IN THE SUPREME COURT OF FLORIDA

DARCUS WRIGHT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 85,070

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal.

The symbol "T" will denote the trial transcript.

The symbol "DJ" will denote the contents of Exhibit 10 in evidence.

The symbol "CJ" will denote the contents of Exhibit 11 in evidence.

The symbol "JR" will denote the content of Exhibit 13 in evidence.

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STATEMENT OF THE CASE

On October 29, 1993, Appellant, Darcus Wright, was charged by indictment with premeditated murder, burglary, and aggravated assault R2-3. Jury selection began on November 7, 1994. At the close of the state's case, and at the close of all the evidence, Appellant moved for judgments of acquittal T2145. Appellant's motions were denied T2145. Appellant was found guilty of murder in the first degree, and burglary R758-59. Appellant was found guilty of assault, a lesser included offense of aggravated assault R760.

The jury's recommendation was 8-4 for the death penalty R761. On December 12, 1994 the trial court sentenced Appellant to death for the murder conviction R818,821. The trial court departed from the recommended guideline sentence of 5½ to 7 years, and sentenced Appellant to life imprisonment for the burglary R823. Appellant was sentenced to 60 days in jail for the

assault R825. On December 12, 1994, the trial court filed its sentencing order R802-818, Appendix.

A timely notice of appeal was filed R828-29.

STATEMENT OF THE FACTS

GUILT PHASE

The following facts are relevant to this case.

On October 10, 1993, Officer James D. Howie with the Port St. Lucie Police Department was called in reference to a child pickup and was to meet with Appellant T1818-1819. Appellant had gone to the police department and said that he had rights to his children and he wanted to enforce them R1846. Appellant was going through divorce and he had papers that he was to pick up the children that day T1819.

Howie testified that Appellant did have papers that indicated that he had a right to his children on that day T1840. Appellant had more paperwork than the injunction for protection T1844. Howie accompanied Appellant to 617 Southeast Streamlet Avenue T1819. When Howie arrived at the residence he came into contact with Allison Prescod T1819. After speaking with Prescod, Howie did not allow Appellant to have his children T1820. Howie decided that Appellant did not have the papers that said he was entitled to the children T1821. When Howie told Appellant this, Appellant did not scream, holler or shout. He was calm T1821. Howie learned that Appellant had a suspended license and discussed this with him T1822. Appellant said that he had already taken care of this T1822. Howie said that he was going to write a citation T1822. Appellant said, fine, and that he would speak to the court Monday because he had already taken care of it T1822. Howie verified through 911 that the license was suspended T1822. Howie learned about Appellant's suspended license while inside

the house T1847. Howie testified that domestic disputes are volatile T1850. Howie knew that this particular situation had the potential to be explosive T1850.

Roy Milner is an attorney involved primarily in civil litigation T1907. Appellant came to him after he was served with divorce papers on October 5, 1993 T1908. A petition for dissolution of marriage had been filed and there was an injunction T1908. Neither of these documents terminates parental rights T1908. The injunction would not permit Appellant to come about his residence where he was living with his wife and children in order to exercise visitation T1908. This was an ex parte injunction T1908. This injunction had a hearing set for October 7, 1993 T1909. Milner called Appellant's wife's attorney, Jackie Russakis T1909. Milner told her he believed that everything could be worked out without a hearing T1909. The two attorneys worked out an agreement T1909. The agreement encompassed child visitation T1909.

Milner called Russakis one or two days after October 5 T1911. When Milner was in Russakis' office, Russakis called Allison Wright and they went over the amount of child support, visitation which in this particular case Appellant was wanting to see his kids and because he could not go to the house, he could not exercise visitation unless she would allow him T1911. The main thing was to get Appellant to see his kids as soon as possible T1911-1912. The agreement specified that on Sunday at 9:00 at the McDonald's on Port St. Lucie Boulevard Allison Wright would go there with her children so that Appellant would have visitation on Sunday T1912. Russakis explained all of this to Allison Wright T1912. Everything seemed fine T1912. Milner then asked Russakis to fax an agreement to his office which she subsequently did that day T1912. Milner testified that the document is non-

enforceable in its present state T1914. Signature of the judge would make it enforceable T1914.

Appellant was in contact with Milner on October 7 which was a Thursday T1915. There was a problem with Appellant not receiving telephone communications with his children T1915. Milner saw Appellant the morning of the 11th before lunch time T1915. It was around 11:00 a.m. T1915. Appellant did not have an appointment T1916. Appellant told Milner that he had gone to McDonalds and waited around pursuant to the agreement T1916. Nobody showed up T1916. Appellant then called the police department to accompany him to the house so he could try to get visitation T1916. The police advised him that they could not really do anything and told him to see his attorney Monday morning T1916.

Milner told Appellant he was sure there was some sort of mis-understanding or miscommunication T1916. Milner said it should not be a problem T1916. Milner said, "I'll see if I can get you some visitation this afternoon" T1916. Milner testified there was some sort of mix-up or misunderstanding T1917. Appellant seemed to be upset that he could not see his kids T1917. Milner said he'd call the other attorney and that he would get Appellant some visitation T1917. Appellant was not agitated, he just seemed upset that he could not see his kids T1917-1918. There were apparently some other problems T1918.

Milner testified that on October 7, 1993 Appellant had full rights to see his children pursuant to the agreement with his wife T1920. There was no restraining order after October 7, 1993 T1920. Milner testified there is a tendency of people to hear what they want to hear when they talk to an attorney T1921. Sometimes they do not comprehend what's said because the emotion involved with divorces and visitation T1921. The agreement was legally binding, but without a signature from a judge ... not take to police T1923. Appellant came to Milner

for professional advice T1924. Milner told Appellant that he would have visitation that afternoon or the next day T1925. Milner does not recall the exact words that he gave to Appellant T1927.

Officer William Winn, patrol officer for the St. Lucie Police Department, was on road patrol on October 11, 1993 T1770-1771. He was parked doing a report when he noticed a grey Ford T1771-1772. The car parked next to Winn's car T1775. Appellant exited from the car T1775. There were two children in the car with Appellant T1776. Appellant said to Officer Winn, "I want to turn myself in" T1777. Winn asked Appellant why T1777. Appellant said, "I want to turn myself in because I just shot my wife for trying to take my kids" T1777. Winn asked Appellant what he did with the gun T1777. Winn searched Appellant, but did not find any weapon T1778. Winn did find seven rounds of .38 ammunition in Appellant's front pocket T1778-1780. Winn transported Appellant to the police station T1781. Appellant said, "He turned himself in because he had the kids in the vehicle and he didn't want anything to happen to them" T1781. Appellant also gave Winn a phone number for his father in another state for Winn to call so he could come down and take custody of the kids T1781. Appellant seemed calm when he approached, he was not crying, not upset, not angry T1781. Appellant's demeanor never changed T1783. Appellant was cooperative and showed concern for his children T1784. After Winn had found out that Appellant's had passed away he tried to tell Appellant T1793. Detective Beck came into the interview room at the police station T1794.

Detective Scott Beck went to where Appellant was at the station and, after he introduced himself to Appellant, said, "Man, what a messed-up scene" T1865. Appellant responded, "That's what she gets for trying to take away my children" T1865. Beck testified that Appellant appeared very calm T1866. Appellant did not appear angry T1866. Beck did not

know about Appellant's feelings or what was going on inside of him T1867. Beck testified that it was equally possible that Appellant may have been dying inside T1867. Beck admitted that his arrest affidavit did not say that Appellant told him "that's what she gets for trying to take my kids" T1870-1871.

Carmelita Prescod lives at 617 Streamlet Avenue in Port St. Lucie T1932. She and her husband own the home T1932. Prescod's daughter, Allison, was married to Appellant T1932. Allison and the children moved in to the Prescods' residence in the fall of 1993 approximately three weeks before this incident occurred T1935. Prescod knew that Allison had gone to an attorney to get a divorce and had gotten a restraining order for Appellant not to come to the house T1937. On October 10, 1993 Appellant came to the house and stayed in a car parked in front of the house T1937. At 9:15 a police officer came inside the house and talked to Allison and then called the police station T1938.

Prescod testified that on Monday morning, Allison answered the phone and she hung up the phone and she told Prescod that it was Darcus T1939. This was around 11:00 to 11:15 T1939. Later, Prescod answered the phone and it was Appellant T1941. Appellant said he wanted to speak with Allison T1942. Prescod said that Allison did not want to speak with him and hung up the phone T1942. Appellant came to the house around noon T1943. Prescod was in the bedroom T1943. Allison was in the family room with the two kids T1943. Allison hollered, "Mommy, Darcus here" T1950. Allison grabbed the two kids and came through the bathroom and went into her bedroom T1950. Allison was pulling the children with both hands T1950. Allison was dragging them T1951. When Allison went to the room, Prescod locked her bedroom door and went to the phone and called 911 T1951. While Prescod was on the phone she heard a big explosion T1951. The next thing she heard was someone coming down

the hallway walking down to her bedroom T1952. Prescod next heard someone kicking down her door T1953. The door broke open T1953. Appellant had two kids in his hands and a gun T1953. He put the kids down and pointed the gun and said, "I'll kill you" T1953. Prescod said, "Please, don't" and to "just take your kids and go" T1953. Appellant then took the kids back in his arms and turned to go out the door and told Prescod that "she's dead" T1953. Appellant walked out the front door and Prescod walked behind him T1955. Appellant took the children with him and sped away in his car T1955-1956. Prescod went into Allison's room T1956. It was a total of two to three seconds between the time Prescod heard the big crash and the time Appellant drove away T1957. It was all very quick T1957. Prescod saw Allison in a sitting position on the floor with her head on the bed T1957. Prescod called out to Allison T1957. Allison raised her head and went back down T1957. Only Allison's head and hand were on the bed T1958. Prescod testified that she did not give Appellant permission to enter her house T1961. When Appellant pointed the gun at Prescod, Prescod was in fear of her life T1961.

Prescod testified that everything she testified to occurred while the 911 tape was on T1965. The tape was played to the jury:

911 OPERATOR: 911, may I help you?

FEMALE VOICE: Yeah, get me the police quick.

911 OPERATOR: What's the problem, ma'am?

FEMALE VOICE: 617 -- Darcus is breaking in the house.

911 OPERATOR: Who is breaking into the house?

FEMALE VOICE: Yeah, 617 Streamlet Avenue, Hurry.

911 OPEATOR: Who is breaking into the house, ma'am?

FEMALE VOICE: It's -- it's my son-in-law. He has a restraining order not to enter the house here. Hurry.

MALE VOICE: "Why you all take my kids?"

FEMALE VOICE: [unintelligible]. Darcus [unintelligible]. Just take them, please [unintelligible].

MALE VOICE: You take my kids -- my life.

FEMALE VOICE: Oh, please, Darcus, go take them. [unintelligible] our house [unintelligible].

MALE VOICE: She's dead.

FEMALE VOICE: Go. Take them. Go take them, Darcus, take them.

911 OPERATOR: This lady's son-in-law --

FEMALE VOICE: Take them.

T1976-1977.

Officer James D. Howie was the first officer to arrive at the scene T1822. He arrived at the house at approximately 12:19 T1824. When Howie arrived Carmelita Prescod was crying and upset T1826. Howie went into the bedroom and found Allison Prescod slumped over the bed T1827. Allison's knees were on the floor and her upper body was laying on the bed T1831. Howie checked for vital signs but there were none T1832. Howie started CPR T1832. Allison appeared to have a gunshot wound to the right wrist T1835. When Howie first walked through the residence he noticed that the sliding glass door had been shattered and saw gun casings T1837.

Detective John Brazas arrived at the residence at 12:20 p.m. that day. Brazas saw that Howie was performing CPR on Allison and Brazas assisted T1760. Brazas also noticed that the master bedroom door frame was kicked in and the door frame was split T1762.

Detective Rick Wilson arrived at the scene at 12:57 p.m. T1720. Wilson saw shell casings on the livingroom floor along with glass and debris T1720. Wilson saw two bullet

holes in the bedsheet T1740. There was no blood or tissue on any of the sheets in evidence T1757.

Detective Robert Fitch arrived at the scene at 3:30 p.m. T1598. When Fitch had gotten to the scene things had already been moved T1607. Fitch testified that the point of entry was a sliding glass door that was shattered except for a few small sections T1617. A projectile was lodged in the wood trim T1618. A shoeprint was lifted from the master bedroom door T1618. A metal projectile was recovered from the kitchen floor T1618. In the northwest bedroom there was a queen size mattress, bedsheet, projectile, another projectile, and nine small pieces believed to be a projectile T1620. There were more holes on one side of the mattress than on the other T1656. There were two holes on one side and three on the other side T1656. The side of the mattress with three holes was the topside T1656. Bullets can change direction when they hit something T1713. In the photos showing glass, the witness does not know if the officers passed through or if the materials were spread or moved T1714.

Charles Diggs is the associate Medical Examiner who performed the autopsy on Allison Prescod on October 12, 1993 T2025,2028. The cause of death was a gunshot wound of the torso with perforation of the left lung and aorta T2029. This gunshot wound also involved the thigh T2029. It perforated the right upper thigh, at the junction of the torso T2029,2041,2045, then came out the thigh T2042, then reentered the body through the abdomen, T2029,2043, and through the abdomen and the chest T2029,2041. The projectile was recovered in the chest T2029. Internal bleeding took place in the abdominal and left chest cavity T2030. As a result of bleeding, Allison went into shock and immediately expired T2030. The gunshot wound to the junction of the torso and thigh was at close range because of the soot and powder T2032-33,2048.

The second wound was located on the right wrist T2030. It was a superficial wound T2030. Despite the wound, the wrist was fully operable T2052. It entered the lateral aspect of the wrist and came out the middle aspect of the wrist T2030. This particular wound just scurried right under the skin T2030. It did not strike any bone or anything of that sort nor did it lacerate the tendons T2030. It was under the skin for a short distance and it came out, entered the side of the wrist, and came out the middle of the wrist T2030.

Diggs opined that the wound exiting the thigh and entering the abdomen could not occur when the body is in a straight position whether it is lying or standing T2043. Rather, this occurrance of wounds occurs when the thigh is flexed and then wounds could line up T2043. In order to get trajectory the gun has to be within six inches and pointed at the quadriceps, really over the lateral aspect of the hip T2055.

Diggs testified that the possible trajectories can be explained in other ways than his explanation T2057. The wounds could be consistent with a defensive position depending on what position you are in T2079. Sometimes you may fold which may not be a defensive position but a reflex type action T2079. The position that Diggs demonstrated is most consistent because of the ease of motion that takes place. Diggs testified that he cannot exclude any other position T2079. When the bullet hits something with a different coefficient of friction trajectories can radically be altered T2086-2087. Dr. Diggs did demonstrated a number of scenarios T2094. Common to all the scenarios was the right leg flexed in toward the chest T2094. The positions are best described as legs flexed inward toward the chest T2094. From the example of the position that Dr. Diggs testified to one cannot raise up one's hand from that position T2054. If the wound to the wrist is an entry wound, it is totally inconsistent with the arm being in a normal position with palm down to the body T2054.

Michael Kelly, a forensic firearm and tool mark examiner, testified that the bullets found at the scene were .38 caliber bullets T2100-2108. Kelly examined the bed mattress from the bedroom. There was damage to the box spring and mattress T2111. There are two holes which entered the top part of the mattress T2114,2111. One bullet hit the spring inside the mattress and split the lead T2115. Kelly examined the white bed cover that had two bullet holes T2128. Kelly was not able to determine the distance from the muzzle to the bed cover T2128. Based on the trajectories a person could have been firing from both sides of the bed T2139. If lines were drawn, where they intersect would give a height above the mattress of an approximate distance T2139. But this would not necessarily show where the person was shooting T2139. The shooting could have been an inch away from the mattress and to get the same trajectory T2139 or fifteen feet away would have yielded the same data T2139. The bullet holes had no blood which indicates that the bullet absolutely missed the person T2140.

Bonnie Scarliarini met Appellant two years ago T1981. Appellant told Scarliarini that there were a lot of marital problems from time to time and that he loved his children T1986. Appellant always talked about his children T1986. Appellant stayed at Scarliarini's home T1989. Appellant left a phone number for his wife to let her know where he could be reached T1989. Allison Prescod Wright called that number T1989. During the summer of 1993 Scarliarini heard a phone call from Allison to her home T1989-1990. Scarliarini heard the emotional content of one or more of those calls T1990. Allison was screaming and yelling T1990. On October 5, 1993 Appellant was living with Scarliarini when he received divorce papers T1990. Appellant said that he could deal with the fact that he and his wife were getting divorced, but he was hoping he would be able to see his children T1991. Scarliarini saw Appellant cry T1991.

Scarliarini testified that on October 10, 1993 Appellant was going to pick up his kids at 9:00 at McDonalds T1991. Appellant got all dressed up and borrowed Scarliarini's sister's car T1991. Appellant was very happy T1991. Scarliarini testified that Appellant was a "happy little camper" T1992. Appellant was going to get his kids and he was in a good mood T1992. A half hour after Appellant left the phone rang and it was the Port St. Lucie Police Department T1992. Scarliarini's sister had to pick up Appellant because he had no license T1992. Scarliarini and her sister and brother went over to pick up Appellant T1992. Appellant was sad because he thought he would see his kids that day and he could not figure out why he was not able to T1993. Appellant cried and was upset T1993. His voice cracked T1993. He was very upset T1993. He was depressed throughout the day T1993. Later that day, Appellant complained of headaches and pains in his chest T1994. Appellant was upset all night T1994. He was crying off and on all night T1994. He really wanted to see his kids that day T1994. Appellant said the first thing Monday he was going to get ahold of his lawyer and find out what was going on T1994-1995. The next morning, Appellant was upset, but he was pretty cool and calm T1995. He said he was going to see his lawyer and hopefully the matter would be straightened out T1995. He left the house at 10:30 or 11:00 o'clock T1995.

PENALTY PHASE

Carol Pate testified she was the daughter of Carmelita and Winston Prescod T2453. Allison was her sister T2453-2454. Appellant was her brother-in-law T2454. Appellant married Allison in the early 1980s T2455. Pate was aware of Appellant and Allison's marital problems in 1986 T2456. As a result of the marital problems Allison moved out of the home with her two children and moved into her mother's and father's home T2456. Pate also lived there at that time on June 10, 1986 T2456. Pate and Allison left with her children to go to the

aunt's house on that day T2457. They stayed there until 9:00 that night T2457. On the way back Pate drove and Allison was on the passenger side T2457. A truck came to the side and forced their car off the road and the car ran into a tree T2458. Allison got out of the car and screamed and ran T2458. Pate saw Appellant come to the car with a gun in his hand T2458. Pate ran out the same door as Allison T2458. As Pate ran Appellant started shooting at her T2459. Pate got shot above the wrist T2459. Pate fell to the ground T2459. Appellant kept shooting and Pate rolled so she would not be hit T2459. Appellant came up to Pate and tried to fire the gun but it jammed T2459. Appellant then started kicking Pate in her buttocks and chest T2459. Appellant then went to the car where the children were T2459. Pate ran to her aunt's house T2459.

Pate testified that she was aware of many fights that were going on between the family and Appellant about wanting to be with his children T2462. On one occasion Appellant had raised his hand to hit Pate and Pate hit Appellant while defending her self T2462. There was also an incident where Appellant argued with Mr. Prescod T2465. Appellant came to the house and Pate told him that Appellant did not let her father close the door T2465. Pate called the police T2466. At the door Appellant said, "It's you I want" T2468. Appellant raised his hand to grab Pate T2468. That is when Pate grabbed Appellant T2469. Pate had a plastic hose connection that went into the vacuum T2469. At times Pate would lie to Appellant about the whereabouts of her sister T2471.

Dr. McKinley Cheshire was tendered as an expert in psychiatry and neurology T2489,2492. Cheshire testified that he has probably testified in over ten cases for the state T2488. Cheshire testified that he examined Appellant for twelve to fourteen hours, first on July 30, 1994 and last on November 13, 1994 T2492. Cheshire has reviewed depositions, military

records, school records, medical records T2493. Medical records suggest head in juries T2493. The first major head injury occurred at the age of four when Appellant fell headfirst from the back porch stoop landing on his head, busted it open and he now has a scar T2493. The scar is in the frontal lobe T2494. The frontal lobe creates abnormal behaviors when impairment to that part of the brain occurs T2494. The frontal lobe has to do with thinking, connecting and making decisions T2494. Appellant was climbing rope at the age of ten. The rope broke and he hit the back of his head busting it open and he was taken unconscious to the emergency room T2495. At the age of eleven or twelve Appellant fell down a flight of stairs and was in a coma in the hospital for some time T2496. At the age of thirteen Appellant dove off a twenty-foot board and hit the bottom of the pool, went unconscious and was rescued by paramedics T2496. At the age of fifteen Appellant fell off a ladder, broke his arm, had dizziness and was taken to the emergency room T2496. At the age of twenty-one Appellant was painting on a slippery roof, fell off, injuried his hips and his shoulders and was dizzy T2496. At the age of seventeen Appellant went into the U.S. Army, was hit in the head multiple times in boxing, knocked out by a blow to the right temple T2496. He was dazed and had numbness for hours T2496. At the age of nineteen he was in a head-on crash in the army and hit his head on the steering wheel and he had a concussion and was seen by a neurologist T2497. In 1981 he was hit in the jaw and had X-rays of his head taken T2497. In 1978, he was unconscious from an army fight T2497. In 1984, he spent four days in the hospital disoriented with blurry vision and general cerebration impairment and clouded sensorium T2497. He developed colitis T2497. The relationship between gastrointestinal trouble and head injury T2498. Cheshire reviewed jail records of September 27, 1993 to July 16, 1994 and January, 1994 to April, 1994 T2498. Eleven times there were complaints of stomach and ulcer

complications T2498. There is nothing of stomach or intestinal tract problems in the military records T2499. The report of head injury in the military records, Appellant reported "don't know" T2499.

