised by Mr. Murray that the record evidence demonstrates that the victim may have been unconscious or semi-conscious at the time of her death. If the victim was unconscious or semi-conscious, then the henious, atrocious or cruel aggravating factor would not apply. Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989). The State again improperly cites Taylor v. State, 630 So.2d 1038 (Fla. 1993). This Court in Taylor did not reach the issue of whether the victim was conscious. Rather, looking at the record in Mr. Taylor's case, the court found clear evidence that the henious, atrocious or cruel aggravating factor applied without any determination of the victim's consciousness.

However, based on the record in the instant case, the evidence offered was entirely consistent with the victim being unconscious or semi-conscious during the portions of her attack upon which the trial court relied in finding this factor applicable. The trial court considered only the testimony that the victim was "alive" during the matters assertively relevant to the HAC aggravator. [Vol. III, 470-471]. The medical examiner, however, testified that the victim suffered no defensive wounds whatsoever. [Vol. XXXVI, 1090-1092]. The medical examiner further testified that, although the victim remained alive until she was strangled, the evidence he found was consistent with her having been unconscious from the

earliest moments of the attack. [Vol. XXXVI, 1090-1092]. No evidence exists to the contrary. The State would have this Court ignore its own precedent in Rhodes, supra, in order to apply the unjustified henious, atrocious or cruel aggravating factor.

The State further improperly argues that the HAC factor can be imputed to a defendant who did not actually wield the torturous blows if the defendant was a principal to and fully participated in the crime. See Copeland v. State, 457 So.2d 1012, 1019 (Fla. 1984). In Copeland, the trial court found the capital felony was especially henious, atrocious, or cruel not on the actual method of killing, but rather on the additional act setting this crime apart from the norm of capital felonies, which included the victim's hours long ordeal from the time she initially encountered appellant to the time of her eventual execution.

In the instant case, although evidence established that the victim had suffered from sexual battery, the evidence offered at trial established that Mr. Taylor, not Mr. Murray, engaged in the sexual battery. All of the seminal stains found on the victim's blouse and bed comforter were consistent with Steven Taylor, not with Mr. Murray. [Vol. XXXVII, 1252-1254]. The record further demonstrates that Mr. Murray, following his wife's death, regressed to falling under the dominating influence of Steven Taylor prior to the homicide of Ms. Vest, the record fails to establish beyond a reasonable doubt that Mr. Murray personally inflicted or intended to inflict great pain or suffering on Ms. Vest, and the record fails to establish that Ms. Vest was even conscious during the

actions cited by the trial court, even to the extent of establishing that Ms. Vest most likely was unconscious during this incident, as set forth above. Accordingly, the trial court erred in concluding that the especially henious, atrocious and cruel and aggravating factor existed in this case, and Mr. Murray's death sentence should therefore be reversed.

XI.

THE TRIAL COURT ERRED IN OVERRULING MR. MURRAY'S OBJECTIONS TO THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE INSTRUCTION IN DENYING HIS ADDITIONAL PROPOSED INSTRUCTIONS REGARDING THAT AGGRAVATING FACTOR

The State's entire argument is that the appellant has not provided adequate reason for finding the jury instruction regarding the heinous, atrocious or cruel aggravating factor unconstitutional. However, the State ignores that states are constitutionally required to narrow the class of those eligible for the death penalty and to narrow the discretion of those imposing such a sentence by clear, objective and reviewable standards. Godfrey v. Georgia, 446 U.S. 420, 422, 432-33 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988). The HAC jury instruction in the instant case was constitutionally infirm by failing to properly limit the jury's discretion in deciding what offenses qualify for this aggravator.