Dr. Cheshire testified that school records show that Appellant missed many days and had an unsatisfactory intellectual effort T2500. Appellant's aptitude for verbal reasoning was very low T2500. School record show deficient intellectual ability T2501. Appellant scored in 3 percentile in verbal reasoning T2501. He scored in the 25 percentile in numerical ability T2501. He scored 20 percentile in abstract reasoning T2501. Head injuries interfere with thinking and calculating T2501. Appellant has a number of impairments that are beyond his ability to overcome at certain times T2502.

Dr. Cheshire heard facts of the case from Appellant and others T2502. He reviewed the documents of the medical examiner T2502. It is Cheshire's opinion that Appellant was under an extreme emotional state of disturbance T2502. Cheshire relied on statements made by Appellant and the records T2508. Appellant had lost the ability to evaluate objects in his environment and the relationship to him T2509. Not having the kids was not equivalent to taking life, but Appellant said take my kids, take my life T2509. Appellant said he had a right to visit, was told by his attorney this. He first went to the police, but instead he got a citation. He went to the attorney and was told it was okay. He goes expecting to see his kids. He was frustrated by her not opening the door. At that point, Appellant became overwhelmed T2513. Appellant experienced stress, anxiety, depression, and frustration T2514. Appellant's statement -- You take my children, you take my life -- shows that he is out of touch with reality T2515. At the point his wife turned away and refused to open the door, Appellant lost the ability to conform his conduct to the requirements of the law T2516.

Dr. Cheshire testified thta of the parents who lose custody of children, some are unable to cope and see the total loss of child T2516. Sometimes it goes borderline between sanity and insanity T2516. From Appellant's point of view, being locked out was extreme provocation T2517. Compulsion is psychic energy and urge to do something which is outside the range of what ordinarily one expects to do T2518. Cheshire saw evidence of compulsion in this case T2518. Appellant had a compulsion with obsession to get his children based on the fear that they were lost to him T2518. Cheshire saw bizarre behavior seeking custody of the children by lawsuit where there is no place to put them T2519. Appellant could not have custody of the children in jail T2519.

Dr. Cheshire testified that Appellant has substantial impairment T2519. Appellant had a strong psychological need to be with his children T2562. Appellant suffered additional stress and frustration which was caused by being told by his lawyer that he could see his children but going to the residence with police and not being able to see his children even though he had an order; going back to the attorney and again being told he could see the children; being elated he goes to see his children and his wife turns her back on him when he wanted to come inside T2563. Appellant's mind could not handle the disappointment and he lost the ability to conform his conduct T2563. Appellant had a compulsion to go through the door to get his children T2564. Appellant was unable to remember what occurred in the room T2564.

Dr. Cheshire concluded from interviews, Appellant had an absence of being aware of what was going on around him T2565. At times Appellant would go blank and stare into space when asked about things that were not incriminating T2567. In Cheshire's opinion, Appellant has an impairment T2567. Epilepsy is an abnormal firing of nerve cells in the brain T2567. Head injury can impact epilepsy T2569. Cheshire saw photos of Appellant as a boy and he has

a scar which indicates physical trauma to the forehead T2569-2573. That type of injury is consistent with an evolution that may result in epilepsy-like symptoms T2574. It is Cheshire's opinion that Appellant has signs and symptoms that go along with a form of epilepsy T2575. It is very expensive to verify this and need an electroencephalogram T2575.

In Dr. Cheshire's opinion, Appellant has organic brain problems caused by blows to the head T2582. One's perception can be built on misinformation T2585. If there is an impairment, there will be a problem making determinations about conflicting information T2585. Appellant was given conflicting information from the attorney and police T2586. Appellant went back to the attorney and was given the opinion it was okay to see his kids which was more misinformation T2586. Appellant had two different inputs T2586. He was overwhelmed by the misinformation T2586. He was frustrated and emotional T2586. He was unable to act without emotion T2586. Within a reasonable degree of medical certainty, Appellant's capacity to appreciate the criminality of his conduct was substantially impaired T2586.

Dr. Cheshire has seen Appellant exhibit remorse T2587. Appellant wept at the video of the funeral of his wife T2587. There were tears in his eyes as he spoke of his wife and children T2587. Appellant has concern about his children's attitude toward him T2587. Appellant says he is sorry and he has written the children expressing his remorse T2587. Appellant is concerned they might not forgive him T2587. Cheshire saw Appellant shaking from head to toe when he was unable to speak T2587. The stimulus which caused this was the video of the funeral T2588. While Appellant watched the video he could not stop shaking and weeping and was full-flow tears T2589. Appellant was out of control and said that he could not see anymore T2589.

Dr. Cheshire testified that florescent lighting makes Appellant dizzy T2590. A person with slow seizure threshold can be affected by certain fluorescent lighting T2590. There were episodes in which Appellant's fact twitched T2591. These are some characteristics seen in complex partial epilepsy T2591. Cheshire testified that he can neither prove nor disprove the seizure disorder T2598, but within a medical degree of certainty he can say there was such disorder T2599. Cheshire reviewed the jail records, medical records, depositions and statements, he can not say which ones because they were given back to the attorney. Cheshire reviewed the medical examiner's reports, police statements, the listed 911 tape, and the deposition of Pate T2599-2602. Medical records of the traffic accident on February 26, 1980 reflect injuries but there is no indication of any head injuries T2608-2609. Cheshire testified there is no indication of head injury or epilepsy or loss of consciousness T2610. Appellant did answer yes to questionnaires whether he had ever had a head injury T2612. He answered I don't know to whether he has had dizziness or unconsciousness T2612. The answer is no to whether he has had frequent or severe headaches T2613. Cheshire only has Appellant's history as to evidence of falls T2616. Cheshire has not seen clonectonic or grand mal epilepsy in Appellant T2620.

As a psychiatrist Cheshire does not expect to be told the truth by his patients T2642. Patients sometimes have a strong need to look good to protect themselves T2643. Medical records are not always complete T2644. Dr. Cheshire could not eliminate the occurrance of head injury just because of the records T2644. Certain forms of epilepsy have abdominal discomfort T2647. Jail records indicate that Zantac, a gastrointestinal medication T2623.

Exhibit 10 in evidence - deposition of Doris Jones

Doris Jones knew the defendant since 1972 DJ3. As a teenager, Appellant would always spend time at Jones' house DJ7. Jones did not know why Appellant preferred her house DJ8. Jones felt that Appellant stayed there because something was wrong at his home DJ9. Appellant would never say that anyone was doing something wrong to him DJ9. Jones would feed Appellant DJ10. Appellant would check on Doris Jones to see if there was anything that she needed DJ12. This occurred until Appellant went into the service DJ12. Appellant was always very polite and mannerly DJ13. Appellant worked for Doris Jones' husband painting DJ13. Appellant also worked with her husband doing dry cleaning DJ23. Appellant was a very good worker DJ23. Appellant was always good with people DJ23. Appellant was a typical teenager, a nice kid DJ19. Jones never say any signs of violence from Appellant DJ20. Appellant always looked out for Jones' three daughters DJ20. Although Appellant worked for Doris Jones, he would not take money from her DJ24. Appellant would make sure that Jones' daughter Carla would get home safely from school each night DJ25. Appellant looked out for her like her big brother DJ26. Doris Jones felt safe knowing that Appellant was with her kids DJ26. Appellant was outgoing with Jones' family, but when around his stepfather he would not say anything DJ28. Appellant's stepfather called him lazy and would denigrate him DJ28,30. Appellant was very embarrassed by this DJ31. It was Jones' opinion that Appellant's mother needed to see a psychiatrist DJ31. Appellant's mother would never make an effort to find out where he was DJ32. Appellant put his life around his children, he did not want to be without his children DJ33. On one occasion Appellant's stepfather injured Jones' dog by improperly roping him DJ36. An operation was required DJ36. Appellant felt so bad about

this that he wanted to pay for the operation DJ36. Doris Jones is baffled as to what has happened to Appellant DJ36.

Exhibit 11 in evidence - deposition of Carla Jones

Carla Jones grew up with Appellant CJ4. Appellant would give Carla rides from school and back CJ9. Appellant worked for Carla Jones' father CJ9. Appellant was like her big brother, he was always smiling CJ10. Carla had heard stories of abuse at Appellant's house CJ18. Carla had heard of beatings at Appellant's house CJ27. Appellant always seemed happy. If there was anything wrong, he would never show it CJ19. Jones heard that Appellant's father abused his mother CJ19. Jones has never seen Appellant abusive or hostile towards women CJ20. Jones had never seen Appellant raise his voice CJ20. Appellant grew up in church and sang in the choir CJ22. Jones did not see any signs of nurturing by Appellant's mother CJ23. Appellant would stop whatever he was doing and pick up Jones and give her a ride CJ28. Whenever Jones' parents wanted something done, it was "Call Darcus" CJ28. Appellant gave moral support to the Jones family CJ28. Appellant always talked about his children CJ35. Prior to October 19, 1993, Appellant had expressed his love for his children CJ36.

Exhibit 13 -- deposition of Jacqueline Russakis

Allison Prescod was Russakis' client JR2. Prescod came to Russakis to get an injunction in a divorce JR3. She obtained an injunction which was signed on September 22 JR3-4. A hearing would be set for October 7 JR4. The injunction was served on October 1 JR4. An agreement was reached between the parties prior to the hearing JR7-8. The agreement was that Appellant would have reasonable visitations JR7. Appellant would have visitation every Sunday from 9:00 a.m. to 6:00 p.m. JR7. The pickup and delivery would be at McDonalds JR7.

Visitations would begin on October 10, 1993 JR7-8. Russakis stipulated to the agreement JR7. Russakis testified that would never agree to the agreement if Allison had not agreed to it JR8. She consulted with Allison Prescod before agreeing to it JR8. Russakis was certain that Allison was aware the visitation was to start Sunday, October 10 JR9.

Exhibit 14 -- statement of David Blouin

Blouin worked with Appellant doing painting and drywall repairs, etc. DB3. The night before the shooting Appellant was at Blouin's house DB4. Appellant was upset about the divorce DB10. Appellant was acting depressed and was "kinda like spaced out a little bit" DB10. Appellant had a lot on his mind about the divorce and he was pretty upset about his kids DB10. Appellant was upset when his wife would not let him see his children DB11. Blouin told him to calm down and to call his lawyer, that it was no big deal DB11. Appellant kept saying that he wanted to see his kids DB11. Appellant never indicated that he would use violence against his wife DB12. Blouin had never seen Appellant violent towards anybody DB13. Appellant had been drinking beer that night, but was not intoxicated DB22. Blouin never thought of Appellant doing this because of his personality DB22.

Exhibit 15 in evidence - transcript of Allison Wright's testimony

Allison testified that she married Appellant in October, 1984 AW184. Allison left and moved in with her parents because she and Appellant had marital problems AW187. When they moved Appellant would call up because he wanted to see the kids AW188. At first, because Allison advised Allison not to take Appellant's calls, she would not AW188-189. The family would be standing right there when she took calls from Appellant AW188.

Allison testified that a few weeks prior to the shooting of Carol Pate, there was an incident where Appellant came to the house wanting to talk with Allison AW189. However,

the mother would not open the door and she slammed the door on Appellant's foot AW189. Appellant went around to the side of the house to speak with Allison AW189. Allison told Appellant to leave because her mother was really upset AW190.

Allison testified that later Appellant came to Allison's house and wanted to see the kids and talk with Allison AW191. Allison's family would not let Appellant see her AW191. Allison's father told Appellant to leave AW191. Appellant begged with him that he wanted to see Allison and the children AW191. Allison's father would not let him. Allison's father started a big argument AW191. Allison's sister came from behind and hit Appellant with a vacuum cleaner AW191. Appellant had blood on his shirt AW191. At one point in time, Allison decided to get divorced because everyone was on her back and she was being intimidated AW191. Allison would meet Appellant at other places away from home AW192-193. Allison could not tell her parents about these meetings AW193.

Allison testified an June, 1986, at approximately 2:30 to 3:00, Appellant came over to the house AW193. Appellant said that he wanted to see the kids AW194. Allison would not let him see the kids AW194. Appellant was upset and angry when he left AW194. Later that day, Allison, her sister Carol Pate, and the children left from their aunt's house and noticed there was a white truck behind them AW194. Allison's sister, Carol, started driving faster AW194. The truck tapped them from behind in the back AW197. Carol turned the corner so fast that she ran onto someone's lawn and then she jammed on the brakes AW197. The white truck pulled up and jammed on its brakes AW197. Allison got out of the car and started to run AW199. Appellant got out of the truck AW199. Appellant and Carol were having a dispute AW199. Carol was always telling Appellant what to do AW199. Carol was "putting her nose in our affairs" AW199. As Allison was running she heard a couple of shots AW200. Allison

saw her sister on the ground and Appellant was standing AW200. Allison went to someone's house to call the police AW201. Then, Allison went to her aunt's house AW201. Her sister was already there AW201.

Allison testified that her family would not allow her to talk to Appellant when he called AW207. Appellant had permission to see his son at any time because there was no court order AW208. Appellant never hit Allison AW208. Allison's father would tell Appellant "got off my fucking phone" AW209. He would also tell him to get out of the "fucking" house AW209. Allison's family would tell Appellant to get off the property AW210. The family did not want Allison to have anything to do with Appellant AW210. Allison's sister tried to convince Allison that she should get a divorce AW210. Allison felt lost and had nowhere to turn AW211. Everyone was against Appellant AW211. Allison tried to talk to them, but they would not listen AW211.

Appellant was a good provider for Allison and the kids AW211. He truly loved Allison and the kids AW211. Allison's sister Carol would constantly interfere with Allison's relationship with Appellant AW211. On many occasions, Allison would want to speak with Appellant, but Carol would tell her not to AW211. Even if Allison could speak with Appellant her family would argue with her afterward AW211. Appellant would call and call and the family kept hanging up the phone AW212. Appellant made a threat just one time when he was really upset AW212. Allison's sister made threats against Appellant AW213. Allison's sister said "I could beat this shit" AW213, meaning that she could whip Appellant AW213. Allison's sister is much bigger than Appellant AW213.

Allison testified that Appellant is not violent AW213. On a couple of occasions Allison's family attacked Appellant AW214. Appellant came over to see Allison and Allison's

mother slammed the door on Appellant's foot AW214. On another occasion Appellant came over to see Allison, but her mother was going to hit Appellant with a ceramic vase AW214, but Appellant pulled back AW214. Allison had told Appellant to leave on that afternoon before her father got home because she did not want any conflicts AW215. Appellant kept asking to see the kids AW215. Allison was intimidated by her mother, father and sister AW217. They were telling Allison what to do AW217. If Allison said something good on Appellant's behalf, the family turned against her AW217. Allison would try to see Appellant when he would come by, although the family did not want him around AW472. Appellant came around every day AW472. Allison had to "sneak behind their backs to see my own husband" AW472. That happened a lot AW472.

Allison testified that Appellant never physically attacked Allison AW472, although they did have verbal arguments AW472. On one occasion Allison saw Appellant in possession of their neighbor's rifle AW473. Allison was at Jackie Roberts' house at that time AW473. Appellant was upset AW473. He was depressed "like he didn't want to live anymore" AW473. Appellant was so afraid of losing his wife and children AW473. Appellant felt that everybody was keeping him away from his family AW473. Everybody was Allison's parents and sister AW473. Appellant threatened to kill himself AW474. Appellant felt that he had nothing to live for AW474. Allison grabbed the gun and said "Give up the gun" AW474. Allison threw the gun in the dumpster AW474. When Appellant had moved out Allison hit Appellant and then Appellant hit Allison AW480.

Allison testified that in April of 1986, Appellant did come and give money to Allison on several occasions AW484. Appellant gave what money he could AW485. The work was slow for a period of time AW485. Allison knew that the incident involving the car was

spontaneous AW489. Allison's mother and father made statements against Appellant because they did not want her to get back with him AW491-492. Allison felt that she had to live her life to please her family AW491-492. Allison's sister would not let Allison talk to Appellant AW491. Appellant called a lot of time, but Allison's sister would hang up the phone AW491. After the shooting Appellant called and said he was sorry AW492. Appellant turned himself in, but was turned away AW492.

SUMMARY OF THE ARGUMENT

1. A defendant has the right to view and not merely hear the evidence that is presented against him during trial. The deprivation of such a right in this case denied Appellant his rights of confrontation, due process, effective assistance of counsel and a fair trial.

2. A side bar conference was held regarding prosecutorial misconduct observed by Appellant. Appellant was absent from the conference. Appellant's rights of confrontation, due process, effective assistance of counsel and a fair trial were denied by his absence.

3. Appellant requested an inquiry into the prosecutor displaying a drawing of a hangman's noose during jury selection. It was error not to inquire into the allegation of prosecutorial misconduct.

4. Appellant was absent from hearings which involved discussions about him. Appellant's rights of confrontation, due process, effective assistance of counsel and a fair trial were denied by his absence from those hearings.

5. Appellant was absent from a hearing which involved discretionary excusal of jurors for non-legal reasons. Appellant's rights of confrontation, due process, effective assistance of counsel and a fair trial were denied by his absence.

6. The prosecution used a peremptory challenge on a black juror. An inquiry was held in which the prosecutor stated its reason for the challenge. The reason was not legitimate and a pretext. A new trial is required.

7. There was absolutely no evidence of a stealthy entry in this case. It was reversible error to give an instruction on stealthy entry.

8. Appellant offered proposed instructions on a good faith belief defense. The evidence and law supported such a defense. It was reversible error to deny the instruction on Appellant's defense.

9. The prosecution obtained Appellant's legal research for his defense from jail officials. In obtaining Appellant's confidential materials, the prosecution violated Appellant's Fifth and Sixth Amendment rights.

10. The premeditated murder instruction violated Appellant's rights to due process and a fair trial by failing to adequately define the element of premeditated design.

11. It was error to deny Appellant's motions to suppress his statement taken in violation of his constitutional rights.

12. Only the grand jury has the authority to amend an indictment. It was reversible error to constructively amend the indictment in violation of the Grand Jury clause.

13. The indictment never alleged felony murder. It was reversible error to proceed on a felony murder theory which was not noticed.

PENALTY PHASE

14. The death penalty is not proportionally warranted in this case.

15. Appellant moved for a continuance until his penalty phase witnesses could rent a car and drive from West Palm Beach to the courthouse in Ft. Pierce. It was reversible error to deny the request for this continuance.

16. Appellant complained that his attorney failed to contact certain witnesses for the penalty phase. At a hearing from which Appellant was absent, the defense attorney made representations and the trial court made findings on Appellant's complaint. Appellant's rights to confrontation, due process and a fair sentencing were deprived due to his absence.

17. The trial court failed to conduct an adequate inquiry into Appellant's waiver of mitigating evidence. This was reversible error.

18. It was uncontroverted that Appellant's ability to conform his conduct to the requirements of law was substantially impaired. The trial court reversibly erred in rejecting this mitigation.

19. It was uncontroverted that Appellant acted under extreme duress at the time of the offense. The trial court reversibly erred in rejecting this mitigation.

20. It was reversible error not to conduct an inquiry into defense counsel's failure to subpoena and contact certain witnesses for the penalty phase.

21. Appellant moved to discharge his counsel due to ineffective assistance of counsel. It was reversible error to fail to hold a Nelson inquiry.

22. The felony murder aggravator is unconstitutional on its face and as applied in this case.

23. The trial court reversibly erred in failing to adequately define the nonstatutory mitigating circumstances.

24. The trial court reversibly erred in overruling Appellant's objection to the requirement of "extreme" mental or emotional disturbance and "substantial" impairment for mitigating evidence.

25. The state presented evidence of an attempted murder for which Appellant was acquitted. This was reversible error.

26. The record in this case is not complete. Appellant is being denied due process and a full and fair appellate review due to an incomplete appellate record.

ARGUMENT

POINT I

APPELLANT'S RIGHTS OF CONFRONTATION, DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL WERE DENIED BY THE USE OF EVIDENCE OUTSIDE OF HIS PRESENCE.

Because certain state witnesses used illustrations, easels, charts, etc. to convey their testimony in a part of the courtroom which was not within Appellant's vision, Appellant complained that he was not present when their testimony via exhibits was presented to the jury:

> DEFENDANT WRIGHT: There is another matter that I'd like to present to the Court also, that during these proceedings, while illustrations were being made with easels and charts and what have you, that the judge, the prosecutor, the defense attorney went to the -- to another area of the courtroom, and was only in sound of the defendant, but the evidence was not shown to the defendant and exemplified to the defendant, and I've asked him to confer with the Court on that, but yet the proceedings have continued and that's not been brought to the Court's attention. So I would like to place that on record, because I was only in sound but not in vision of what the expert testimonies and what they were saying and what they were doing to exemplify so that I may confer with my attorney as to regarding these matters.

T2164. Appellant also complained that the inability to see the witnesses' use of exhibits deprived him of the ability to confer with his attorney T2164. A trial at which a defendant cannot see the evidence which the state is using to take his life is fundamentally unfair. Appellant had been deprived of the right to be present during the introduction of testimony

against him and his rights to confrontation, due process, effective assistance of counsel and a fair trial were violated. Fifth, Sixth, Eighth and Fourteenth Amendments, United States Constitution; Article I, Sections 9 and 16, Florida Constitution.

After Appellant voiced his complaint of not being present as the witnesses utilized the exhibits, the trial court asked defense counsel if he would like to have Appellant present at the jury box so that he could view the testimony T2164-65. It was agreed that in the future Appellant should be allowed to view the testimony T2165.

A defendant's absence during an essential stage of his trial constitutes fundamental error. Salcedo v. State, 497 So. 2d 1294 (Fla. 1st DCA 1986) rev. den. 506 So. 2d 1043 (Fla. 1987). Certainly, the presentation of evidence constitutes an essential stage of the trial. Numerous decision of both this Court and the United States Supreme Court have recognized that the right to be present is one of the most "fundamental" rights accorded to criminal defendants. "The right to be present has been called a right scarcely less important to the accused than the right to trial itself." 14 A Fla.Jur.2d, Criminal Law, § 1253, at 298 (1993) (citing state and federal cases); see also Mack v. State, 537 So. 2d 109, 110 (Fla. 1989) (Grimes, J., concurring) (characterizing a criminal defendant's right to be present, along with right to counsel and right to a jury trial, as one of "those rights which go[es] to the very heart of the adjudicatory process").

In Waters v. State, 486 So. 2d 614 (Fla. 5th DCA 1986) rev. den. 494 So. 2d 1153 (Fla. 1986) the "prosecutor used aerial views of the crime scene and permitted witnesses to point out the location of objects and persons." 486 So. 2d at 615. From counsel's table, the defendant was unable to see the exhibits that the prosecution's witnesses were utilizing. The appellate court held that the right to be present must be interpreted so that a defendant must be

able to view, and not merely to hear, the evidence against him and the restriction of the defendant's ability to see the witnesses use the exhibits compelled reversal:

> Presence must be interpreted to mean that the defendant is allowed to view not merely hear the evidence against him. The primary purpose of the requirement that a defendant be present during trial is to allow the defendant to confront witnesses and the evidence against him. Without being able to actually see what the witnesses were testifying to the appellant was not permitted to adequately confront the witnesses and the evidence and prepare a cross examination. Significant restrictions on cross examination deprive a defendant of the right to confrontation and compel reversal.

486 So. 2d at 615. Likewise, in this case the witnesses' testimony through the use of visual exhibits which Appellant could not view while they were being used requires reversal. See also D.A.D. v. State, 566 So. 2d 257 (Fla. 5th DCA 1990) (noting that child's testimony via speakerphone, as opposed to closed circuit TV, did not permit the defendant to be aware of what the child was doing and this type of proceeding would not pass constitutional muster). The absence of Appellant from the witnesses' use of exhibits cannot be deemed harmless. Most of the state's case was presented through witnesses' use of exhibits. The state utilized 84 exhibits to prove its case. As in Waters, supra, state witnesses utilized a large number of exhibits to point out the location of various items at the crime scene. Witnesses were asked to step down to explain exhibits including photos and diagrams to the jury. It cannot be legitimately said beyond a reasonable doubt that Appellant's absence would be harmless.

Because of Appellant's absence during the presentation of evidence, his rights under the Confrontation Clause of the Florida and United States Constitutions were violated. Because his viewing of the testimony by use of the exhibits was reasonably related to the "fullness of the opportunity to defend against the charge," Appellant was denied his right to due process under the United States and Florida Constitutions. See Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 332-333, 78 L.Ed.2d 674 (1934); Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct.

2658, 2667, 96 L.Ed.2d 631 (1987) (defendant has right to be present if his presence would contribute to the fairness of the proceedings); Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982) (defendant has constitutional right to be present where fundamental fairness might be thwarted by his absence). The inability to see witnesses' use of exhibits also deprived Appellant of the ability to confer with his counsel and thus deprived him of his right to effective assistance of counsel pursuant to the Florida and United States Constitutions. This cause must be remanded for a new trial.

POINT II

APPELLANT'S RIGHTS OF CONFRONTATION, DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL WERE DENIED BY APPELLANT'S ABSENCE FROM A HEARING REGARDING A MATTER TO WHICH HE WAS A WITNESS.

During jury selection, a sidebar conference was held outside the presence of the jury and Appellant T1052. At the sidebar conference defense counsel informed the trial court that Appellant had observed the prosecutor drawing a hangman's noose on its legal pad during jury selection T1052. Defense counsel represented that Appellant said that the prosecutor had shown Appellant the drawing of the hangman's noose T1052. It was represented that Appellant may have been affected by these actions T1052. Despite that fact that Appellant was not present at the sidebar conference, the trial court found that Appellant was not disturbed and was not prejudiced T1052-53. Appellant was deprived of the right to be present at the bench conference in violation of his rights to confrontation, due process, effective assistance of counsel and a fair trial. Fifth, Sixth, Eighth and Fourteenth Amendments, United States Constitution, Article I, Sections 9 and 16, Florida Constitution.

Numerous decisions of both this court and the U.S. Supreme Court have recognized that the right to be present is one of the most "fundamental" rights accorded to criminal defendants.

"The right to be present has been called a right scarcely less important to the accused than the right to trial itself." 14 A Fla.Jur.2d, Criminal Law § 1253, at 298 (1993) (citing state and federal cases); see also Mack v. State, 537 So. 2d 109, 110 (Fla. 1989) (Grimes, J., concurring) (characterizing a criminal defendant's right to be present,along with right to counsel and right to a jury trial, as one of "those rights which go[es] to the very heart of the adjudicatory process").

A defendant has the right to be present whenever his presence is relevant to the proceeding. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 332, 78 L.Ed.2d 674 (1934). The "presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence." Id., 54 S.Ct. at 332-333; Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 2667, 96 L.Ed.2d 631 (1987) (defendant has right to be present if his presence would contribute to the fairness of the proceedings); Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982) (defendant has constitutional right to be present where fundamental fairness might be thwarted by his absence). However, a defendant has no right to be present when such presence would be useless or merely a shadow. Id., 54 S.Ct. at 330.

Appellant's silence does not constitute a waiver of the right to be present. Savino v. State, 555 So. 2d 1237 (Fla. 4th DCA 1989) (notwithstanding counsel's waiver, the defendant's silence could not be construed as acquiescence or waiver of right to be present); Turner v. State, 530 So. 2d 45 (Fla .1987); State v. Melendez, 244 So. 2d 137 (Fla. 1971); see also Bryant v. State, 656 So. 2d 426, 428-429 (Fla. 1995).

It cannot be said that Appellant's presence at the bench conference would be useless or a mere shadow to his attorney. Appellant was the key witness who saw the prosecutor showing the hangman's noose. Appellant could have explained exactly what he saw the prosecutor do

with the hangman's noose drawing and whether it was exposed to the jury. Only Appellant is in the position to explain what impact the drawing has on him and could have on him during trial. The absence of Appellant from the bench conference cannot be deemed useless. Contrast Roberts v. State, 510 So. 2d 885 (Fla. 1987) (defendant's absence did not thwart fairness of hearing where nothing involved matters that defendant could have assisted his counsel in arguing). This cause must be remanded for a new trial.

POINT III

THE TRIAL COURT ERRED IN FAILING TO INQUIRE INTO THE PROSECUTOR'S DISPLAYING A DRAWING OF A HANGMAN'S NOOSE DURING JURY SELECTION.

During jury selection defense counsel approached the bench and then notified the trial court that Mr. Wright informed him that prosecutor Denton had drawn a hangman's noose on her legal pad which she showed to Mr. Wright T1052. Prosecutor Denton never denied drawing the hangman's noose, but claimed that she had not shown her pad to anyone T1052. Defense counsel requested an inquiry T1052-1053. Counsel wanted to know how his client knew about the drawing if the prosecutor had not been displaying her pad in the courtroom T1052. The trial court declined to hold an inquiry and specifically stated that he was not making any factual determinations T1052-53,1055. It was reversible error not to make the inquiry into the prosecutorial misconduct.

As quasi judicial officers, prosecutors have the duty to ensure that defendants receive a fair and impartial trial. Gluck v. State, 62 So. 2d 71 (Fla. 1953). A prosecutor has a duty to be fair, honorable and just. Boatwright v. State, 452 So. 2d 666 (Fla. 4th DCA 1984). A prosecutor has the duty to refrain from committing acts which could affect the fairness of the trial. Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979).

It is severe prosecutorial misconduct for the prosecutor to display the hangman's noose to Appellant with the intent of goading him into taking inappropriate actions. See Duncan v. State, 525 So. 2d 938 (Fla. 3d DCA 1988) (error for prosecutor to waive toy gun during trial with intent to goad defendant). Appellant's counsel claimed that this is what the prosecutor was trying to do T1052,1053,1055. In addition, such actions would be prejudicial if the hangman's noose had been displayed to the jury.

This Court has made it clear that due process requires an inquiry before decisions as to issues are made:

> Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. *State ex rel. Munch v. Davis*, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, § 9, Fla. Const.

Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990) (emphasis added).

Once a claim of prosecutorial misconduct or prejudice is made, the trial court must hold an inquiry into the matter. E.g. Alfonso v. State, 443 So. 2d 176 (Fla. 3d DCA 1983) (inquiry must be held into possible prejudice of state witness talking to jurors); Dusue v. State, 498 So. 2d 1334 (Fla. 2d DCA 1986) (refusal to inquire into exposure prejudicial news article constitutes reversible error); Bello v. State, 547 So. 2d 914 (Fla. 1989) (error to allow shackling without first conducting inquiry into necessity); Smith v. State, 500 So. 2d 125 (Fla. 1986).

Because of the lack of any inquiry, it cannot be said beyond a reasonable doubt that the error was harmless as required by State v. DiGuilio, 492 So. 2d 1129 (Fla. 1986). Here, there was no factual determination as to whether or not the prosecutor was deliberately trying to bait Appellant into inappropriate actions by displaying the hangman's noose. The main witness --

Appellant -- was absent from the bench conference and thus there was no inquiry into exactly how the prosecutor acted as she displayed the hangman's noose. If her action was deliberate in trying to goad Appellant, sanctions would certainly be appropriate. Maybe even recusal of the prosecutor as Appellant suggested might be warranted T1053. The trial court did find that Appellant was not prejudiced because he did not look upset. However, there was no inquiry into the effect of the prosecutor's actions on Appellant. Appellant was never asked how the prosecutor's goading him affected him. Nor could Appellant even volunteer such information -- Appellant was absent from the bench conference.[1] The trial court simply did not have the information to make a finding as to prejudice. Because of Appellant's absence from a hearing in which prejudice might have been shown had he been present, the error cannot be deemed harmless. See Ingraham v. State, 502 So. 2d 987 (Fla. 3d DCA 1987) (defendant's failure to show prejudice because jurors denied seeing him in handcuffs cannot be held against him because he was absent from the inquiry and thus could not rebut other testimony). The failure to inquire into the prosecutorial misconduct denied Appellant due process and a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. This cause must be reversed and remanded for a new trial.

[1] Appellant never waived his right to be present at the bench conference. See Point II, supra.

POINT IV

APPELLANT'S RIGHTS OF CONFRONTATION, DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL WERE DENIED BY HIS ABSENCE DURING HEARINGS REGARDING APPELLANT.

During the penalty phase, Appellant's counsel asked to approach the bench and a bench conference was held between the judge, the defense attorney and the two prosecutors T2768-2776. Appellant was absent from the bench conference. The topic of the bench conference was the defense attorney's attorney-client relationship with Appellant T2769-75. Among other things, the defense attorney told the court and prosecutors that Appellant wanted to "rehash" the guilt phase and "to go get other records and bring them in" T2771. In other words, the trial attorney informed the trial court of the lack of merit of Appellant's penalty phase evidence. The trial court responded by telling the defense attorney that it appeared that Appellant was causing the problem and the ultimate decision as to strategy, no matter how foolish, belonged to his client.

During the guilt phase of the trial a similar bench conference was held, again without the presence of Appellant T2146-52. Defense counsel explained that he was furious and that his client had requested a Nelson inquiry T2146. During the discussion the judge told the defense attorney that a client controls the case, even where the decisions are ill-advised, as long has he does not seek unethical solutions T2150.

Holding these bench conferences in the absence of Appellant violated his rights to confrontation, due process and effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

First, it was totally improper to spill out attorney-client conversations to the prosecution. Second, the defense attorney's act of informing the trial court that Appellant's ideas of penalty phase mitigation (the facts of the case and obtaining certain records) was without merit is clearly improper and prejudicial. Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983) (improper for defense attorney to inform the trial judge in chambers that no mitigating evidence could be produced on behalf of the defendant and that "no purpose would be served by his mother testifying").

Most important is the fact that these matters were discussed outside the presence of Appellant. An example of something somewhat similar is People v. Blye, 233 Cal.App.2d 143, 43 Cal.Rptr. 231 (5th Dist. 1965). In Blye, the defense attorney met with the trial court and prosecutor -- the defendant was not present. The defense attorney explained that the defendant was not communicating with him and that he wanted to take the stand and testify that he did not do it. The defense attorney noted the evidence against his client and stated that he did not intend to call him as a witness. The appellate court noted that it was improper to disclose private communications. However, the court said it was even more significant that the disclosure was done outside the defendant's presence. 233 Cal.App.2d at 149, 43 Cal.Rptr. at 236. The court held that by not being present the defendant was deprived of the opportunity to make objections and thus was not being treated fairly. 233 Cal.App.2d at 149, 43 Cal.Rptr. at 236.

Likewise, in the present case, Appellant's absence deprived him of the opportunity to object to what was occurring. For example, Appellant could have objected to the prosecutor's presence as his attorney made the disclosures. Appellant could have objected to the disclosures and requested further Nelson inquiries if he had known of the disclosures. Appellant could

have requested that he be allowed to represent himself -- especially in light of the fact that his attorney had turned on him. Appellant could have defended his position on the Phase II proceeding. There are many more possibilities as to what options Appellant had. However, the bottom line is that he was not present and thus had no options. As in Blye, Appellant was absent and thus was not being treated fairly.

As stated earlier, a defendant has the right to be present where his presence would contribute to the fairness of the proceeding. E.g. Kentucky v. Stincer, 107 S.Ct. 2658 (1987). It must also be recognized that the right is not guaranteed "when presence would be useless or the benefit but a shadow. " Snyder, supra, 54 S.Ct. at 333. In this situation, Appellant's presence certainly would not have been a mere shadow to the actions of his attorney. His attorney was arguing against Appellant -- in other words, Appellant had no one to speak on his behalf. Appellant's only voice would have been his own, Under the particular circumstances of this case, the absence requires reversal and a new trial and/or a new sentencing.

POINT V

APPELLANT'S RIGHTS OF CONFRONTATION, DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL WERE DENIED BY HIS ABSENCE DURING THE PARTIES DISCRETIONARY DECISION TO EXCUSE CERTAIN JURORS.

Outside the presence of Appellant, a number of jurors were excused by agreement of counsel for non-legal reasons. The law is quite clear, except for the resolution of purely legal issues during jury selection (such as cause challenges), the defendant has the right to be present during jury selection.

During jury selection, the trial court called the attorneys for each side to the bench for a bench conference T763,770. Appellant was not present at the bench conference T763-777.

At the bench conference the trial court explained that the instant proceeding did not involve cause challenges (T774), and twice explained that jurors would be excused only if both sides were in agreement T769. If one party did not agree to the excusal, the juror would not be excused T769. During this bench conference the defense attorney agreed to excuse a number of jurors for non-legal reasons. Included among the jurors defense counsel agreed to excuse were the following:

* Ms. Vaneron (#13) -- plans to go to New York T766-67
* Leigh Abbot -- leaving town T771
* Betty Robinson -- T774

None of the jurors were removed for cause.[2] Later, other jurors were also excused by agreement of counsel for both sides for non-legal reasons without Appellant being present

* Ms. Bertolini T1085 -- trip to Georgia
* Mr. Grose T823-24 -- work
* Mr. Fitch T937-38 -- long commute
* Mr. Maratea T1308-09
* Ms. Parks T1308-09 -- work
* Mr. Sprague T1310-11
* Mr. O'Brien T1311 -- going on trip
* Mr. Floyd T1312
* Mr. Eplin T1312 -- work

It cannot be said that Appellant's presence while his counsel agreed to excuse these jurors would amount to Appellant merely being his attorney's shadow. The excusals were not based on legal reasons -- but rather were based on preferences of the two parties. For example, if Appellant had been present at the bench conference it is doubtful that the defense could have agreed to excuse Betty Robinson. Betty Robinson was a black juror T774-75. One of Appellant's primary concerns in this case was the fact that blacks were being excluded in

[2] Again, all were excused by agreement of defense counsel and not for cause under section 913.03 of the Florida Statutes.

all forms -- (judges, prosecutors, jurors, etc.) and that he was tried with an "all-white jury" and all he wanted was a fair trial as demonstrated by his later comments in this case:

> DEFENDANT: What I'm trying to do is get a fair trial. Most black people that come through here, it seems like this we all get railroaded, because I don't see any black judges around her or any black prosecutors around here. And it's not -- I don't want to make it a racial issue, but it is. It's turning into that. When we tried with the jury, I had an all-white jury.

T2910 (emphasis added). With this in mind, it seems likely that if Appellant had been present he would not have simply agreed to excuse black juror Robinson when he did not have to.

Where the excusal of a juror is for non-legal reasons, and a party has discretion whether to challenge or excuse the juror, the defendant's absence is reversible error. Francis v. State, 413 So. 2d 1175 (Fla. 1983); Lane v. State, 459 So. 2d 1145 (Fla. 3d DCA 1984); Walker v. State, 438 So. 2d 969 (Fla. 2d DCA 1983). In Salcedo v. State, 497 So. 2d 1294 (Fla. 1st DCA 1986), it was recognized that challenges of jurors is one of the essential stages of a criminal trial and may involve on-the-spot strategy decisions:

> The challenges of jurors is one of the essential stages of a criminal trial where the defendant's presence is required. Lane v. State, 459 So. 2d 1145, 1146 (Fla. 3d DCA 1984). It is not a mere "mechanical function" but may involve the formulation of on-the-spot strategy decisions which may be influenced by the acts of the state at the time. The exercise of peremptory challenges is essential to the fairness of a trial by jury. Walker v. State, 438 So. 2d 969, 970 (Fla. 2d DCA 1983), State v. Francis, 413 So. 2d 1178. authorities, we find that Salcedo's motion for new trial alleged fundamental error which no objection was necessary to preserve.

497 So. 2d at 1295,

Appellant had the right under the United States and Florida Constitutions and Fla.R.Crim.P. 3.180 to be physically present at the immediate site where non-legal challenges are exercised. Art. I, §§ 9, 16, Fla.Const.; Amend. V, VI, XIV, U.S. Const.; Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct.

330, 78 L.Ed.2d 674 (1934). Florida Rule of Criminal Procedure 3.180(a)(4) specifically provides:

> (a) Presence of Defendant. In all prosecutions for crime the defendant shall be present.
>
> * * *
>
> (4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury; . . .

In Turner v. State, 530 So. 2d 45 (Fla. 1987), this Court recognized that the decision regarding selection of jurors was one of the essential stages of trial where a defendant's presence is mandated:

> We recognized in Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982), that the defendant has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.2d 674 (1934). See also Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).
>
> Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.
>
> * * *
>
> A defendant's waiver of the right to be present at essential stages of trial must be knowing, intelligent and voluntary. Amazon v. State, 487 So. 2d 8, (Fla.), cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986); Peede v. State, 474 So. 2d 808 (Fla. 1985), cert. denied, 487 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986).

Ibid. at 47-49.