The Florida HAC aggravator is phrased in the disjunctive: "Especially heinous, atrocious or cruel." Section 921.141(5)(h), Fla.Stat. (1993) (emphasis added). The precise instruction given

in this case, absent the last sentence, has been held unconstitutional. Shell v. Mississippi, 498 U.S. 1, 2 (1990) (Marshall, J., concurring). The definitions of "heinous" and "atrocious" are so interlocking as to be indistinguishable from one another. The definition of "cruel" as given in this case likewise provides no meaningful limitation on the discretion of the jury or the court in determining the penalty. Shell, supra; Maynard, supra at 361-64. Additionally, the final sentence of the HAC instruction merely sets forth an example - "the kind of crime" - that might be included as HAC, clearly suggesting that crimes other than those found consciousless or pitiless or unnecessarily torturous can meet the HAC definition. Accordingly, the HAC instruction in Florida could be used by "a person of ordinary sensibility to fairly characterize almost every murder." Shell, supra, at 3 (Marhsall, J., concurring) (citation and internal quotations omitted).

The HAC instruction in the instant case is unconstitutional because it fails to "channel the sentencer's discretion by clear and objective standards that make rationally reviewable the process for imposing a sentence death." Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (internal quotations and citations omitted). Perhaps the most striking inconsistency in the result of the application of this aggravating circumstance is the diametrically opposite results reached when the aggravator was reviewed on the same facts in the same case on two different occasions. Compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) with Raulerson v. State, 420 So.2d 567 (Fla. 1982). Even this Court has been unable to apply this

language in a consistent, predictable manner, and in no way can a jury or a trial court, required to give great weight to a jury's recommendation, apply this factor any more consistently. Therefore, the death sentence in this case should be reversed because of the unconstitutionality of the HAC instruction given.

To salvage the HAC instruction, defense counsel proposed limiting instructions. [Vol. III, 414-416]. First, any suffering of the victim must be found to have occurred over a substantial period of time. Clark v. State, 609 So.2d 513, 514-15 (Fla. 1992); Hallman v. State, 560 So.2d 223 (Fla. 1990). Acts against the victim after she lost consciousness or died cannot establish the HAC aggravating factor. Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990); Jackson v. State, 451 So.2d 458 (Fla. 1984). Suffering by the victim which is not a result of the defendant's purpose because pain does not establish the HAC aggravating factor. Robertson v. State, 611 So.2d 1228, 1233 (Fla. 1993); Teffeteler v. State, 439 So.2d 840, 846 (Fla. 1983); Omelus v. State, 584 So.2d 563 (Fla. 1991). Further, a crime is unnecessarily torturous only if the defendant intended for the victim to suffer deliberate and extraordinary mental anguish or physical pain. Porter v. State, 564 So.2d 1060, 1063 (1990). Here an emotional strain may only establish the HAC aggravating factor if the victim had a prolonged awareness of her impending death. Clark, supra, at 514; Hallman, supra, at 233; Douglas v. State, 575 So.2d 165, 166 (Fla. 1991); Robinson v. State, 574 So.2d 108, 112

(Fla. 1991). Likewise, when the defendant does not himself intend such suffering, the suffering is irrelevant to the HAC aggravating factor. Teffeteler, supra, at 846.

Furthermore, the jury's conclusion that the defendant was or was not remorseful should not be considered in deliberations relating to the HAC aggravating factor. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984); Colina v. State, 570 So.2d 929, 933 (Fla. 1990). Finally, even if the facts of the case sufficiently support the HAC aggravating factor, the jury must be informed that if the factual basis resulted from an irrational frenzy, mitigating evidence must be weighed against the HAC aggravating factor specifically. Amazon v. State, 487 So.2d 8, 13 (Fla. 1986). Each of the foregoing principles was set forth in defense counsel's proposed additional jury instructions regarding the HAC aggravating factor but was denied by the trial court. The unconstitutional infirmities of the HAC aggravating instruction can be remedied only by the additional instructions as proposed by Mr. Murray in the instant case. Accordingly, the imposition of the death sentence in this case should be reversed.

XII.