Recently, this Court revisited this issue in Conev v. State, 653 So. 2d 1009 (Fla. 1995). After referencing Francis and Fla.R.Crim.P. 3.180(a)(4), this Court wrote:

> We conclude that the rule means iust what it says: The defendant has a right to by (sic) physically present at the immediate site where pretrial juror challenges are exercised. See Francis. Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presentence through counsel. In such a case, the court must certify thought proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presentence by acquiescing in the strikes after they are made. See State v. Melendez, 244 So. 2d 137 (Fla. 1971). Again, the court must certify the defendant's approval of the strikes through proper inquiry. Obviously, no contemporaneous objection by

> the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure. Our ruling today clarifying this issue is prospective only.
>
> Juror challenges in the present case were exercised on two occasions: first, during a brief bench conference after prospective jurors had been polled concerning their willingness to impose death, and second, during a lengthy proceeding at the conclusion of voir dire. Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he waived his presence or ratified the strikes.

653 So. 2d at 1013 (emphasis added). The prospective new rule is that the trial court must certify the defendant's acquiescence of the strikes and the voluntariness of the waiver. Coney v. Melendez, 244 So. 2d 137 (Fla. 1971), had previously held that a defendant may ratify the action of counsel and proceedings occurring in his absence, while silence will not constitute a ratification. The holding in Coney also otherwise reaffirms the legal principles of Turner and Francis.

The portion of Coney that holds that a criminal defendant's right to be present at all critical stages of trial extends to bench *conferences* at which jury selection occurs -- even if the defendant is present in the courtroom -- broke no new ground. Florida cases have previously applied the right to be present in the context of bench conferences at which jury selection occurs. See Jones v. State, 569 So. 2d 1234, 1237 (Fla. 1990) (recognizing right to be present at side bar conferences during exercise of challenges -- but holding no error because record showed that counsel was conferring with defendant concerning challenges); Smith v. State, 476 So. 2d 748, 478 (Fla. 3d DCA 1985) (record showed counsel and defendant conferred as to each an every challenge); cf. Lane v. State, 459 So. 2d 1145, 1146 (Fla. 3d DCA 1984) (defendant present in courtroom, but excluded from proceedings where peremptories were exercised, which occurred in a hallway "due to the small size of the courtroom"). As these cases demonstrate, common sense dictates that the right to be present would be meaningless if

it were not applied to the absence of a defendant at a side-bar conference during which peremptory and for-cause challenges are exercised. Indeed, the State conceded in Coney's appeal that his right to be present was violated by his absence from the bench conference (but successfully contended that the error was harmless). Coney, 653 So. 2d at 1013.

Applying the right to be present in the context of a side-bar conference would not be a "new rule" even if these prior cases did not exist. The underlying legal norm -- the right to be present at all critical stages of trial -- applies just as forcefully to such a situation as it does to a defendant's total absence from a courtroom during jury selection. See Wright v. West, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (O'Connor, J., concurring, joined by Blackmun & Stevens, JJ.) ("To determine what counts as a new rule, . . . courts [must] ask whether the rule [that a defendant] seeks can be meaningfully distinguished from that established by [prior] precedent.. . . If a proffered factual precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and [the rule in the latter case is not 'new']. ").

Perhaps more important, as this Court recognized in Coney, the plain language of Rule 3.180 dictates the result. See Coney, 653 So. 2d at 1013 ("We conclude that *the rule means just what is says:* The defendant has a right to be physically present at the immediate site where pre-trial juror challenges are exercised. ") (emphasis added). If a rule is not "new" where the legal norms set forth in prior case law dictate the result in a closely analogous situation, surely a judicial interpretation that is merely declaratory of the plain language of a Rule of

criminal procedure[3] is not "new" for purposes of a retroactivity analysis. See Murray v. State, 803 P.2d 225, 227 (Nev. 1990) (where appellate court's decision was "based on the plain language" of statue, court "did not announce a new rule"); John Deere Harvester Works v. Indust. Comm'n, 629 N.E.2d 834, 836 (Ill.App. 1994) (where juridical decision is "merely interpreting the plain language of the relevant statute, " the decision's "rule" should be applied retroactively). Even assuming *arguendo* that Coney announced a "new rule" that would not qualify for retroactive application to Appellant's direct appeal under traditional standards of retroactivity. Stovall v. Denno, 388 U.S. 293, 297 (1967); Witt v. State, 387 So. 2d 922 (Fla. 1980). More recent state and federal constitutional norms governing retroactivity analysis in direct appeal cases require that Appellant be permitted to benefit from Griffith v. Kentucky, 479 U.S. 314 (1987); Smith v. State, 598 So. 2d 1063 (Fla. 1992).[4]

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[3] Although the judicially-promulgated Florida Rules of Criminal Procedure are not legislation, they are tantamount or superior to a statute in terms of their legal effect. A Rule of Criminal Procedure may be repealed only by a two-thirds vote of both houses of the Florida Legislature. See Fla. Const. Art. V. § 2(a); see also Bernhardt v. State, 288 So. 2d 490 (Fla. 1974) (rule of criminal procedure trumps inconsistent statutory provision purporting to govern criminal procedure).

[4] In Griffith, the Supreme Court abandoned its former retroactivity doctrine, see Stovall v. Denno, and held that all new rules of criminal procedure rooted in the federal Constitutional must be applied to *all* applicable criminal cases pending at trial or on direct appeal at the time that the new rule was announced. Griffith's bright-line retroactivity rule is of constitutional dimension. See Harper v. Virginia Department of Taxation, 113 S.Ct. 25 10, 125 L.Ed.2d 74 (1993) (holding that "'basic norms of constitutional adjudication': ...animate[] our view of retroactivity in the criminal context"); (quoting Griffith); Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1061, 1079 (1989) (White, J., concurring) ("[T]he Court's recent decisions dealing with [retroactivity of 'new rules'] on direct review appeal to have constitutional underpinnings."); Williams v. Whitley, 994 F.2d 226, 236 (5th Cir. 1993) ("[T]he retroactivity test adopted in Griffith appears to enjoy constitutional status."); see also Lego v. Illinois, 488 U.S. 902, 109 S.Ct. 251, 102 L.Ed.2d 240 (1988) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari) (suggesting same). Because the Supreme Court's current retroactivity doctrine is rooted in the U.S. Constitution, a state appellate court must apply the Griffith retroactivity framework when the state court has announced an new rule that implicates federal constitutional guarantees. See Harper, 113 S.Ct. at 25 18 ("The Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to interpretations of federal law. "); see also James Beam Distilling Co. v. Georgia, 501 U.S. 529, 111

The violation of Appellant's right to be physically present at the bench during this critical stage is not harmless. As noted earlier, regarding Appellant's vehement complaints about an all-white jury, it seems highly unlikely that Appellant would have agreed with his counsel to exclude a black juror from the jury that presided over his case. It cannot be legitimately claimed that Appellant's presence at the bench conference would be worthless and that he would act as a mere shadow to his attorney. In Garcia v. State, 492 So. 2d 360 (Fla.), cert. denied, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986), this Court noted that it is the state's burden of showing beyond a reasonable doubt that the absence would not be prejudicial:

> ... while Rule 3.180(a) determines that the involuntary absence of the defendant is error in certain enumerated circumstances, it is the constitutional question of whether fundamental fairness has been thwarted which determines whether the error is reversible. In other words, when the defendant is involuntarily absent during a crucial stage of adversary proceedings contrary to Rule 3.180(a), the burden is ont he state to show beyond a reasonable doubt that the error (absence) was not prejudicial.

Ibid. at 364 (citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

Addressing whether the defendant's absence from the site where discretionary challenges were exercised was harmless, this Court, in Francis, noted that:

> The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. 396, 14 S.Ct.

S.Ct. 2439, 2443, 115 L.Ed.2d 481 (1991) ("where the [new] rule at issue itself *derives from federal law*, constitutional or otherwise, " state court must apply the new rule to all litigants whose cases were pending at the time that the new rule was decided) (emphasis added).

Coney unquestionably implicates the U.S. Constitution in addition to Florida Rule of Criminal Procedure 3.180. See Coney, 653 So. 2d at 1013 (Fla. 1985) ("[A defendant] has the constitutional right to be present at stages of his trial where fundamental fairness might be thwarted by his absence. Florida Rule of Criminal Procedure 3.180(a) (4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated. ").

> 410, 38 L.Ed. 208 (1894); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action.. . .

Francis, 413 So. 2d at 1178-1179.

The defendant in Francis was not physically present where his attorney exercised his peremptory challenges, and he could not actively participate, This Court was "unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised." Ibid. at 1179. Accordingly , this Court concluded that Francis' "involuntary absence by waiver by consent or subsequent ratification was reversible error and that Francis is entitled to a new trial. " Ibid.; cf. Coney, 653 So. 2d 1009 (Supreme Court finds violation of right to be present harmless where only legal challenges, not peremptory challenges, were exercised outside the defendant's immediate physical presence). Due to Appellant's absence during the discretionary excusal of jurors for non-legal reasons, Appellant's rights of confrontation, due process, effective assistance of counsel and a fair trial guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida Constitution were violated. This cause must be reversed and remanded for a new trial.

POINT VI

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO THE INSTRUCTION ON STEALTHY ENTRY.

Tracking the Florida Standard Jury Instructions in Criminal Cases, the trial court instructed the jury that:

> Proof of the entering of a structure stealthily and without the consent of the owner or occupant may justify a finding that the entering was with the intent to

commit a crime if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the intent existed.

T2356-57. Fla.Std.Jury.Instr. (Crim.) Burglary; see § 810.07, Fla. Stat. (1993). Giving the stealthy entry instruction was error in the context of the instant case because the entry here was in fact not stealthy thus there was no evidence to support it.

A stealthy entry instruction is only appropriate where a stealthy entry is proved. Vinson v. State, 575 So. 2d 1371 (Fla. 4th DCA 1991); VanTeamer v. State, 417 So. 2d 1129, 1131 (Fla. 5th DCA 1992). The entry in this case was anything but stealthy. The entry was by smashing through a glass door by gunfire. A noisy entry which alerts the occupant is not a stealthy one. See Peters v. State, 76 So. 2d 147 (Fla. 1954); Frazier v. State, 20 Fla. L. Weekly D2102 (Fla. 4th DCA Sept. 13, 1995) (smashing through a glass door was not a stealthy entry and it was error to give stealthy entry instruction); Harrell v. State, 647 So. 2d 1016 (Fla. 4th DCA 1994). It was fundamental error to instruction the jury on the presumption of intent arising from stealthy entry where the entry was manifestly not stealthy. Vinson v. State, 575 So. 2d 1371 (Fla. 4th DCA 1991).

Jury instructions must relate to issues concerning evidence received at trial. Butler v. State, 493 So. 2d 451, 452 (Fla. 1986). Moreover, despite the promulgation of standard jury instructions, this Court has made clear that it remains the responsibility of the trial judge to charge the jury properly and correctly in each case as it comes before him and the approval of standard instructions does not relieve the trial judge of this responsibility. Matter of Use by Trial Courts of Standard Jury Instructions, 431 So. 2d 594, 598 (Fla. 1981), modified, 431 So. 2d 599 (Fla. 1981). A standard jury instruction should to be given where the evidence at trial renders it inappropriate. See Shannon v. State, 463 So. 2d 589, 590 (Fla. 4th DCA 1985).

In addition, the court should not give **instructions which are confusing,** contradictory, or misleading. Butler v. State, 493 So. 2d at 452.

The law requires an evidentiary predicate for the stealthy entry presumption, as it does for jury instructions in general. **The** giving of misleading instructions constitutes fundamental error. Vinson v. State, supra; Dovle v. State, 483 So. 2d 89 (Fla. 4th **DCA** 1986); Carter v. State, 469 So. 2d 194 (Fla. 2d DCA 1985). Further, jury instructions which relieve the state from its burden of proving each element beyond a reasonable doubt violate due process and are fundamental error. Stanlev v. State, 560 So. 2d 1269 (Fla. 3d DCA 1990) (erroneous flight instruction which implied that defendant was guilty if jury found he fled to avoid prosecution constitutes fundamental error); Hayes v. State, 564 So. 2d 161 (Fla. 2d DCA 1990) (failure to instruction on excusable and justifiable homicide fundamental error).

Jury instructions which point to particular circumstances in the state's evidence and indicate whatever inference may be drawn therefrom are impermissible judicial comments on the evidence. Whitfield v. State, 452 So. 2d 548 (Fla. 1984) (giving special instruction on defendant's refusal to submit to fingerprinting); Jackson v. State, 435 So. 2d 984 (Fla. 4th DCA 1983) (disapproving instruction that defendant's change in appearance could be evidence of consciousness of guilt); Redford v. State, 477 So. 2d 64 (Fla. 3d DCA 1985) (false name as consciousness of guilt); Simpson v. State, 562 So. 2d 742 (Fla. 1st DCA), rev. denied, 574 So. 2d 143 (Fla. 1990) (error to instruct on consciousness of guilt from defendant's false statements). The stealthy entry instruction also suffers from this infirmity. In the instant case, the stealthy entry instruction served to relieve the state from proving Appellant intended to commit a crime when he crashed through the door. It also confused the jury by having them

consider a matter not raised by the evidence at trial and by causing them to guess as to the meaning and applicability of an important term in the jury instructions.

The giving of the stealthy entry instruction violated Appellant's right to due process and was fundamental error. Appellant's conviction and sentence must be reversed and remanded for a new trial.

POINT VII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S CHALLENGE TO THE STATE'S IMPERMISSIBLE USE OF A PEREMPTORY CHALLENGE TO EXCUSE A JUROR BASED ON RACE.

The United States and Florida Constitutions guarantee defendants the right to a jury trial by a fair cross section of the community from which no class of citizens has been improperly and discrminatorily eliminated, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Article I, § 16, Florida Constitution; United States Constitution, Amendments VI and XIV.

The United States and Florida Supreme Courts have pledged to engage in "unceasing efforts" to eliminate discrimination in the criminal justice system. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988); see e.g. State v. Neil, 457 So. 2d 481 (Fla. 1984), clarified, State v. Castillo, 486 So. 2d 565 (Fla. 1986). See "Report and Recommendation of the Florida Supreme Court Racial and Ethnic Bias Study Commission," Frank Scruggs, Chair, Dec. 11, 1991 ("First, the underrepresentation of minorities as attorneys and judges serves to perpetuate a system which is, through institutional policies and individual practices, unfair and insensitive to individuals of color.. . . "), and In re: Petition for Removal of Chief Judge, 592 So. 2d 671 (Fla. 1992).

In Neil v. State, 457 So. 2d 481, 486 (Fla. 1984), this Court held that a racial motive for a peremptory challenge is not permissible and, upon an objection that the challenge is being used because of race, the challenger must provide a race neutral reason for the challenge. As the Court further clarified in State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988), any doubt regarding the initial burden is to be resolved in favor the complaining party. Then in Reynolds v. State, 576 So. 2d 1300 (Fla. 1991), it was held that the elimination of even a single minority member, creates the requisite strong likelihood of racial discrimination which shifts the burden to the party exercising the strike. The party striking the juror must then demonstrate a reasonable race-neutral reason which is not a Pretext to justify the strike. State v. Slappy, 522 So. 2d at 22. In the present case, the trial court erred in overruling Appellant's challenge to the state's impermissible use of a peremptory challenge to excuse a black juror.

The state used a peremptory challenge to strike a black juror -- Ms. Cooper, and Appellant objected on the bases of race and gender T1539. It was earlier stipulated that Appellant was black T833. The trial court asked the state for its reason for making the challenge T1540. The state alleged that Ms. Cooper required a higher degree of proof than the law required for conviction T1540. The trial court agreed with the state T1541. It was error to permit the challenge of the black juror.

While a trial court has discretion to evaluate the state's reason for the peremptory challenge, that discretion is abused where the trial court does not "critically evaluate" the reason:

> The trial court is vested with broad discretion in determining whether a peremptory challenge is racially motivated. ***Reed*** v. ***State,*** 560 So. 2d 203 (Fla.), cert. ***den., 498*** U.S. 882, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990). In this instance, however, we find the trial court failed to perform its "function of critically evaluating the state's explanation, " ***see Mansell, 609 So.*** 2d at 682-83, to assure reasonableness and the absence of a pretext for racial discrimination.

Roundtree v. State, 546 So. 2d 1042, 1045 (Fla. 1989); *Gooch v. State, 605 so,* 2d 570 (Fla. 1st DCA 1992).

Givens v. State, 619 So. 2d 500, 502 (Fla. 1st DCA 1993).

Here, Ms. Cooper testified that she could find Appellant guilty beyond a reasonable doubt and could recommend death:

> MS. PARK: If the State of Florida proves the case against Darcus Wright --
>
> MS. COOPER: Uh-huh.
>
> MS. PARK: -- beyond and the to exclusion of any reasonable doubt, could you convict -- court you find him guilty knowing it could subject him to the death penalty?
>
> MS. COOPER: Yes, I feel like I could.
>
> THE COURT: I'm sorry, a little louder.
>
> MS. COOPER: Yes, I feel like I could; but, like I said, I'm going to have to be convinced.
>
> MS. PARR: All right. And that's where we were talking about before, how much it would take to convince you.
>
> MS. COOPER: Uh-huh.
>
> MS. PARK: In the second phase, Ms. Cooper, could you recommend death if the aggravating factors outweighed the mitigating factors?
>
> MS. COOPER: Yes.
>
> MS. PARR: Okay. Now, I know you have certain beliefs and you're having a tough time with it. I'm not picking on you. Okay? I really am not. Would your beliefs interfere with or substantially impair you ability to vote for death when the fact and the law would call for it?
>
> MS. COOPER: No.

T1451-52. Then, despite the prosecutor's assurance that she was not singling Ms. Cooper out, the prosecutor asked Ms. Cooper, and only Ms. Cooper as an individual, about signing a death recommendation as the foreperson of the jury T1452. Ms. Cooper stated that she would have to be convinced that he was guilty T1452. The prosecutor then asked Ms. Cooper if she could follow the law on the burden of proof T1452-53. Ms. Cooper's response was that she "could

under the law" but "the evidence would just have to be there that he did do it" T1453. After a brief question of a white juror, who would actually sit on the jury and who echoed Ms. Cooper's sentiments (T1454), the prosecutor again questioned Ms. Cooper who stated that she had no doubts about following the law, but that she did not want to convict if the evidence did not prove him guilty:

> MS, PARR: Do you have doubts about being able to do that?
>
> MS. COOPER: I don't have doubts about following the law, but I feel like --
>
> THE COURT: Ms. Cooper, could I get you to talk right into the microphone.
>
> MS. COOPER: Okay.
>
> THE COURT: Thank you.
>
> MS. COOPER: I don't have doubts about that; but, like I say, I'm going to have to be really -- I'm going to have to be given evidence that this man did commit this murder, you know, because now I'm signing to say that his life be taken, and I don't want his life to be take if he didn't do it.

R1455. In fact, Ms. Cooper went on to clarify that all she was saying for the person to be guilty the evidence should be there proving that he is guilty:

> MS. COOPER: Yes. I don't feel like -- I don't feel like I will hold the State, as you are saying. more. but I just want to make sure that the evidence is there that he did commit this crime. That's all I'm saving. For a person to go and say tha a person is guilty of a crime. the evidence should be there saving that this person did do that particular crime.
>
> MS. PARR: Okay.
>
> MS. COOPER: That's what I'm saying.

T1456 (emphasis added). A critical analysis of Ms. Cooper's testimony simply does not show that Ms. Cooper was requiring a higher degree of proof as the prosecutor claimed. Thus, it was error to overrule Appellant's objection. See Gilliam v. State, 645 So. 2d 27 (Fla. 3d DCA 1994) (reversal where review of voir dire examination did not reveal that black juror was predisposed to find defendant innocent as prosecutor claimed).

In addition, it is well-settled that the proffered reason for excluding the black juror must be legitimate and not a pretext. State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988). Obviously, if another juror that actually serves on the jury, but is not peremptorily challenged, shares the same alleged bias as the challenged black juror, the reason for the peremptory challenge is a pretext and not legitimate. Slappv, supra, at 22. In this case a white juror who actually sat on the jury, Ms. Blouin, shared the exact same opinion as in reference to the burden of proof:

> MS. BLOUIN: I would just like to say that I wouldn't have a problem signing the verdict form; but, as I think Ms. Cooper has been trying to say, I understand that a human life has been lost, and that's very important, but it would be beyond a reasonable doubt because this is also a human life that has been placed in the Court's hands. So it would have to be proved beyond a reasonable doubt in my mind as well.

T1545 (emphasis added). Thus, the reason given for excluding the black juror was a pretext. This cause must be remanded for a new trial. Slappy, supra.

POINT VIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S PROPOSED INSTRUCTIONS ON A GOOD FAITH BELIEF DEFENSE.