THE TRIAL COURT ERRED IN REJECTING STATUTORY AND NONSTATUTORY MITIGATING CIRCUMSTANCES

As the State concedes, the State does not comprehend appellant's argument that the trial court erred in the legal standard it applied to consideration of mitigating evidence. [Answer Brief of Appellee, 74]. However, the record clearly

demonstrates that the trial court failed to consider and weigh mitigating evidence clearly presented in the record. Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993). The trial court utterly disregarded the mental health evidence presented, ignored unrebutted evidence of positive personality traits and family background, relied on facts not presented in the record, ignored evidence of Mr. Murray's alcohol dependency (including alcohol consumption on the night in question) and found that certain mitigating evidence was inapplicable to support mitigation because Mr. Murray had been employed. [Vol. LXIV, 2238, 2239, 2247-2259, 2264-2269, 2275-2283; Vol. III, 472-477]. By so doing, the court below abrogated its duty to consider and weigh mitigating evidence in the record. [Initial Brief of Appellant at 77-81]. Accordingly, the trial court failed to apply the proper legal standard to the mitigating evidence presented by utterly disregarding certain items of mitigating evidence and failing to weigh or otherwise evaluate such evidence, warranting reversal of the death sentence.

The trial court set forth two factual issues that were established with respect to Mr. Murray having been under the influence of extreme mental or emotional disturbance but then improperly failed to accord those matters any weight whatsoever. However, the aspects of mitigating evidence were unrebutted with respect to Mr. Murray's emotional state, alcohol dependency and susceptibility to undue influence of Steve Taylor at the time Ms. Vest was killed, approximately one month following the sudden,

unexpected death of Mr. Murray's wife shortly after childbirth. [Compare, Vol. III, 472-474 with Vol. LXIV, 2241-2245, 2248-2254, 2273-2283]. None of these factors are diminished, as the State argues, by the evidence that Mr. Murray had engaged in misconduct other than at times when he was with Taylor. The issue presented is not an argument that the trial court merely reached a conclusion based on the evidence differently than appellant, but rather that the trial court utterly failed to weigh significant evidence at all. The decisions upon which the State relies are inapposite to the issue presented and fail to address circumstances of a trial court absolutely failing to consider mitigating evidence presented to it. This failure of the court below infected all of its findings with respect to mitigating circumstances, and accordingly appellant's death sentence should be reversed.

With regard to appellant's role as accomplice, the State relies on the testimony of inmates and asserted hair evidence. First, even if the inmate's testimony is construed as somehow credible, that testimony unequivocably supports that Steve Taylor was the dominant and most significant actor in the events at issue. [Vol. XXXVIII, 1524, 1573; Vol. XXXIX, 1651-1657]. The State further relies on asserted hair evidence about which Agent Dizinno testified. [Answer Brief of Appellee, 79]. However, Agent Dizinno himself described the limited, if not inconsequential, value of precisely the same hair evidence. [Vol. XXXVII, 1377, 1384-1385]. Furthermore, the State's invocation of the "principal theory" could be instructive if applied to a guilt issue but has no bearing

whatsoever on the purely sentencing issues of whether Mr. Murray was merely an accomplice or suffered a diminished capacity to appreciate the criminality of any conduct at issue. [Answer Brief of Appellee, 80]. The absence of evidence that Mr. Murray played any role other than as an accomplice establishes the contrary of the trial court's findings. The evidence clearly accepted by the trial court even demonstrated that the appellant was intoxicated during the events in question. [Vol. XXXIX, 1651-1652].

The State fails even to respond to appellant's observation that the trial court relied on purported evidence that does not exist in the record of this case. See, Initial Brief of Appellant at 49. The trial court found that nonstatutory mitigating evidence presented by the appellant failed to constitute a mitigating circumstance because Mr. Murray had been gainfully employed, that his co-defendant "was reported to be mildly retarded and easily led" and that many students who suffer learning disabilities, like appellant, ultimately lead productive lives. [Vol. III, 477]. Clearly, those constitute no basis whatsoever to reject nonstatutory mitigating evidence. Furthermore, Lucas v. State, 568 So.2d 18, 23-24 (Fla. 1990), upon which the State relies, ultimately stands for the holding that an order evaluating mitigating circumstances and imposing a death sentence must be clear. In the respects identified above, the trial court's order is far less than clear because of its egregious omissions and misstatements of evidence, but the trial court's order is abundantly clear that its reasons for rejecting nonstatutory

mitigators ultimately are founded upon purported evidence that is not in the record of this case. Accordingly, the death sentence in this case should be reversed.

XIII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND MAKING FINDINGS OF TWO AGGRAVATING CIRCUMSTANCES THAT MERGE

The State wrongly relies on Jones v. State, 652 So.2d 346, 350-51 (Fla. 1995), for the strained argument that the appellant must seek a limiting instruction or argue that the trial court should merge the aggravators of burglary and crime for financial gain. However, Jones does not require such a request. In Jones, this Court held that the trial court had not erred in failing to instruct the jury to merge the aggravators of robbery and pecuniary gain. Although defense counsel never requested a limiting instruction, the trial court expressly merged the two factors in the sentencing order. Id. at 350-51. Indeed, this Court has previously stated that the trial court itself should merge these factors. See, Cherry v. State, 544 So.2d 184, 187 (Fla. 1984).

XIV.

THE PECUNIARY GAIN AGGRAVATING FACTOR DOES NOT APPLY TO THE FACTS OF THIS CASE

The State completely ignores this Court's precedent that to apply the pecuniary gain aggravator, it must establish that the murder was itself committed for the purpose of pecuniary gain.

See, Clark v. State, 609 So.2d 513, 515 (Fla. 1992); Hill v. State, 549 So.2d 179, 183 (Fla. 1989). The record evidence cited by the State, at most, establishes that the burglary of which Mr. Murray was convicted was a crime committed for pecuniary gain. However, the burglary does not in and of itself support the State's conclusion that the murder was committed for pecuniary gain. See, Clark, supra (aggravator not established absent proof that pecuniary gain was specific motive for murder, as opposed to murder for burglary). Accordingly, the death sentence in this case should be reversed.

XV.

THE TRIAL COURT ERRED IN DENYING ALL BUT UNOPPOSED OBJECTIONS OF MR. MURRAY'S PRIOR VIOLENT FELONIES

In light of the trial court's denial of the motions to continue Mr. Murray's trial and penalty phase, see, supra Issue IV, Mr. Murray was deprived of any fair opportunity whatsoever to rebut hearsay statements that were presented by the State's witnesses, which hearsay statements constitute almost the entirety of the evidence presented with respect to prior violent felonies. Accordingly, the death sentence in this case should be reversed.

Hearsay testimony is admissible in the penalty phase of a capital trial if the defendant has a fair opportunity to rebut such hearsay. Waterhouse v. State, 596 So.2d 1008 (Fla. 1992). In order to establish the aggravating factor described in §921.141(5)(b), Fla.Stat. (1993), the State presented certified

copies of judgments and sentences of prior criminal cases brought against Mr. Murray through the supervisor of the felony department of the Duval County Circuit Court Clerk. [Vol. LXIII, 2158-2163]. This was sufficient to establish the aggravating factor. However, the State, despite defense counsel's objection, was allowed to present three police officers who provided highly prejudicial hearsay testimony, including hearsay within hearsay, regarding numerous particular factual allegations of those prior offenses. [Vol. LXIII, 2140-2157]. Mr. Murray was then required to defend against numerous factual allegations far in excess of those necessary to establish that he had previously been convicted of felonies involving the use or threat of violence to a person. Coupled with the fact that Mr. Murray's appointed defense counsel were accorded less than two months to prepare for a first degree murder trial and death penalty phase, Mr. Murray was certainly not afforded a fair or reasonable opportunity to attempt to rebut the hearsay testimony. Accordingly, the death sentence in this case should be reversed.