In the court below, Appellant was tried for burglary and first degree murder which included the theory of felony murder with burglary as the underlying felony. Appellant's defense to burglary was the he had a good faith belief that he could lawfully enter the house to get his children due to advice of his attorney that he was legally entitled to his children. Appellant gave the trial court several proposed instructions on his theory of defense T2222-2258, 2370-71, R770, 774. Among the instructions was the following:

> An issue in this case is whether Darcus Wright unlawfully entered or remained in a dwelling with the intent to commit an offense. Where it appears that the actions of the Defendant are based on an erroneous good faith belief that he had a right to enter the property he cannot be convicted of burglary even though he may haver been mistaken because of his good faith belief.

T2223, R774, and the following:

> If you find that Darcus Wright had discussed this matter with a competent attorney and that he acted pursuant to that advice, then you must find that the Defendant did not enter or remain in a dwelling with intent to commit an offense, and you should bring in a verdict of not guilty.

T2222-23, R773. The trial court denied the instruction T2286. Appellant objected T2288. It was reversible error to deny the instruction on Appellant's theory of defense.

It is well-established that a defendant is entitled to a jury instruction on the rules of law applicable to his theory of defense if there is any evidence to support such instruction, regardless of how weak or improbable the defense, Mathews v. United States, 485 U.S. 58 (1988); Campbell v. State, 577 So. 2d 932, 935 (Fla. 1991); Hansbrough v. State, 509 So. 2d 1081, 1085 (Fla. 1987); State v. Holley, 480 So. 2d 94 (Fla. 1985); Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981); Eberhardt v. State, 550 So. 2d 102, 105 (Fla. 1st DCA 1989), rev. denied, 560 So. 2d 234 (Fla. 1990) (defendant entitled to jury instruction where any evidence, however "marginal, " supported defense). Due process requires that the court completely define every element of the law relating to the defense; failure to do so is necessarily prejudicial and misleading. Motley v. State, 20 So. 2d 798, 800 (1945); see also Amends. V, XIV, U.S. Const.; Art. I, § 9, Fla. Const. Moreover, the judge should not weigh the evidence to determine whether the instruction is appropriate. Smith v. State, 424 So. 2d 726, 732 (Fla. 1982). It is the jury's duty to weigh the evidence after receiving proper instruction on the law. Gardner. v. State, 480 So. 2d 91, 92-3 (Fla. 1985).

In the present case, there was evidence, and inferences from the evidence, which could support a theory that Appellant entered the house to retrieve his children on reliance of his attorney's advice that he had a legal right to his children. Appellant's attorney, Roy Milner, testified that on the morning of the incident, Appellant told him that he had not been permitted to see his children as had been previously arranged T1916. Milner advised Appellant that there

was some sort of misunderstanding, but that he would straighten it out by calling his wife's attorney T1916. Although Milner did not recall the exact words that he gave to Appellant T1927, in effect Appellant was told by his attorney that he could have the children that afternoon T1925, 1916.[5] Of course, Appellant would have the right to enter the house to get the children which he believed he had a legal right to. In fact, Appellant came out of the house with the children and because of concern for the children, Appellant turned himself and the children over to the police T1781. Certainly, there was a version of the evidence which could support the defense instruction.

Advice of counsel can be a valid legal defense to a specific intent crime, Huff v. State, 646 So. 2d 742 (Fla, 2d DCA 1994). Burglary is a specific intent crime, E.g. Presley v. State, 388 So, 2d 1385, 1386 (Fla. 2d DCA 1980). Thus, advice of counsel can be a defense to burglary.

Due to advice of counsel, Appellant had a good faith belief that he had the right to possess his children. As such, Appellant had a good faith belief that he had a right to enter the property to retrieve his children. See Thomas v. State, 526 So. 2d 183 (Fla. 3d DCA 1988), rev. denied, 536 So. 2d 245 (Fla. 1988) (good faith belief in right to specific property was valid defense to robbery). It was error to deny the instruction on the theory of defense. The failure to give the instruction violates Appellant's right to due process and a fair trial under Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

[5] Milner also testified that sometimes people hear what they want to hear when talking to an attorney T192 1. This is especially true in cases involving child custody T1921.

This error cannot be deemed harmless beyond a reasonable doubt as required by State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In the court below, the prosecutor claimed that defense counsel's argument to the jury would suffice in place of the instruction T2238. However, the fact that defense counsel was allowed to argue this defense to the jury at trial, and Appellant's jury received instructions on the burden of proof and reasonable doubt, does not render the error harmless. Gardner v. State, 480 So. 2d 91 (Fla. 1985), quoting Mellins v. State, 395 So. 2d 1207, 1209 (Fla. 4th DCA 1981), review denied, 402 So. 2d 613 (Fla. 1981):

> The fact that [appellant's] counsel could have argued his [good faith] defense to the jury cannot render the error harmless because the jury must apply the law as given by the court's instructions, rather than counsel's arguments.

480 So. 2d at 93. Also, because the jury may have based its finding as to the first degree murder on felony murder with burglary as the underlying felony, the error also impacts the first degree murder conviction, As a consequence, Appellant's convictions and sentences for first degree murder and burglary must be reversed and this cause remanded for a new trial.

POINT IX

APPELLANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE PROSECUTOR OBTAINED APPELLANT'S RESEARCH FOR HIS DEFENSE FROM JAIL OFFICIALS.

Appellant was using the law library at the county jail to help with the legal strategy for the guilt and penalty phases of this case. When it was revealed that the prosecutor had obtained Appellant's research for his defense from jail officials, Appellant requested an evidentiary hearing on the ground that the prosecutor had violated his Fifth and Sixth Amendment rights in obtaining confidential material T607- 12 ,R459-461.

At the hearing it was established that the prosecutor had obtained copies of Appellant's legal research for his defense T621-23. It was also shown that Appellant consulted with his attorney over this legal research T6 15. The trial court ruled that such research is not protected under the Sixth Amendment. However, work product certainly is protected material. See Gore v. State, 614 So. 2d 1111, 1114 (Fla. 4th DCA 1992) (noting that such materials "could easily be a roadmap of trial strategy"). Since the work product related to legal research for Appellant and his attorney's use, it involved the Sixth Amendment. See Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 484 (1985) (Sixth Amendment preserves defendant's right assistance of counsel and prosecutor and police have obligation not to act in way that might impact that right).

Appellant testified that he did not waive any right to the confidential material T647. Defense counsel conceded that he had turned over some of the materials to the prosecutor in discovery, but noted that the disclosure was inadvertent T635. Only a few pages of the over 200 page packet of jail records that counsel turned over to the prosecutor contained the materials. The trial court ruled tha defense counsel had waived his client's Sixth Amendment rights by disclosing this material R506. However, the inadvertent disclosure of these materials by counsel did not waive any privilege Appellant had not to disclose the materials to the prosecution. Smith v. Armour Pharmaceutical, 838 F.Supp. 1573 (S.D.Fla. 1993); Georgetown Manor, Inc., v. Ethan Allen. Inc., 753 F.Supp. 936 (S.D.Fla. 1991).

The state's (jail personnel) actions of obtaining Appellant's legal research and giving it to the prosecutor denied Appellant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. This cause must be reversed and remanded for a new trial.

POINT X

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO THE INSTRUCTION ON PREMEDITATED MURDER WHICH RELIEVED THE STATE OF ITS BURDEN OF PROOF AND PERSUASION AS TO THE STATUTORY ELEMENT OF PREMEDITATED DESIGN.

Appellant requested a special instruction on premeditated murder in place of the standard jury instruction R422-23. Appellant's instruction correctly defined the element of "premeditated design" while the standard instruction does not R422-25. Appellant was denied due process and a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 12 and 16 of the Florida Constitution by the giving of the standard instruction.

Section 782.04(1)(1), Florida Statutes defines murder from premeditated design as follows:

> The unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being,

McCutchen v. State, 96 So. 2d 152, 153 (Fla. 1957) defined the "premeditated design" element (emphasis supplied) :

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

See also Littles v. State, 384 So. 2d 744 (Fla. 1st DCA 1980) (quoting McCutchen).

In Owen v. State, 441 So. 2d 1111, 1113 n.4 (Fla. 3rd DCA 1983), the court wrote that deliberation is defined as a prolonged premeditation and so is even stronger than premeditation.

The standard jury instruction on premeditation is unconstitutional and misstates Florida law. It unconstitutionally relieves the state of its burdens of proof and persuasion as to the statutory element of premeditated design. The only attempt in defining the premeditation element is: "'Killing with premeditation' is killing after consciously deciding to do so." There is no mention of the requirement, under McCutchen, that the state prove "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation," and that "the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution."

Additionally, the standard instruction relieves the state of the burdens of proof and persuasion as to the requirement that the premeditated design be fully formed before the killing. While the standard instruction states that "killing with premeditation" is killing after consciously deciding to do so, it relieves the state of its burden by creating a presumption: "It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the premeditation at the time of the killing." Thus the jury is told that it need only find premeditation at the time of the killing. Finally, it does not instruct the jury that the premeditated design element, carrying with the element of deliberation, requires more than simple premeditation.

It is fundamental error to instruct the jury incorrectly as to what the state must prove in order to obtain a conviction. State v. Delva, 575 So. 2d 643 (Fla. 1991) (error in instruction on element not fundamental where element not in dispute).

The federal and state constitutional rights to trial by jury carry with them the right to accurate instructions as to the elements of the offense. In Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945), the court wrote:

> There is much at stake and the right of trial by jury contemplates trial by due course of law. See Section 12, Declaration of Rights, Florida Constitution.. . . We have said that where the court attempts to define the crime, for which the accused is being tried, it is the duty of the court to define each and every element, and failure to do so, the charge is necessarily prejudicial to the accused and misleading.

Appellant was denied due process and a fair trial by the failure to adequately and fully define "premeditated design. " Appellant's conviction and sentence for murder must be reversed and this cause remanded for a new trial.

POINT XI

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS TO SUPPRESS HIS STATEMENT.

Officer Scott Beck testified that he went to the police department to get a statement from Appellant T269. Beck went to the holding area and introduced himself to Appellant T271. Beck then sat down next to Appellant and said "What a messed up scene" T272. Beck testified that Appellant "responded" by saying, "That's what she gets for trying to take away my children" T272. As this was happening, Beck was just starting to pull out his Miranda card T272. Beck never gave Appellant any Miranda warnings.

Appellant moved to suppress his statement on the ground that it was obtained in violation of his Fifth and Sixth Amendment rights citing to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) R191-193, T286-288. Appellant renewed his motion during trial T1553. Appellant specifically noted that Appellant had never waived his rights and

was never remirandized prior to the statement T286-288.[6] Obviously, where Appellant was in custody, and where Officer Beck made a statement that could reasonably be expected to draw an incriminating response, the statement was obtained in violation of Miranda. Thus, it was error to deny Appellant's motion to suppress. This cause must be remanded for a new trial.

POINT XII

IT WAS REVERSIBLE ERROR TO CONSTRUCTIVELY AMEND THE INDICTMENT CONTRARY TO THE GRAND JURY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Article I, Section 15(a) of the Florida Constitution provides in pertinent part:

> No person shall be tried for capital crime without presentment or indictment by a grand jury....

The Fifth Amendment to the United States Constitution has the exact same requirement with regard to charging a capital crime.

In the present case the Grand Jury charged Appellant with first degree premeditated murder:

> The Grand Jurors of the State of Florida inquiring in and for the body of the County of ST. LUCIE, upon their oaths do present that DARCUS L. WRIGHT A/K/A/ DARCUS L. HODGE, on October 11, 1993 with force and arms, at and in the County of ST. LUCIE and the State of Florida, did unlawfully, with a premeditated design to effect the death of any human being, kill and murder Allison Prescod, by shooting her with a firearm, in violation of Florida Statutes 782.04(1)(a).

R2 (emphasis added). The grand jury did not charge felony murder R2. However, during trial the jury was instructed on felony murder T2353, the prosecutor also argued for conviction on a theory of felony murder T2302. Proceeding on the felony murder theory constituted a constructive amendment of the indictment. See eg. United States v. Davis, 679 F.2d 845, 85 1

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[6] Appellant had been read Miranda warnings by a different officer when Appellant was in a police car at a different time T255. Assuming arguendo, that the prior warnings given at some unknown time could apply to his statement, the statement would still be inadmissible because Appellant never actually waived his rights. Understanding one's rights does not amount to a waiver of those rights.

(11th Cir. 1982) (constructive amendment occurs by jury instructions and evidence expanding the case beyond what is specifically charged); United States v. Cruz-Valdez, 743 F.2d 1547, 1553 (11th Cir. 1984).

Only the Grand Jury has the authority to amend an indictment. State ex rel. Wentworth v. Coleman, 163 So. 316 (1935); Pickeron v. State, 113 So. 707 (Fla. 1927); Dickson v. State, 20 Fla. 800 (1884); Phelan v. State, 448 So. 2d 1256 (Fla. 4th DCA 1984); Russell v. State, 349 So. 2d 1224 (Fla. 2d DCA 1977). There is no jurisdiction to present a theory different than that charged by the Grand Jury. After all, that is the very purpose of the Grand Jury Clause. Florida's Grand Jury Clause for charging a capital crime is identical to the Grand Jury Clause of the United States Constitution,

In Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the Court noted that the Federal Constitution's Grand Jury Clause prohibits amendment of an indictment by anyone other than the grand jury. In Stirone the Grand Jury Clause was violated even though there was no formal amendment of the indictment. The indictment was, "in effect," amended by the prosecutor's presentation of evidence and the trial court's charge to the jury which broadened the possible basis for conviction:

> And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same.

80 S.Ct. at 273. The Court went on to state the importance of the Grand Jury Clause protection from broadening what the Grand Jury specifically expressed in its indictment:

> The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which

> subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

80 S.Ct. at 270-271. The Court made it clear that while there may be several methods of committing an offense, conviction may be only based on the method alleged in the indictment:

> The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened.

80 S.Ct. at 271. Later, in United States v. Miller, 105 S.Ct. 1811 (1985), the Court reiterated that it matters not that multiple methods of committing the offense are proceeded on by prosecution as long as they are all alleged in the indictment:

> The Court has long recognized that an indictment may charge numerous offenses or the commission of any one offense in several ways. As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means committing the same crime.

105 S.Ct. at 1815 (emphasis added).

As in Stirone, supra, the Grand Jury Clause was violated in this case where the indictment by the Grand Jury charged only one method (premeditation in this case), for violation of a particular law, but there was a constructive amendment of the indictment by instructing the jury on a different method (felony-murder in this case) for violation of a particular law. In Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), the Court noted that a constructive amendment of an indictment, which only alleged premeditated murder, by adding a felony-murder theory would violate the Grand Jury Clause. However, the Court eventually reversed the conviction on the basis that the constructive amendment violated the right to fair

notice. 558 F.2d at 338[7] In this case the amendment of the indictment violates the Grand Jury Clause as well as the right to fair notice. See Point XIII.

In Stirone, supra, the Court made clear that reversal was necessary due to the unauthorized constructive amendment which added a second method of proving the offense which might have been the basis for conviction and which would constitute a conviction on a charge that was never made by the grand jury:

> Here, as in the Bain case, we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under it s charge this might have been the basis upon which the trial jury convicted on a charge the grand jury never made against him. s was fatal error. Cf. Cole v. State of Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644; DeJonge v. State of Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278.
>
> Reversed.

80 S.Ct. at 274 (emphasis added). Likewise, reversal is necessary here due to the unauthorized amendment of the indictment which violated the Grand Jury Clause. Art. I, Section 15, Florida Constitution; Fifth and Fourteenth Amendments, United States Constitution. Appellant's conviction and sentence for murder in the first degree must be reversed.

POINT XIII

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON A THEORY OF FELONY-MURDER WHEN THE INDICTMENT GAVE NO NOTICE OF THE THEORY.

The indictment in this case only charged premeditated murder R2. Defense counsel filed a motion to prohibit the use of a felony-murder theory due to lack of notice R63-65. The trial court denied this motion R195. The jury was instructed on the theory of felony-murder (burglary) T2353.

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[7] Unlike in Florida, Ohio law permits amendment of indictments by others than the grand jury. 558 F.2d at 337.

This lack of notice denied Appellant due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

An indictment or information is required to state the elements of the offense charged with sufficient clarity to apprise the defendant what he must be prepared to defendant against. Russell v. United States, 369 U.S. 749, 763-69, 82 S.Ct. 1038, 8 L.Ed.2d 249 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3d Cir. 1987); Givens v. Housewright, 786 F.2d 1378, 1380-81 (9th Cir, 1986). In Givens, the Ninth circuit held that it was a Sixth Amendment violation to allow a jury instruction and prosecutorial argument on murder by torture (under Nevada law analogous to Florida's felony-murder) where the information charged willful murder (analogous to Florida's premeditated murder). The error was harmful as there is virtually no evidence of premeditation,

The first-degree murder conviction must be reduced to second-degree murder. If the Court rejects Appellant's argument, a new trial is required as we cannot know if one or more of the jurors relied on felony-murder. See McGahagin v. State, 17 Fla. 665 (Fla. 1880); Owens v. State, 593 So. 2d 1113 (Fla. 1st DCA 1992).

PENALTY PHASE

POINT XIV

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different. " Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Its application is reserved for "the most aggravated, the most indefensible of crimes." State

v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). Sentences of death are not clothed with a presumption of correctness, regardless of the jury's recommendation.

The death of Allison Wright was the result of an impassioned domestic dispute over Appellant's being deprived of the right to see his children. It had been a long ongoing dispute. Appellant and his wife Allison were separated in 1986 with Allison and the children living with her parents T24566,AW187. Appellant would try to see his children, but Allison's family would not allow it AW191. On one specific occasion in June of 1986, Appellant came to see his children, but Allison would not let him see them AW 194. In relation to this, later that day, Allison, her sister, and the children were in a car and the car stopped. It was at this time that Appellant committed his prior violent felony -- an aggravated battery.

The instant incident was again related to Appellant not being able to see his children. Appellant was served with divorce papers and a temporary injunction which kept him from his children. Appellant thus went to an attorney T1908. Appellant's primary concern was being able to see his children T191 1- 12. Through attorneys, Appellant and Allison worked out an agreement that included that Appellant would be allowed to see his children at 9:00 a.m. at McDonald's on Sunday T1911-12. Three days before the visitation, Appellant complained to his attorney that he was not receiving phone communication with his children T1915. On Sunday Appellant went to McDonald's pursuant to the agreement T1916. He waited, but nobody showed up T1916. Appellant then called the police to accompany him to his in-law's house so he could enforce the visitation agreement T1916. Instead of seeing his children,

Appellant was issued a citation for a suspended license T1812.[8] The next day, Appellant went to his attorney and told him what occurred. The attorney told Appellant that he would receive visitation that afternoon T1916,1925. After noon, Appellant tried to visit his children. Upon Appellant's knocking on the door, Allison grabbed the children and pulled them away T1950. This was when Appellant broke in the house. Allison was then shot. As Appellant left he asked "Why you all take my kids" and "You take my kids -- my life" T1977.

Domestic disputes involve some of the most intense passion and in such cases the death penalty is not proportionally warranted, Garron v. State, 528 So. 2d 353, 361 (Fla. 1988) ("... when the murder is a result of a heated domestic confrontation, the penalty of death is not proportionally warranted"). In cases that are factually similar, if not more egregious, to this one the penalty of death has been disapproved.

In Garron v. State, 528 So. 2d 353 (Fla. 1988), Garron was home with his wife and two children. The wife was "threatening to take the children away." 528 So. 2d at 354. Garron got a gun and hid it under a towel. Id. Garron proceeded to kill his wife with two shots. Id. Garron then killed his daughter as she was on the phone calling the police. Id. Due to the domestic nature of the case and the threats to take the children this Court held:

> In *Wilson v. State*, 493 So. 2d 1019 (Fla. 1986), this Court stated that when the murder is a result of a heated domestic confrontation, the penalty of death is not prouortionallv warranted. See *Ross v. State*, 474 So. 2d 1170 (Fla. 1985); *Blair v. State*, 406 So. 2d 1103 (Fla. 1981). The record shows that this is clearlv a case of aroused emotions occurring during a domestic dispute. While this does not excuse appellant's actions, it significantly mitigates them.

528 So. 2d at 361 (emphasis added). In this case death is not proportionally warranted as a heated domestic dispute.

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[8] Appellant had shown the officer the visitation agreement and directed the officer into the house. It was after the officer returned from speaking with Allison and her family that Appellant was issued the citation and not permitted to see his children.

In Downs v. State, 574 So. 2d 1095 (Fla. 1991) Downs and his wife had been separated. On the morning of the murder, Downs stole a gun from an acquaintance. Downs called his wife who said he could come over to this house to see his children. 574 So. 2d at 1096. While Downs was visiting, his wife noticed a gun in Downs' pants and attempted to call the police. Id. Downs shot the phone. She grabbed the two children. Id. Downs asked her to release the children, but she refused. Id. Downs shot her three times and she died while the children were in her arms. Id. The trial court found four aggravators (including prior violent felony) and no mitigators and sentenced Downs to death. This Court reversed noting that it was improper to override the jury's recommendation. But, in addition, this Court noted that was consistent with other domestic confrontations where the death penalty was unwarranted:

> Further, the recommendation is consistent with other cases involving domestic confrontations or lovers' quarrels in which this Court has found the death penalty unwarranted. See, e.g., ***Cheshire v. State,*** 568 So. 2d at 911-12; *Fead* ***v. State,*** 512 So. 2d 176 (Fla. 1987), ***receded from on other grounds, Pentecost v. State,*** 545 So. 2d 861 (Fla. 1989); *Irizarry* ***v. State,*** 496 So. 2d 822 (Fla. 1986); ***Chambers v. State,*** 339 So. 2d 204 (Fla. 1976).