XVI.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ARGUE IMPROPERLY IN THE PENALTY PHASE

The State first improperly argues that defense counsel, although objecting to the prosecutor's characterization of the defendant as "an evil person," did not preserve this issue on appeal because the court did not render a ruling on the objection. However, the cases cited by the State do not involve objections but

rather involved motions. The objection in the instant case was sufficient to alert the judge and the prosecutor of possible error.

In the instant case, defense counsel objected to the State's closing argument in the penalty phase when the State impermissibly argued that the victim in this case sustained a number of superficial wounds "because the defendant is an evil person." [Vol. LXIV, 2316-2317]. However, despite defense counsel's objection, the trial court simply directed the State "move on to something else." [Vol. LXIV, 2316-2317]. Additionally, the State was allowed to argue, over objection of the defense, that evidence presented at mitigation was "an attempt to get sympathy." [Vol. LXIV, 2318, 2322-2323]. The trial court additionally denied a defense motion for mistrial based on the State's improper closing argument. [Vol. LXIV, 2323-2324].

These statements alone unfairly prejudiced the defendant's case. Closing argument is not a proper vehicle to be used by a prosecutor as a means to inflame the passions of jurors. Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985); Taylor v. State, 640 So.2d 1127, 1134 (Fla. 1st DCA 1994). This proposition carries even greater force when a death sentence is at stake. Hall v. Wainwright, 733 F.2d 766, 774 (11th Cir. 1984). As previously stated, the natural and probable effect of a prosecutor's impermissible argument in this regard is to create or inflame hostile emotions by jurors towards the accused, and such argument can require reversal. See Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989) (this Court held that the prosecutor's comment that the

defendant "acted like a vampire when he committed the crimes" was improper and the cumulative effect with other improper prosecutorial comments required reversal of defendant's conviction); Brown v. State, 593 So.2d 1210, 1211 (Fla. 2d DCA 1992); Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1993). Accordingly, the death sentence in this case should be reversed due to the numerous improper comments by the prosecutor.

XVII.

FLORIDA'S STATUTORY PROVISION ALLOWING PRESENTATION OF VICTIM IMPACT EVIDENCE IN A CAPITAL SENTENCING PROCEEDING IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE

The State asserts that certain arguments made in appellant's Initial Brief are raised improperly for the first time on appeal. Answer Brief of Appellee at 92. However, to the contrary, appellant's arguments that the Victim Impact Statute violates the ex post facto clauses of the Florida and United States Constitutions necessarily requires that an appellant demonstrate that application of a new law to events occurring prior to enactment of such law results in a disadvantage to a defendant or denigration of substantial or substantive rights of a defendant. Miller v. Florida, 482 U.S. 423, 430 (1987); Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988).

Appellant's arguments that the Victim Impact Statute renders death sentences arbitrary and capricious and is vague, overbroad and violative of appellant's equal protection rights demonstrates

precisely the manner in which Mr. Murray was disadvantaged by ex post facto application of the statute in the penalty phase of his trial. Such showing demonstrates clearly that his substantial and substantive rights were denigrated by application of victim impact evidence under the statute in the case below. See, Sochor v. Florida, 504 U.S. 527 (1992); Stringer v. Black, 503 U.S. 222 (1992); D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977); Espinosa v. Florida, 505 U.S. 1079 (1992); Bolender v. State, 422 So.2d 833 (Fla. 1982); Coleman v. State, 610 So.2d 1283 (Fla. 1992). Additionally, the State ignores appellant's observation that the procedure employed in the capital sentencing proceeding below renders the death sentence in this case unconstitutional. See, Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Accordingly, the arguments criticized by the State are not raised for the first time on appeal but rather are part and parcel of the ultimate conclusion that introduction of victim impact evidence at the penalty phase below violated appellant's rights under the ex post facto clauses of the state and federal constitutions.