574 So. 2d at 1099.

In Blakely v. State, 561 So. 2d 560 (Fla. 1990), Blakely awakened his children to tell them he had killed his wife. She had been bludgeoned to death with a hammer. The killing was the "result of a long-standing domestic dispute." 561 So. 2d at 561. The main conflict "appears to have been the children. " Id. The "marital discord culminated in an argument the night of the attack," Id. Despite a unanimous jury recommendation of death and the existence of two aggravators (HAC and CCP), this Court vacated the sentence of death because "when the murder is a result of a heated domestic confrontation, the death penalty is not proportionally

warranted" noting that "the killing [in this case] resulted from an ongoing heated domestic dispute" and was factually comparable to other cases. 561 So, 2d at 561.

In addition, there are other similar domestic cases where the penalty of death was deemed to be inappropriate. [9]

The common thread in some of the above cases is that they are domestic disputes which become even more heated through the threat, or actual, deprivation of contact with the children. [10] The instant case was not merely a heated domestic dispute -- it had reached the boiling point and resulted in an explosion. The long standing domestic problems had first steamed with Appellant's deprivation of contact with his children in 1986. The situation continued to simmer until Appellant was served divorce papers and an injunction. It became hotter after Appellant had gone to McDonald's pursuant to an agreement to see the children -- but his wife never showed up with the children. When Appellant believed that the police would enforce the visitation agreement and he received only a citation, the situation was at the boiling point. After Appellant had gotten what he perceived as permission to be with his

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[9] See Santos v. State, 591 So. 2d 160 (Fla. 1991) (history of domestic problems preceded Santos' killing of two people [including ex-spouse]. Santos believed ex-spouse and her family were restricting his access to child, Santos saw ex-spouse walking and approached and shot her and other victim. Santos had previously threatened to shoot ex-spouse and her mother. Reduced to life. 621 So. 2d 838 (Fla. 1994); Maulden v. State, 617 So. 2d 298, 303 (Fla. 1993) (death vacated for killing of ex-wife and her soon to be husband because Maulden's "emotional distress grew continuously from the time he and his ex-wife separated" and Maulden was overwhelmed by being replaced as a "father figure" for his children); Wright v. State, 586 So. 2d 1024 (Fla. 1991) (Wright and victim had a "long history of domestic problems" and when victim and children would not answer Wright's demand to be let in house, Wright knocked down the back door and began shooting the victim as she tried to flee).

[10] This type of deprivation can be especially traumatic as shown by Maulden v. State, 617 So. 2d 298, 303 (Fla. 1993) where the defendant perceived that he was being replaced as the "father figure" to his children.

children through the legal system for the third time," only to have his wife grab the children and run away. It is at this point the heated, burning domestic situation resulted in an explosion. It is in situations like that the death penalty is not proportionally warranted. E.g. Garron, supra.

Blakely v. State, 561 So. 2d 560 (Fla. 1990) seems to recognize one exception to the rule that the death penalty is not proportionally warranted in domestic cases -- where there is a prior violent felony unrelated to the domestic dispute, Blakely cites to Lemon v. State, 456 So. 2d 885 (Fla. 1984), King v. State, 436 So. 2d 50 (Fla. 1983) and Williams v. State, 437 So. 2d 133 (Fla. 1983). In each of those cases the defendant's prior violent felony dealt with an incident that was totally unrelated to that for which they were on trial." Whereas, in the present case Appellant's prior violent felony was related to the same exact thing for which Appellant was on trial -- Allison's trying to keep Appellant from seeing his children. Unlike in each of the cases cited above, Appellant's prior felony was part of the long ongoing domestic dispute between Appellant and Allison. While this does not excuse Appellant's actions, it places this case in the class of cases for which the death penalty is not warranted. E.g. Blakely, supra.

In addition, it cannot be claimed there was no mitigation in this case. The trial court found the mitigating factor that Appellant was under the influence of extreme mental or

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[11] The first time he hired an attorney and a visitation agreement was made only to have the other side renege on the agreement. The second time he contacted the police to enforce the agreement only to wind up with a citation and no visitation. The third time he went back to the attorney to get assurance that the visitation situation was straightened out only to later have his wife ignore him and turn away with the children.

[12] Lemon's prior violent felony included a prior stabbing of a female unrelated to the stabbing death of his girlfriend. King's prior violent felony involved a prior unrelated murder via an axe-slaying. Williams' prior violent felony involved unrelated assault convictions for shooting a number of victims.

emotional disturbances at the time he committed the offense R807-808. The trial court also found over a dozen non-statutory mitigating circumstances including the following. Appellant expressed remorse to his children and to the Prescod family R810. Appellant cooperated with the police R811. Included within this was the fact that Appellant surrendered to the police and gave the police a name and phone number of a person to take custody of the children R812. This was to avoid harm to the children R812. The difficulty between Appellant and the victim's family exacerbated the problems between Appellant and the victim R813. The trial court found that "this case clearly reflects that this was a domestic dispute over child visitation" R813. Appellant had a good employment record and was an honest, dependable and hard worker R813. Appellant regularly attended church and sang in the choir R814. Appellant was "mentally abused by his stepfather" R816, and raised in an environment where he would stay away from home on a regular basis R816. There were also stories of beatings at Appellant's house CJ27. Appellant did a number of specific good deeds which included helping out another family in a number of ways R817. Also there was no indication of violence from Appellant outside the domestic dispute concerning the children DJ20,CJ20. Appellant would check out on the Jones family to see if anything was needed DJ12. This occurred until Appellant went into the service DJ12. Appellant was always very polite and mannerly DJ13. Appellant would not take money for the work he did for Doris Jones DJ24. Appellant looked out for the Jones' three daughters DJ20. He made sure Carla would get home safely from school each night DJ25. He looked out for her like a big brother DJ26,CJ10. Appellant was outgoing with the Jones family, but when around his stepfather he would not say anything DJ28. Appellant's stepfather would denigrate him DJ28,30. Carla Jones had heard of beatings at Appellant's house CJ27. Appellant's mother would never make an effort to find out where Appellant was

DJ32. There were no signs of nurturing by Appellant's mother CJ23. Appellant always talked about his children CJ35. Appellant put his life around his children; he did not want to be without his children DJ33. The night before the incident Appellant was acting depressed and was "kinda like spaced out a little bit" DB10. Appellant had a lot on his mind about his divorce and he was pretty upset about his kids DB10. Appellant was drinking DB22. Appellant was upset about not being able to see his children DB11. Appellant kept saying that he wanted to see his kids DB11. It cannot be said that this is one of the most aggravated cases of murder for which the death penalty is reserved.

POINT XV

THE DENIAL OF APPELLANT'S REQUEST FOR A CONTINUANCE DENIED APPELLANT DUE PROCESS AND A FAIR SENTENCING.

On November 14, 1994, the jury reached its verdict. In preparing the schedule for the penalty phase, the trial court was informed that Appellant's grandfather had died and there was a concern for acquiring the presence of Appellant's family members for the penalty phase T2280,2294. The funeral was scheduled for Friday, November 18, 1994 T2294,2555. Appellant requested a continuance to Monday, November 21, 1994, in order for Appellant's family to come to Florida for the penalty phase T2555. The penalty phase was continued to the morning of November 21.

On the morning of November 21, Appellant's attorney explained to the trial court that Appellant's sister had arrived in West Palm Beach, but did not yet have transportation to Ft. Pierce T2751,2759. Appellant's attorney told the sister that the malls opened at 9 or 10 a.m. in Palm Beach and the sister said she would get a rental car T2759. The sister asked for directions to the courthouse and other things of that nature T2759. There was no definite time

given for her arrival due to the uncertainties of the exact time of getting a car T2760. A 20 minute recess was held until 9:30 a.m. T2768.

Appellant's witness did not drive from West Palm Beach to Ft. Pierce during the 20 minute recess. Appellant personally explained to the trial court that his family was on the way and there was no reason for them to have flown to West Palm Beach other than to come to testify in the penalty phase T2777. Appellant moved for a continuance based on witness unavailability T2787. The prosecutor objected on the ground that the case needed to be over and they were just wasting time by waiting for defense witnesses and noted that the time was almost 10:19 a.m. T2787-88. The trial court denied the request and declined to wait for the defense witnesses T2788. The jury began deliberating at 12:14 p.m. R756. Appellant's first defense witness, his sister, arrived at 1:43 p.m. T2855.

Under the unique circumstances of this case, the trial court abused its discretion in denying the motion for continuance. The general rule is that granting or denying a motion for continuance is within the discretion of the trial court. Wike v. State, 596 So. 2d 1020 (Fla. 1992). However, it is an abuse of discretion to deny a short and reasonable continuance due to witness unavailability. Wike, supra; Jones v. State, 558 So. 2d 131 (Fla. 1st DCA 1990) (trial court abused discretion in denying continuance so that witness disclosed to counsel by defendant five days earlier could appear at trial). For example, in Wike v. State, 596 So. 2d 1020 (Fla. 1992), the defense requested a one week continuance in the penalty phase in order to procure the attendance of additional mitigation witnesses which included family members who were either not yet in town or could not immediately testify due to health problems. 596 So. 2d at 1020. This Court held that in denying a continuance for a short period of time ("a

few days") for a specific purpose (family members in mitigation) the trial court had abused its discretion:

> Given the circumstances of this case, we conclude that the trial court abused its discretion in denying Wike's motion for a continuance. We emphasize that Wike's request for a continuance was for a short period of time and for a specific purpose. It is clear that Wike's family members, specifically, his cousin and ex-wife, could have provided admissible evidence for the jury to consider during the penalty phase had the continuance been granted. Ordinarily, we are reluctant to invade the purview of the trial judge; however, we find that the failure to grant a continuance, if only for a few days, under these circumstances was error. Consequently, we must remand this case for a new penalty phase proceeding before a new jury.

596 So. 2d at 1025. Likewise, not waiting while family members rented a car and drove from West Palm Beach to Ft. Pierce, which would amount to a very short delay in proceedings,[13] is an abuse of discretion. The error denied Appellant due process and a fair reliable sentencing under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. This case must be remanded for a new sentencing hearing before a new jury.

POINT XVI

APPELLANT'S RIGHTS TO CONFRONTATION, DUE PROCESS AND A FAIR SENTENCING WERE DENIED BY APPELLANT'S ABSENCE FROM A HEARING ON APPELLANT'S COMPLAINT THAT DEFENSE COUNSEL HAD NOT CONTACTED PENALTY PHASE WITNESSES.

Appellant complained that counsel had not contacted penalty witnesses T2556-57. At the penalty phase bench conference, out of Appellant's presence, T2648-5 1, counsel represented that the witnesses had not arrived and that he could not help if Appellant "has problems with it . . . that's unavoidable" T2649. The court then said that it was comfortable with these representations and that the defense had not received contact back from the witnesses T2650.

[13] The continuance was denied at 10:19 a.m. T2787-88. The jury began deliberating at 12:14 p.m. R756. Defense witnesses arrived at 1:43 p.m. T2855.

A defendant has the right to be present when his presence is relevant to the proceedings, Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 320, 332, 78 L.Ed.2d 674 (1934), but not when such presence would be useless or merely a shadow to counsel. Id., 54 S.Ct. at 330.

Appellant's presence at the bench conference would be not have been useless or merely a shadow to counsel. His complaint dealt with counsel's failure to obtain some penalty witnesses. He was not merely a shadow to counsel, but in fact was the catalyst of the inquiry. Thus, he should have been present when counsel addressed his complaints: This is especially true where he gave the witnesses' names to counsel. He should have been present when the court made findings, based on counsel's representations, as to the complaints. Appellant was deprived of his right to be present and thus denied his rights to confrontation, due process and a fair reliable sentencing. U.S. Const. amend. V, VI, VIII, XIV; Fla.Const. Art. I, §§ 9, 16. The death sentence must be reversed and this cause remanded for jury resentencing.

POINT XVII

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY INQUIRE INTO THE WAIVER OF MITIGATING EVIDENCE.

Because the death penalty is uniquely irrevocable, there must be heightened scrutiny of the waiver of mitigating evidence. Koon v. Dugger, 619 So. 2d 246 (Fla. 1993) delineated the required rules to be applied for waiver of mitigation:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require to defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Thus, once counsel informs the court of the client's decision, there are three points of inquiry:

(1) Counsel must indicate whether he believes there is mitigating evidence,

(2) Counsel must define what that mitigating evidence is, and

(3) The **court** must require the defendant to confirm that this mitigation was discussed with counsel and that he wants to waive this mitigation.

Here, the state acknowledged that waiver of mitigation could be done pursuant to Koon T2665. After counsel announced that Appellant was not going to present mitigation, an inquiry was held in which counsel said that there was "significant" and "powerful" mitigation that was being waived T2664. But contrary to Step 2 in Koon, counsel never defined what the mitigation was. It was error to fail to inquire about the nature of the mitigation being waived.

The trial court cannot perform an adequate inquiry into a defendant's waiver of mitigating evidence if there is no attempt to ascertain specifically what is being waived. See United States v. Simtob, 901 F.2d 799, 804 (9th Cir. 1990) (trial court could not properly rule on admissibility of tape recording without first reviewing the content of the tape, court's ruling was therefore made without consideration of the "relevant facts" and constituted an abuse of discretion); Koenig; v. State, 597 So, 2d 256 (Fla. 1992) (stipulation as to factual basis for plea is insufficient for judicial inquiry, judge must actually be informed of the contents of the factual basis). Here, the trial court was informed that the source of the mitigating evidence would come from certain witnesses in the form of depositions. But, the trial court was not informed of the content of their testimony. In fact, when Appellant's attorney tried to be specific, the trial court indicated that he did not need to know about the specifics T2672. Obviously, the court's inquiry was insufficient as it needed to know what the mitigating evidence was to properly conduct an inquiry into the waiver of mitigation pursuant to Koon. How could one determine whether the waiver was knowing and intelligent without first knowing what exactly it was that was being waived? The court also failed to ascertain Appellant's understanding of what mitigating evidence was available and his understanding of counsel's reasons for wishing

to introduce such evidence. Only under such circumstances could the trial court ascertain if the purported waiver of mitigation was knowing, voluntary and intelligent. The sentence must be reversed and this cause remanded for a new sentencing before a new jury.

POINT XVIII

THE COURT ERRED IN REJECTING THE MITIGATING CIRCUMSTANCE IN SECTION 921.141(6)(f) OF THE FLORIDA STATUES WHERE IT WAS UNCONTROVERTED THAT APPELLANT'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.

Dr. Cheshire testified that Appellant had lost the ability to conform his conduct to the requirements of the law T2516,2563. The basis for this finding was the recognition that when a parent loses custody of a child he may be unable to cope T2516. Appellant had a strong psychological need to be with his children T2562. The impact of the deprivation of not being able to see one's child can go to a borderline between sanity and insanity T25 16. Dr. Cheshire saw that Appellant had an obsession to get his children based on the fear that he would lose them T25 18. The obsession was a compulsion T25 18. Thus, he acted in a bizarre manner by filing suit seeking custody of the children while he was in prison -- where he, of course, could not have custody of the children T2519. He went through the legal system to arrange to see his children and then his wife reneged on the agreement, he then tried to enforce the agreement only to have the police tell him he could not see his children. Dr. Cheshire testified that this increased his stress and frustration T2563. At the point he had gone back to his attorney and been told that visitation that afternoon would be no problem, only to have his wife grab the children and turn away as he knocked on the door -- he lost the ability to conform his conduct to the requirements of the law T2516,2563. He had lost the ability to conform his conduct and had a "compulsion" to go through the door to get his children T2563-64.

The above facts were uncontroverted and support the circumstance that Appellant's ability to conform his conduct to the requirements of the law was substantially impaired. "The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor. " Maxwell v. State, 603 So. 2d 490 (Fla. 1992). As this Court noted in Johnson v. State, 660 So. 2d 637 (Fla. 1995), the uncontroverted factual evidence supported by expert testimony cannot be ignored or rejected:

> Johnson also appears to suggest that, had he introduced expert testimony about his mental state in the penalty phase, the trial court could simply have rejected the testimony wholesale under *Walls*. Actually, *Walls* stands for the proposition that opinion testimony *unsupported by* factual evidence can be rejected, but that uncontroverted and believable factual evidence supported by opinion testimony cannot be ignored. *Walls*, 641 So. 2d at 390-391. Johnson did in fact introduce uncontroverted facts supporting a case for mental mitigation, but the record completely and substantially supports the trial court's determination of weight.

660 So. 2d at 647 (emphasis added). Thus, while the court had discretion as to the weight to give to the impaired capacity mitigator, it was not free to totally reject Dr. Cheshire's testimony which was based on uncontroverted facts.[14] Moreover, the impaired capacity mitigator has been generally recognized to exist when a defendant's obsession or compulsion has been triggered. See Irizarrv v. State, 496 So. 2d 822, 824 (Fla. 1986) (impaired capacity mitigator existed because crime resulted in "passionate obsession. " Irizarry was "obsessed" that his ex-wife had jilted him, causing impairment of capacity to appreciate criminality of his conduct); Kampff v. State, 371 So. 2d 1007 (Fla. 1979) (impaired capacity, where Kampff had "obsessive desire to regain former status as husband").

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[14] While the court's order stated that there was no factual basis to support Dr. Cheshire's findings, it disputed only one fact, saying there was no evidence as to what Attorney Milner told Appellant on the day of the homicide -- "Mr. Milner's testimony did not establish what he told the Defendant prior to the homicide" R808. While he testified that he did not remember his exact words, Milner was sure he communicated that he would call the wife's attorney to get visitation (T1917) and further that Appellant "would have visitation that afternoon or the next day" T1925. The evidence was uncontroverted that Appellant believed he had the right of visitation.

The reason the court gave for rejecting the impaired capacity mitigator was that Appellant "obviously recognized what he had done" by his voluntary surrender to the police R809. This is irrelevant as to whether Appellant had an impaired capacity at the time of the offense. This is more akin to stating that he was not insane. The court used the wrong standard in rejecting the mitigator. It is reversible error to reject a mental mitigator by use of an incorrect standard such as sanity. See Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990) (court improperly used "sanity" standard in rejecting "impaired capacity" as a mitigator); Ferguson v. State, 417 So. 2d 639, 644-45 (Fla. 1982) (trial court concluded Ferguson had "absolute understanding of events and consequences"; it was error to reject impaired capacity by use of wrong standard). There are many cases where the defendant recognized what he had done as demonstrated by his turning himself in or by his confession, and yet the impaired capacity mitigator was found or upheld, E.g. Wright v. State, 586 So. 2d 1024 (Fla. 1991) (defendant surrendered to police, one mitigator was impaired capacity); Maulden v. State, 617 So. 2d 298 (Fla. 1993) (impaired capacity found; Maulden gave detailed confession to police); Henry v. State, 574 So. 2d 73 (Fla. 1991) (confession and impaired capacity both present).

The erroneous rejection of the impaired capacity mitigator is not harmless beyond a reasonable doubt. Only two aggravators were present. The prior violent felony was actually part and parcel of this case -- ongoing domestic dispute concerning custody of the couple's children. The other aggravator is that the killing occurred during a felony (burglary). Under the particular circumstances at bar, this is not one of the most aggravated of murder cases.

On the other side of the scale was ample mitigation. The court found that Appellant was under the influence of extreme mental or emotional disturbances at the time he committed the offense R807-808. The court also found over a dozen non-statutory mitigating circum-

stances including: Appellant expressed remorse to his children and to the Prescod family R810. He cooperated with the police R811. He surrendered to police and gave them a name and phone number of a person to take custody of the children lest harm befall them R812. He had mental health problems R812. The difficulty between Appellant and the victim's family exacerbated the problems between him and the victim R813. The court found that "this case clearly reflects that this was a domestic dispute over child visitation" R813. He had a good employment record and was an honest, dependable and hard worker R813. He regularly attended church and sang in the choir R814. He was "mentally abused by his stepfather" R816, and raised in an environment where he would stay away from home on a regular basis R816. There were also stories of beatings at his house CJ27. He did a number of specific good deeds which included helping out another family in a number of ways R817. There was no indication of violence from him outside the domestic dispute concerning the children DJ20,CJ20.

Although the court indicated that it would impose the same sentence regardless of any errors in rejection of mitigation, such boilerplate language cannot be used to judge the error harmless. In Griffis v. State, 509 So. 2d 1104 (Fla. 1987) this Court rejected the claim that a trial judge's boilerplate statement, that its sentencing decision would remain the same despite errors in sentencing thus making sentencing errors harmless, noting that the trial judge should be given the opportunity to weigh the appropriate factors after the appellate court gives its guidance:

> Moreover, in *Albritton* v. State, 476 So. 2d 158 (Fla. 1985), we held that where the appellate court finds some reasons for the departure to be invalid, it must reverse unless the state can show ***beyond a reasonable doubt*** that the sentence would have been the same without the invalid reasons. We cannot in good conscience say that such a standard can be met through the anticipatory language of the trial judge rather than the reweighing of only the appropriate departure

> factors. The trial judge should have the opportunity to review and weigh the appropriate factors under the guidance of the appellate court's review of the reasons given. We see no reason to recede from our position of December 1985.

509 So. 2d at 1105 (emphasis added). Any attempt to find the error of **rejecting mitigating** evidence harmless based on anticipatory language by the judge in this case is particularly flawed. If the court errs in failing to find a mitigating circumstance, it is not in the position to ascertain how much weight the mitigator deserves and how it will thus affect the overall balance between aggravators and mitigators. It will only be after the trial court understands why its evaluation is in error that it will be able to know the significance of the unweighed mitigator. The error cannot legitimately be said to be harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The improper rejection of mitigating evidence denied Appellant due process and a fair, reliable sentencing. Fla.Const. Art. I, §§ 9 and 17; U.S. Const. amend. V, VI, VIII, XIV.

POINT XIX

THE TRIAL COURT ERRED IN REJECTING THE MITIGATING CIRCUMSTANCE IN SECTION 921.141(6)(e) OF THE FLORIDA STATUTES WHERE IT WAS UNCONTROVERTED THAT APPELLANT ACTED UNDER EXTREME DURESS AT THE TIME OF THE OFFENSE.

The extreme duress mitigator is supported by uncontroverted evidence. As already shown, Appellant had an obsession to see his children and, despite three attempts through legal channels to see them, he was constantly turned away. When he went to see his kids the last time, with a good faith belief that visitation had been arranged," only to have his wife grab the

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[15] On the morning of the murder, Appellant went to his attorney (Mr. Milner) to ensure that he had visitation. While Milner did not remember his exact words, he effectively told Appellant he would have visitation that afternoon or the next day. He said that in such matters clients tend to hear what they want to hear. This is especially true in Appellant's case where he was obsessed in seeing his children. Even if Milner was not perfectly clear as to when visitation would begin, Appellant's state of mind would interpret his statement in the light that he would have visitation rights after noon. It should be noted that Appellant had pure custody rights at this time. Milner testified that the injunction had expired 2 days before the incident.

children and turn away, he was under extreme duress. Dr. Cheshire testified to the extreme duress and that Appellant feared that the children were being lost forever T25 18. The court recognized that Dr. Cheshire's opinion was based on facts supported by the evidence R810. However, the trial court merely rejected the opinion R810. This was error.

The trial court rejected the duress mitigator citing to the requirement in ~~Toole v. State,~~ 479 So. 2d 731, 734 (Fla. 1985) that external provocation (such as threats), rather than merely internal pressure, be the catalyst for the killing.

Here there was both internal pressure (Appellant's obsession with seeing his children) and external provocation that ignited the internal pressure. The initial forms of external pressure were the actions which Appellant reasonably saw as threats to deprive him of his children. For example, he and Allison Wright agreed through their attorneys that he would visit the children at McDonald's. However, she completely ignored the agreement by failing to show up with the children. Obviously, this was a threat to deprive him of his children. The final external provocation causing the explosion was his belief that he could see his children after noon -- only to be locked out and to see his wife grab the children and hurry away. Dr. Cheshire testified that from Appellant's point of view this was an extreme provocation as a threat to totally deprive him of his children T25 17-18. Thus, it was error to reject the extreme duress mitigator. See Fead v. State, 512 So. 2d 176 (Fla. 1987) (Fead acted under extreme duress because of his obsessive jealousy over his former wife and the external provocation included "seeing her dancing with other men" on the evening of the killing).

The erroneous rejection of mitigating evidence denied Appellant due process and a fair, reliable sentencing. Fla.Const. Art. I, §§ 9 and 17; U.S. Const. amend. V, VI, VIII, XIV.

POINT XX

THE COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE INQUIRY INTO APPELLANT'S COMPLAINT THAT COUNSEL DID NOT SUBPOENA AND CONTACT WITNESSES FOR THE PENALTY PHASE.

The court erred in failing to inquire adequately into Appellant's complaint that counsel failed to subpoena and contact penalty witnesses. The failure to make the required inquiry violates Appellant's rights under Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

During the penalty phase, Appellant complained that counsel had failed to subpoena witnesses from Ft. Lauderdale, Hollywood, and Port St. Lucie for the penalty phase T2556-57. Later, he also claimed that defense penalty phase witnesses Billings, Scott, Coachman, Hopp and McCormick had not been contacted by counsel T2753.

If competency of counsel is at issue, the court must make a sufficient inquiry of the defendant and court-appointed counsel to determine if reasonable cause exists to believe effective assistance of counsel is being denied. If such cause exists, it should so find on the record and appoint substitute counsel. If it determines effective assistance of counsel is being rendered, it should so state. Nelson v. State, 274 So. 2d 256, 258-259 (Fla. 4th DCA 1973) adopted in Hardwick v. State, 521 So. 2d 1071 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). If counsel is competent, the court must advise the defendant that counsel may be discharged, but that the state is not required to appoint substitute counsel, although the defendant may represent himself. Taylor v. State, 557 So. 2d 138 (Fla. 1st DCA 1990); Jackson v. State, 572 So. 2d 1000 (Fla. 1st DCA 1990) (although defendant was informed that if he dismissed court-appointed counsel, state would not be required to appoint substitute counsel, he was not told that he had right to represent himself; requiring defendant

to proceed to trial despite continued dissatisfaction with attorney was reversible error); Chiles v. State, 454 So. 2d 726 (Fla. 5th DCA 1984). If the trial court fails to follow this procedure, it has committed reversible error. Taylor; Jackson; Chiles.

No inquiry was ever made into Appellant's complaint about ineffectiveness in failing to subpoena the witnesses from Ft. Lauderdale and Hollywood. Thus, a new penalty phase is required. E.g. Nelson, Hardwick; Kearse v. State, 605 So. 2d 534, 537 (Fla. 1st DCA 1992) (new trial required where defendant was allowed to air complaints regarding attorney's alleged failure to file statement of particulars per defendant's request but court failed to "question counsel concerning the issue of competency orally"); Perkins v. State, 585 So, 2d 390, 392 (Fla. 1st DCA 1991) (court must examine both defendant and counsel to be able to make finding on effectiveness) .

When Appellant complained that counsel had not contacted witnesses Billings, Scott, Coachman, Hopp and McCormick (T2753), the court asked counsel if this was the same matter covered the prior week and counsel answered, "Yes" T2753. Counsel's representation was not correct. The inquiry the prior week dealt with witnesses Tina and Wilbur Bowles and Carla, Bill and Doris Jones T2663. The only inquiry into Appellant's complaint regarding failure to contact Billings, Scott, Coachman, etc. was the defense attorney representing that he had his investigator contact these people, but "they have been and have come to dead-ends" T2753. There was no inquiry into what defense counsel meant by this statement. There was no inquiry of Appellant or counsel as to what these people could testify to as to make a determination whether defense counsel was acting competency. A new penalty phase is required.

Also, there were no specific findings as to whether counsel was ineffective in not getting the witnesses (Billings, Scott, Coachman, etc. from Ft. Lauderdale, Hollywood or Port St.

Lucie) for the penalty phase. Thus, a new penalty phase is required. E.g. Kearse 605 So.2d at 537 ("court failed to make rulings as to the sufficiency of any of the ineffectiveness claims").

As to the claim that counsel failed to raise the issue regarding the day of worship, there was no inquiry into this claim of ineffectiveness. Thus, a new penalty phase is required.

POINT XXI

THE COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE INQUIRY INTO APPELLANT'S REQUEST TO DISCHARGE COUNSEL.

The court erred in failing to adequately inquire into Appellant's request to discharge counsel. This failure constitutes reversible error. Fla. Const. Art. I, §§ 2, 9, 16 and 17; U.S. Const. amend. V, VI, VIII, XIV.

During trial, prior to the penalty phase, defense counsel, David Lamos, said Appellant wanted a Nelson inquiry T2146. In this regard, Appellant made three specific claims of ineffective counsel: 1. That he informed Lamos that he did not want to be present in court on Sundays out of religious principals T2158, but Lamos did not make a motion on his behalf T2159. 2. That he would like to be present during the jury viewing of demonstrative charts and diagrams as were the attorneys and judge T2164. He said that he specifically told Lamos to ask the judge if he could be present, but proceedings continued without the matter being brought to the judge's attention T2164. 3. That Lamos failed to move for an evidentiary hearing where a member of the jury pool had physical contact with evidence (a mattress) prior to trial T2158. The court found there was no need for a Nelson inquiry T2165.

The Sixth Amendment guarantees indigent persons accused of felonies to court appointed counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). Although an indigent defendant has no right to counsel of his or her own selection, he is entitled to effective representation. Nelson.

Where a defendant indicates a wish to discharge court-appointed counsel, the judge must inquire of the defendant to learn the reasons for the request. Id. at 258; Hardwick; Johnston v. State, 497 So. 2d 863 (Fla. 1986); Williams v. State, 532 So. 2d 1341 (Fla. 4th DCA 1988); Black v. State, 545 So. 2d 498 (Fla. 4th DCA 1989).

If competency of counsel is at issue, the court must make as sufficient inquiry of the defendant and court-appointed counsel to determine if reasonable cause exists to believe effective assistance of counsel is being denied. If reasonable cause exists, the court should so find on the record and appoint substitute counsel. If the court determines effective assistance of counsel is being rendered, the court should so state. Nelson. If counsel is competent, the court must further advise the defendant that counsel may be discharged, but that the state is not required to appoint substitute counsel, although the defendant may represent himself or herself. Taylor; Jackson (although defendant was informed that if he dismissed court-appointed counsel, state would not be required to appoint substitute counsel, he was not told that he had right to represent himself; requiring defendant to proceed to trial despite continued dissatisfaction with attorney was reversible error); Chiles v. State, 454 So. 2d 726 (Fla. 5th DCA 1984). If the trial court fails to follow this procedure, it has committed reversible error. Taylor v. State; Jackson v. State; Chiles v. State.

Here, the court failed to make an adequate inquiry into the ineffectiveness claims that counsel failed to raise the issues of Appellant being present during the presentation of demonstrative evidence and Appellant's presence during a day of worship. After Appellant complained that counsel failed to raise the presence issue during presentation of demonstrative evidence, the court merely asked the attorney if in the future he would like Appellant present during the jury's viewing of demonstrative evidence T2164. The attorney reluctantly stated he

had no objection T2165. There was no inquiry into why the attorney had not requested his presence to view demonstrative evidence with the other players (jury, attorneys, and judge). Thus, a new penalty phase is required. E.g. Nelson , Hardwick (must inquire of defendant and appointed counsel "to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant"); Kearse (new trial required where defendant was allowed to air complaints regarding attorney's alleged failure to file statement of particulars per defendant's request but trial court failed to "question counsel concerning the issue of competency orally"); Perkins (court must examine both defendant and counsel to be able to make finding on effectiveness).

Naturally, there were no specific findings whether counsel was ineffective for not trying to secure his client's presence to view evidence. Thus, a new trial is required. E.g. Kearse.

As to Appellant's claim that counsel failed to raise the issue regarding the day of worship, there was absolutely no inquiry into this claim of ineffectiveness. Thus, a new penalty phase is required,

If a defendant persists in seeking to discharge counsel, he must be given an opportunity to proceed pro se. The court must adequately inquire into his ability to do so. Faretta v. California, 422 U.S. 806, 96 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Fla. R. Crim. Proc. 3.111(d). Clark v. State, 442 So. 2d 1044 (Fla. 4th DCA 1983); Mansfield v. State, 430 So. 2d 586 (Fla. 4th DCA 1983); Smith v. State, 444 So. 2d 542 (Fla. 1st DCA 1984).

At bar, Appellant again complained of ineffectiveness of counsel due to counsel failing to acquire jail records regarding his head injuries T2903-04. Appellant repeated his request to discharge counsel and have new counsel appointed T2907. No inquiry was made into whether the attorney was ineffective. This was error. The only inquiry at this point was to the general

topic as to whether the attorney and Appellant were communicating T2907, Indeed, both the attorney and Appellant agreed that there was no communication between the two of them.

Thus, the court found that there was no ineffective assistance of counsel to trigger an inquiry T2929. This misperceived the purpose of Nelson. It is the claim of ineffectiveness of counsel which triggers the inquiry and not the actual existence of a finding of ineffective assistance. It makes no sense to require a finding of ineffectiveness when ineffectiveness is the very thing the inquiry is designed to ferret out. The finding as to the ineffectiveness issue cannot be determined until after inquiry.

The court expressly refused to address another claim that counsel was not giving effective assistance. On one occasion counsel essentially admitted that due to the breakdown in the client-attorney relationship that he was ineffective T2775 (MR. LAMOS: . . . based on the total breakdown in information going on, I don't know what's happening.). Appellant complained that counsel specifically told his family not to come to the sentencing hearing T2776, and that other witnesses did not appear on his behalf due to his attorney T2777. The court specifically stated that it was not going to address the issue of the attorney's failure to get the witnesses T2777. It was reversible error not to inquire of the attorney's action of thwarting the appearance of mitigation witnesses. The failure to make the required inquiries was unconstitutional. Fla.Const. Art. I, §§ 2, 9, 16 and 17; U.S. Const. amend. V, VI, VIII, XIV. The death sentence must be reversed and this cause remanded for a new penalty phase.

POINT XXII

FLORIDA STATUTE 921.141(5)(d), THE FELONY MURDER AGGRAVATOR, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

Florida Statute 921.141(5)(d) violates Article I, Sections 2, 9, 12, 16 and 17 of the state Constitution and Amendments Fifth, Sixth, Eighth and Fourteenth to the federal Constitution.

Appellant moved to declare the aggravator unconstitutional R72-78 ,T102- 108 . The trial court denied the motion R364. The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator.

Aggravating circumstance (5)(d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141. All of the felonies listed as aggravators are also felonies which constitute first degree felony murder. Fla. Stat. 784.04(1)(a)2.

Under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements: (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235, (1983). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Id. at ???

The felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start with this aggravator, even if they were not the actual killer or if there was no intent to kill. However,

persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation." Rogers v. State, 511 So. 2d 526 (Fla. 1987).

In this regard, the following discussion of the premeditation circumstance in Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (footnote omitted) is especially pertinent:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stenhens, 462 U. S . 862, 877 (1989) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

The same logic applies to the felony murder aggravating circumstance. It is irrational to make one who does not kill and/or intend to kill automatically eligible for the death penalty whereas one who kills with a premeditated design is not automatically eligible. This aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to Zant.

Three state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or federal constitutional grounds. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn, 1992); Tennessee v. Middlebrooks, 113 S.Ct. 1840 (1993) (granting certiorari); Tennessee v. Middlebrooks, 114 S.Ct. 651 (1993) (dismissing writ of certiorari as improvidently granted).

State v. Cherry, held that when a defendant is convicted of First Degree Murder under the felony rule, the trial judge is not to submit to the jury at the penalty phase of the trial, the aggravating circumstance concerning the underlying felony. The Court in Cherry held that:

> We are of the opinion, that nothing else, appearing the possibility that the defendant convicted of felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to an "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the Statute we hold that when a defendant is convicted of First Degree Murder under the felony

murder rule, the trial judge shall not submit to the jury, at the sentencing phase of the trial, the aggravating circumstances concerning the underlying felony.

This Court should follow these courts and declare this aggravator unconstitutional. U.S. Const. amend. VIII; Fla. Const. Art. I, § 17

This circumstance was essential to death eligibility at bar. The jury was only instructed on (and the judge only found) two aggravators. If there is only one aggravating circumstance, the sentence must be reduced to life imprisonment, unless there is little or no mitigation. Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984). Here, there is substantial mitigation. Thus, felony murder was essential to the states case for first degree murder and for death.

This Court should declare the aggravator unconstitutional and reduce the death sentence to life imprisonment or at least remand for resentencing.

POINT XXIII

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY DEFINE NONSTATUTORY MITIGATING CIRCUMSTANCES.

Appellant sought special jury instructions defining nonstatutory mitigating circumstances applicable to this case. For example, it requested an instruction explaining that the jury could consider: his physical abuse as a child; his good conduct in jail; his prior drug use; his employment history; his potential for rehabilitation T2738. The court denied the requests T2742. This ruling violates due process and the Eighth Amendment requirements that all mitigating evidence be considered in a death sentencing proceeding.

The court ruled that the instructions were not necessary and that the circumstances could be argued to the jury T2742. But, an attorney's argument will not substitute for a proper jury instruction. Mellins. Abstract instructions relating to a defense theory are insufficient; such

instructions must be "precise and specific rather than general and abstract." United States v. Mena, 863 F.2d 1522 (11 th Cir. 1989). This is true even where standard instructions are involved. Harvey v. State, 448 So. 2d 578, 580-81 (Fla. 5th DCA 1984) (error to blindly adhere to standard instructions). Jurors will only understand what specific nonstatutory mitigating evidence is being offered if they are given instructions on such evidence.

It cannot be presumed that a judge knows what mitigating circumstances are being offered. Campbell, 571 So. 2d at 419. Likewise, a jury cannot be presumed to adequately understand what is being offered as mitigation without the proper instruction to guide it. [16] An attorney's argument will not substitute for a proper jury instruction. See Mellins.

Under Parker v. Dugger, 111 S.Ct. 731, 738 (1991), juries must be told what the non-statutory mitigation is upon request. Finding the appellate review inadequate because this Court did not consider the nonstatutory evidence in declaring error harmless and finding the jury override valid, the Court noted the difficulty in defining nonstatutory mitigation:

> Nonstatutory evidence, precisely because it does not fall into any predefined category, is considerably more difficult to organize into a coherent discussion; even though a more complete explanation is obviously helpful to a reviewing court, from the trial judge's perspective it is simpler merely to conclude, in those cases where it is true, that such evidence . . . does not outweigh the aggravating circumstances.

It is error not to give the defendant's requested written instructions on possible mitigating circumstances. State v. Cummings, 389 S.E.2d 66, 80 (N.C. 1990).[17]

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[16] If a trial judge with training and experience needs guidance, a jury needs more guidance.

[17] Cummings wrote that because the non-statutory circumstances "were not presented on an equal footing" with statutory circumstances the jury "could easily believe that the unwritten circumstances were not as worthy as those in writing." 389 S.E.2d at 81. It also noted that "jurors . . . are apt to treat written documents more seriously than items verbally related to them. Had the circumstances been required to directly address each of them." Id.

Given the lack of clarity in defining nonstatutory mitigation as recognized in Parker, putting this issue before the jury in lump form, with no instructions on what can mitigate, invites the jury to decide for itself what is mitigating. The refusal to instruct on the nonstatutory mitigators rendered a reasonable probability of the jury ignoring relevant mitigating evidence contrary to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9, 16 and 17 of the Florida Constitution.

POINT XXIV

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE REQUIREMENT OF "EXTREME" MENTAL OR EMOTIONAL DISTURBANCE AND "SUBSTANTIAL" IMPAIRMENT FOR MITIGATING CIRCUMSTANCES.

The defense objected to characterization of the mitigating circumstances of the offense being committed while under the influence of "extreme" mental or emotional disturbance, and that his capacity to conform his conduct was "substantially" impaired, arguing that the modifiers "extreme" and "substantially" would cause the jury to discount the mitigation because it did not reach the level of "extreme" or "substantial" T115-116,2738,2850,R84-85. The court erred in overruling these objections.

The modifiers would lead to rejection of unrebutted mitigating circumstances when viewed under the strict statutory definition of "extreme" mental or emotional disturbance or "substantially" impaired. The limitation of the jury's consideration of mitigating circumstances by use of modifiers "extreme" or "substantially" violates Article I, Sections 9, 16, and 17 of the state Constitution and Amendments Five, Eight and Fourteen of the federal Constitution.

Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) held it was error to restrict the mitigating circumstances by use of the "extreme" modifier despite the statutory language:

> Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme. " However, it clearly would be unconstitutional for the state to

> restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, *any* emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what *the* statutes say. *Lockett*; *Rogers*. Any other rule would render Florida's death penalty statute unconstitutional. *Lockett*.

This case presents the extreme of vague sentencing criteria, where use of such modifiers can be viewed by the sentencer as barring consideration of valid mitigation unless it rises to the ethereal benchmark specified by statute. As here, unless the evidence shows that the independent considerations constitute "extreme" mental or emotional influences, the sentencer summarily rejects valid mitigation and affords the facts no weight. The term "extreme" prevents consideration of compelling emotional or mental influences in mitigation unless the perpetrator is psychotic, and, perhaps, even then. See Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986) (defendant not under influence of "extreme" mental or emotional distress, even though two of five psychiatrists testified that he was legally insane at the time of offense). The modifiers unduly restrict categories that may be considered as mitigation, and their use violates the Eighth and Fourteenth Amendments by making consideration of valid mitigation inconsistent, arbitrary and capricious.