In view of the foregoing, and based upon the arguments in appellant's Initial Brief, this Court should reverse the death sentence in this case because of the presentation of victim impact evidence in violation of the ex post facto clauses. As the State has candidly noted, Answer Brief of Appellee at 92 n.16, the vagueness of the Victim Impact Statute has not been directly addressed by this Court, and the vagueness of the statute demonstrates, in part, the manner in which appellant's rights were

denigrated by victim impact evidence under the 1992 statute. To the extent that prior decisions suggest a contrary result, the appellant herein clearly has demonstrated that his ex post facto rights were violated in this case. Accordingly, the death sentence in this case should be reversed.

XVIII.

THE SENTENCING COURT ERRED BY IMPOSING MULTIPLE PUNISHMENTS FOR SINGLE CONVICTIONS

Appellant relies on his arguments made in the Initial Brief of Appellant.

XIX.

THE TRIAL COURT IMPROPERLY FAILED TO ADVISE THE JURY OF THE GRAVITY OF SENTENCING RECOMMENDATION

Appellant relies on his arguments made in the Initial Brief of Appellant.

XX.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A DEATH SENTENCE

Appellant relies on his arguments made in the Initial Brief of Appellant.

XXI.

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Appellant relies on his argument made in the Initial Brief of Appellant.

XXII.

THE STATE IMPROPERLY CONTENDS THAT THE DEATH PENALTY IS PROPORTIONATELY WARRANTED IN LIGHT OF STEVEN TAYLOR'S CASE

In Taylor v. State, 630 So.2d 1038 (Fla. 1993), a case heavily relied upon by the State, the trial court found three aggravating factors and one mitigating factor. Id. at 1042-43. The State is quick to point out that the trial court in the instant case found four aggravating factors and no mitigating factors for Mr. Murray. The State clearly ignores that in determining whether death is a disproportionate penalty, a court may not engage in a comparison between the number of aggravating and mitigating circumstances. Terry v. State, 668 So.2d 954 (Fla. 1996). Rather, this Court must consider the totality of circumstances in the case. Id., citing, Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990).

Death is a unique punishment in its finality and total rejection of a possibility of rehabilitation. Terry, supra. In the instant case, the ultimate punishment of death is disproportionate. As presented elsewhere in this brief as well as in the initial brief on the merits, the trial court ignored the mitigating evidence, and the aggravators so heavily relied upon by the State are fewer than determined by the trial court or carry

little weight. See supra Issues X, XI, XII, XIII, XIV, XV, XVI and XIX.

Additionally, the State's reliance on the factors applied against Mr. Taylor in affirming his death is misplaced. The evidence in Mr. Murray's trial revealed that the seminal stains found on the victim's blouse and bed comforter were consistent with Mr. Taylor, not Mr. Murray. [Vol. XXXVII, 1252-1254]. Mr. Murray was also eliminated by the State's expert as a donor of any blood samplings found at the crime scene. [XXXVII, 1260]. Furthermore, the hair found at the scene which shared characteristics with Mr. Murray's hair and Mr. Murray's seized hair should not have been admitted. See, supra, Issues II, III and IV. Accordingly, looking at the circumstances of the case, rather than numerically comparing aggravating against mitigating factors, death is unwarranted.

XXIII.

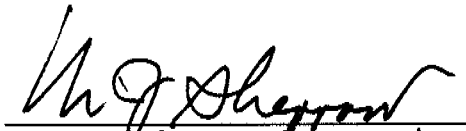
THE SENTENCING COURT ERRED IN SENTENCING GERALD MURRAY TO TWO CONSECUTIVE LIFE SENTENCES WHEN HIS SENTENCE ON ONE COUNT HAD BEEN ENHANCED UNDER THE HABITUAL OFFENDER STATUTE

The State has conceded that since the three offenses were committed in a single criminal episode, the sentence for burglary must be imposed to run concurrently with a death sentence. Otherwise, the appellant relies on the arguments made in the Initial Brief of Appellant.

CONCLUSION

For all of the foregoing reasons, the convictions and sentences in this case should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Sara D. Baggett, Esquire,** Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401-2299, by mail, this 22nd day of April, 1996.

ATTORNEY

db-3.96/MURRAY.BRF