Here, the modifiers of "extreme" and "substantially" would prevent the jury from considering such things, for example, as evidence that Appellant smoked marijuana laced with a substance on the day of the offense, T1914, with a number of effects on him T1914, 1916. Instead of considering whether Appellant was mentally or emotionally disturbed to some degree, or if his capacity to conform his conduct was merely impaired to some degree, the instruction confined the statutory mitigating factors to "extreme" disturbance or "substantial" impairment, The statutory limitation of the extent of mental or emotional disturbance, or the extent of impairment, that must be present before it can be considered in mitigation impermissibly

violates Lockett v. Ohio, 438 U.S. 586 (1978). Art. I, §§ 9, 17, Fla. Const., and Constitution Amendments V, VIII, and XIV, U.S. Const.

POINT XXV

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF AN OFFENSE FOR WHICH APPELLANT WAS ACQUITTED.

Over Appellant's objections (T2417,2428,2434,2435-36), the state was permitted to present evidence of an attempted murder for which Appellant was acquitted. Specifically, Appellant objected to the alleged evidence of the pointing of a gun at the head and pulling the trigger, and to the alleged evidence of kicking as crimes for which Appellant was acquitted:

> Obviously the gun to the head, pulling the trigger, the misfiring would constitute attempted murder of which he was acquitted by operation of law, if believed. Again, the conviction for aggravated battery with a firearm I think would preclude them from getting into kicks in the ribs and the vaginal area; again, nonstatutory aggravation.

T2428. The court overruled these objections, T2431-32, but permitted a continuing objection by agreement of the prosecutor T2434. State witness Carol Pate testified that Appellant put a gun to her head and pulled the trigger and also kicked her T2459. Appellant was charged with attempted murder for his alleged actions. He was acquitted of the attempted murder, and found guilty of the lesser offense of attempted battery with a firearm. It was error to present the details of the attempted murder for which he was acquitted. Amendments V, VI, VIII, XIV, U.S. Const.; Art. I, Sec. 9, Fla. Const.

Under Article I, Section 9 of the Florida Constitution evidence of crimes for which a defendant has been acquitted is not admissible at a later trial. Burr v. State, 576 So. 2d 278 (Fla. 1991). Burr reversed a sentence of death because evidence of a crime for which Burr was acquitted was introduced into evidence. Evidence of a crime for which a defendant is acquitted is inherently unreliable. Such evidence represents the state's theory of the case and

is not based on what the jury found. The evidence of acquitted crimes may have contributed to the weight given to the aggravating factors. Thus, a new sentencing was required. Id.

Here the jury heard testimony regarding the attempted murder. Obviously, such evidence sat heavily in the jury's weighing the aggravating factor of prior violent felony, especially given the state's emphasis on it in its penalty argument to the jury T2810-11. Such evidence may have tipped the scales in the jury's weighing of sentencing factors. The error is not harmless beyond a reasonable doubt. The sentence must be reversed and this cause remanded for resentencing without use of the evidence for which Appellant was acquitted.

As noted in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989) the introduction of the details of a prior offense is error where the prejudicial value outweighs the probative value:

> Although this Court has approved the introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, , . . the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value.

547 So. 2d at 1204-05 (emphasis added). The prejudicial value of the details of a beating for which Appellant was acquitted outweighed any probative value attaching to those details. [18]

Further, the state used the evidence in a way that affirmatively mislead the jury. The jury was mislead into thinking that the prior jury had found that appellant put the gun to the woman's head and pulled the trigger, when, in fact, the state had failed to convince the prior

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[18] This is especially true where the state had filed a copy of conviction regarding the offense for which Appellant had been convicted. Under Rhodes, a taped statement from the prior crime victim is unnecessary where a copy of the conviction has been filed:

> [W]e see no reason why introduction of the tape recording was necessary to support aggravation in this case. The State had introduced a certified copy of the Nevada judgment.. . . There was testimony from Captain Rolette regarding his investigation of the incident. This evidence was more than sufficient to establish the aggravating circumstance . . . and to establish the circumstances of the crime.

Rhodes, 547 So. 2d at 1205, n.6.

jury that these acts had occurred. Since the prior jury had rejected the state's facts, the state was collaterally estopped from presenting them to the new jury. As a matter of law, the prior verdict was a binding determination that these acts did not occur. Hence, the state in the instant case presented the jury with legally unreliable and false evidence contrary to Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (death sentence based on unreliable evidence violates eighth amendment and due process). In U.S. v. Tavano, 12 F.3d 301 (1st Cir. 1993), the court wrote that the Due Process Clause "guarantees every defendant a 'right to be sentenced upon information which is not false or materially incorrect.' United States v. Berzon, 941 F.2d 8, 18 (1st Cir. 1991); accord United States v. Curran, 926 F.2d 59, 61 (1st Cir. 1991)." It is a violation of due process for a prosecutor to give a jury a false evidentiary picture. U.S. v. Kojayan, 8 F.3d 1315 (9th Cir. 1993). The state's presentation of a false evidentiary picture can be raised for the first time on appeal, where, as here, the state has suppressed evidence refuting it. U.S. v. Tincher, 907 F.2d 600 (6th Cir. 1990). The state has an "affirmative duty" to correct false evidence. Thorpe v. State, 350 So. 2d 552 (Fla. 1st DCA 1977). It may not claim that its trial prosecutor was ignorant of the falsity of the evidence, where other prosecutors have access to it. Giglio v. U.S., 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (rejecting claim that trial prosecutor was unaware of impeachment evidence, where evidence was available to other prosecutors), U.S. v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992) (prosecution has duty to search files of police agency for exculpatory information). Here, the state attorney's office knew what had happened at the prior trial. Hence, its misrepresentation of what occurred there should receive the sharpest sanction.

Even if the evidence was properly admitted, detailing collateral offenses for which sentence has already been imposed in a capital sentencing proceeding invites punishment for them, a double jeopardy violation." Cf. United States v. Halper, 109 S.Ct. 1892 (1989)

[19] Double jeopardy is prohibited by the Fifth and Fourteenth Amendments to the Federal Constitution and Article I, section 9, of the Florida Constitution. Although this Court has ruled previously that some details of offenses for prior violent felonies may be introduced in a capital sentencing hearing, see Elledge v. State, 346 So. 2d 998 (Fla. 1977), it must reconsider in light of the serous constitutional error in twice punishing a person for a crime.

(although sanction denominated 'civil, ' when it could only be punishment for offense already punished, sanction violated double jeopardy; use of details invites jury to punish prior offense); Graham v. West Virginia, 224 U.S. 616, 32 S.Ct. 583, 586 (1912) (approving habitualization statute, but noting it limited evidence to facts of prior offense and offender's identity, not reopening questions of guilt, unlike introducing details).

POINT XXVI

APPELLANT IS BEING DENIED DUE PROCESS AND A FULL AND FAIR APPELLATE REVIEW DUE TO AN INCOMPLETE APPELLATE RECORD.

On September 7, 1995, Appellant filed a motion to supplement the record on appeal with the transcript of Appellant's trial in Circuit Case No. 86-8528 CF. The trial was transcribed and placed in the appellate record in DCA Case No. 87-2810. Appellant's motion to supplement the record in the present case was denied.

The right to due process and effective assistance of counsel entitles Mr. Wright to a complete record on appeal. Lipman v. State, 428 So. 2d 733, 737 (Fla. 1st DCA 1983); Loucks v. State, 471 So. 2d 131, 132 (Fla. 4th DCA 1985). This is especially true in this capital case, demanding a unique need for reliability under the eighth amendment and Article 1, Section 17, Florida Constitution. Delap v. State, 350 So. 2d 462, 463 (Fla. 1977); Section 921.141, Florida Statutes (1993); Rule 9.140(f), Florida Rules of Appellate Procedure.

At the penalty phase, when the state introduced evidence of a prior criminal incident involving Appellant, he moved to bar introduction of the details of an attempted murder of which he was acquitted T2417,2428,2433-34. Specifically, he argued that allegations that he pointed a gun at the victim's head and pulled the trigger, but the gun didn't fire, constituted the attempted murder of which he was acquitted T2428. Indeed, at the attempted murder trial, the state specifically argued to the jury that the attempted murder was pointing the gun to the

victim's head and the gun jammed when the trigger was pulled. Appellant testified he never placed a gun to the victim's head. Appendix 18. Character witnesses testified to his non-violent and reputation for truthfulness. Appendix 19-71. The jury disagreed with the state's theory by acquitting Appellant of attempted murder. A complete record is needed to fully determine the issues regarding the introduction of a crime for which Appellant was acquitted.

The use of evidence related to the acquittal of attempted murder raises substantial former jeopardy and collateral estoppel issues at bar. The issue will turn on precisely what constituted the conduct of which Appellant was acquitted and what constituted the conduct of which he was convicted. To tell precisely what was litigated below, this Court must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge and other related matter...." Ashe, 397 U.S. at 444. Accord, Gragg v. State, 429 So. 2d 1204, 1206 (Fla. 1983); Jones v. State, 20 Fla. L. Weekly D1540 (Fla. 2d DCA June 20, 1995) ("Pursuant to the dictates of Ashe, we have examined the record in the first trial . , . "); Cuthbertson v. State, 657 So. 2d 20 (Fla. 4th DCA 1995) ("We are satisfied from our review of Appellant's trial on the [prior charge for which Appellant was acquitted] . . . "):

> [T]he test to determine whether collateral estoppel acts as a bar to further prosecution is not whether the factual issue in question was inherently decided by the jury's prior verdict, but rather whether such factual issue was actually decided by the jury in reaching its verdict.

Gragg v. State, 429 So. 2d 1204, 1206 (Fla. 1983); Ashe. Thus, the record of the trial where Appellant was acquitted of attempted murder is needed for a complete appellate record. The state has an affirmative duty to correct its misrepresentation of what occurred at the prior trial. Giglio, v. Brooks, Thorpe.

Lack of a complete record denies due process, a reliable appeal, and effective assistance of counsel. Amendments V, VI, VIII, XIV, U.S. Const.

CONCLUSION

Based on the foregoing arguments, this Court should vacate Appellant's convictions, and vacate or reduce his sentences, and remand this cause for a new trial or grant relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401-2299, by courier this 2nd day of February, 1996.

Jeffrey L. Anderson

Of Counsel

IN THE SUPREME COURT OF FLORIDA

DARCUS WRIGHT, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 85,070

APPENDIX

IN THE CIRCUITCOURTOFTHE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE
COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO.: 93-2344CF

STATE OF FLORIDA,

-Plaintiff,

VS

DARCUS WRIGHT A/K/A
DARCUS HODGE,

Defendant.

FILED IN OPEN COURT THIS THE
12 OF Dec 19 94
JoANNE HOLMAN, CLERK
BY: [signature] D. C.

SENTENCING ORDER

The Defendant was tried by a jury on November 7, 1994 through November 15, 1994. The jury found the Defendant guilty of three Counts in the Indictment: Count I - First-Degree Murder; count II - Armed Burglary; Count III - Assault. The same jury reconvened on November 16, 1994, and evidence in support of aggravating and mitigating factors was heard. On November 21, 1994 the jury returned a recommendation that the Defendant be sentenced to death by a vote of eight to four. This Court requested memoranda from Counsel for the State and Counsel for the Defendant. The memoranda were received from both sides and are filed with the Clerk. On December 27, 1994, the Court held a further sentencing hearing where the parties presented further legal argument. Due to the severity of the potential penalty, the Defendant was given broad leeway in presenting evidence and argument on his own behalf at that hearing.

This Court, having heard the evidence presented in both

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the guilt phase and penalty phase, and having had the benefit of argument both in favor of, and in opposition to the death penalty, finds as follows:

I. AGGRAVATING FACTORS

A. The Defendant Was Previously Convicted Of A Felony Involving The Use Or Threat Of Violence To The Person.

The evidence established that the Defendant was convicted in 1987 of the crime of aggravated battery. The incident occurred in 1986. The testimony of Carol Pate clearly established that it was a felony involving the use or threat of violence to the person. The judgment of guilt in that case is in evidence as State's Exhibit #85. This aggravating circumstance was proven beyond a reasonable doubt.

B. The Capital Felony Was Committed While The Defendant Was Engaged In The Commission Of, Or An Attempt To Commit, Or Flight After Committing Or Attempting To Commit A Burglary.

The evidence in this case established that on October 11, 1993, the Defendant went to the home of Carmelita and Winston Prescod. During the time-frame relevant to this case, the Defendant's wife (the victim) and the Defendant's children had separated from the Defendant and were living in the Prescod home. The Defendant did not have permission to enter the premises.

The Defendant entered the fenced-in backyard of the home, and gained entry into the home by shooting through the glass doors. He then chased his wife into a bedroom, and fired several shots,

killing her. The Defendant then took his two young children, kicked in the door of Carmelita Prescod's bedroom, and assaulted her. The Defendant then left with his children.

The capital felony was committed while the Defendant was engaged in the commission of a burglary. This aggravating circumstance was proven beyond a reasonable doubt.

Only the relevant evidence of record was considered by the Court in evaluating the aggravating circumstances. None of the other aggravating circumstances enumerated by statute is applicable to this case, and no others were considered by this Court.

II. MITIGATION

A. GENERAL CONSIDERATIONS

Mitigating evidence was presented in both Phase I and Phase II. The Defense has asked this Court to consider a variety of statutory and non-statutory mitigating circumstances. An evaluation of Dr. Cheshire's testimony is necessary as a preliminary matter in consideration of most of the mitigating circumstances.[1] The Defense relied heavily on his testimony to establish a variety of mitigating circumstances.

Dr. Cheshire is a medical doctor specializing in the field of psychiatry. He was hired by the Defense to evaluate the

[1] It is important to recognize that this writer had the opportunity to observe the doctor and evaluate his demeanor and credibility while he testified.

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Defendant and to testify. Dr. Cheshire's opinions were based on interviews with the Defendant between July 30, 1994 and November 13, 1994, totalling twelve to fourteen hours of interviews. He also considered some police reports; some depositions; a small number of military records; two pages of school records; some jail records and the medical examiner's report. He could not specify which police reports and depositions he read, he did not know if he reviewed all the relevant medical records, and did not read any reports of the Defendant's prior violent felony case. He did not interview anyone other than the Defendant.

The doctor testified that the Defendant suffered a number of head injuries beginning at age four and continuing into his military service, All this information was obtained directly from the Defendant. The only injury that was corroborated was a scar on the Defendant that is observable in a photograph of the Defendant at a young age. In fact, the Defendant's claim of a head injury during military service is contradicted by the military records themselves. Although the doctor testified that he assumed that defendants lie to him, and did not expect this defendant to tell the truth, he accepted the data from the Defendant at face value without any corroboration by medical records or testing.

Dr. Cheshire-testified that school records reflected a lack of regular attendance and an unsatisfactory intellectual effort. The Defendant's verbal reasoning scores in school were very low.

The doctor did not conduct any testing of the Defendant,

and did not conduct his interviews of the Defendant until nine to thirteen months after the date of the crime.

It is important to begin the analysis of the mitigating circumstances with the recognition that a trial judge is not bound to accept an expert's opinion, even if uncontroverted. Walls v. State, 641 So.2d 381, 390-391 (Fla. 1994). Having had the opportunity to directly evaluate Dr. Cheshire on the witness stand, it was, and is clear, that the doctor was testifying with a considerable bias for the Defendant.[2] While this writer finds and accepts many of the facts as testified to by the doctor, it is the *opinions* he drew that this court finds lacks support or credibility.

Further, most of Dr. Cheshire's opinions appeared to be premised on a finding that the Defendant suffered from a mild form of epilepsy as a result of numerous head injuries, and that the epilepsy prevented the Defendant from having a clear understanding of what was occurring around him. The basis for this opinion included the Defendant's gastrointestinal distress, and the fact that he sat and stared into space after viewing his wife's funeral, and at other times. No medical, psychiatric or psychological testing was performed to confirm this theory. In fact, during cross-examination, the doctor admitted he could not prove or

[2] The cold transcript may not convey the obvious bias of Dr. Cheshire since it cannot reflect his demeanor, nor how he said what he testified to.

disprove the existence of the seizure activity.' The doctor's opinion concerning the existence of epilepsy was shear speculation.'

As mentioned above, the doctor obtained a great deal of data from-the Defendant-himself-that he used-to form-.his opinions.. During his testimony, the doctor, stated his belief that the Defendant's memory of what happened in the bedroom with the victim was "quite defective". This certainly calls into question the validity and accuracy of the other "facts" provided to the doctor by his patient.

B. STATUTORY MITIGATING CIRCUMSTANCES

1. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

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[3] It is interesting to note that the testimony of Carla Jones (Defendant's Exhibit #11), and Doris Jones (Defendant's Exhibit #10) does not reveal any indication of the types of behavior or symptoms Dr. Cheshire believes would exist as a result of the alleged head injuries during the Defendant's youth.

[4] It is also interesting to note that this writer observed the Defendant in court on many occasions since the beginning of this year, both at trial and at several pre-trial hearings. On many occasions this writer spoke directly with the Defendant. The Defendant was always alert and fully aware of the nature and content of the proceedings. All of the Defendant's questions and answers were coherent.,- intelligent and rationally related to the topic. While some of the choices made by the Defendant may have been foolish, this writer did not observe any indication of any thought disturbance on the part of the Defendant, nor any evidence of the seizure activity alleged by Dr. Cheshire. Johnson v. State, 442 So.2d 185, 190 (Fla. 1983), cert. denied by Johnson v. Florida, 466 U.S. 963, 104 S.Ct. 2182, 80 L.Ed.2d 563 (1984). Those observations buttress and confirm this writer's conclusion regarding the doctor's opinions. However, those conclusions would remain unchanged even without considering this writer's in-court observations of the Defendant.

At the time of the homicide, the Defendant was under the influence of an extreme emotional disturbance. This circumstance was established by the evidence, exclusive of Dr. Cheshire. Listening to the Defendant on the tape of Carmelita Prescod's 911 call reveals the existence of this circumstance..

This mitigating circumstance has been given moderate weight.

2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Dr. Cheshire opined that the Defendant's capacity to appreciate the criminality of his conduct was substantially impaired. The basis for that opinion was the doctor's feeling that it was not reasonable to take a gun to go to get one's children; that the Defendant filed an action seeking child custody, and that the Defendant obtained information from his attorney that was contradicted by a police officer. Dr. Cheshire felt that this caused the Defendant frustration and thus the inability to act cooley and rationally. In fact, Dr. Cheshire did not know what Mr. Milner had actually advised the Defendant. In point of fact, Mr. Milner's testimony did not establish what he told the Defendant prior to the homicide, because even Mr. Milner was unclear on that point.

Dr. Cheshire's opinion on this factor is not accepted by the Court. It is not credible and lacks any factual basis. To the

contrary, the evidence revealed that at all other times in September and October, 1993, the Defendant was seeking to work within the court system, through an attorney, to resolve his marital and child visitation difficulties. He obviously recognized what he had done since he located a police officer and surrendered to him shortly after the homicide. Further, his comment to the police clearly shows the Defendant's specified motive for his actions. While the Defendant undoubtedly permitted his emotions to get the best of him, this mitigating circumstance was not established.

3. **The Defendant acted under extreme duress.**

The Defense pursuit of this factor rests on Dr. Cheshire's testimony. The doctor felt the Defendant was on the border of sanity and insanity due to the loss of custody of his children. The factors the doctor considered in reaching this opinion were: the Defendant had a strong need to be with his children; he spoke to an attorney about it; he went to the victim's house with the police to see his children; the officer advised the Defendant that the visitation order was not effective; the Defendant was instead cited for a driver's license misdemeanor; he went back to his attorney; the attorney told him he could see his children[5]; he went back to the house; saw the children, and shot

[5] The evidence in this case did not establish that Mr. Milner told the Defendant on October 11, 1993 that he could go right back to the victim's home to see his children.

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his way in.

Duress is defined as follows: "'Duress' is often used in the vernacular to denote internal pressure, but it actually refer5 to external provocation such as imprisonment or the use of force or threats." Toole v. State, 479 So.2d 731, 734 (Fla. 1985).

While most of the *facts* relied on by Dr. Cheshire to arrive at his opinion on this mitigating circumstance were established by the evidence, the *opinion* drawn from those facts by the doctor was not credibly shown to flow from the facts. Further, this type of factual scenario does not meet the legal definition of duress. This mitigating circumstance was not established.

C. NON-STATUTORY MITIGATING CIRCUMSTANCES

1. Remorse

The Defendant wrote a letter to his child expressing sorrow about this crime. During the sentencing hearing the Defendant did express remorse to the family of Allison Prescod.[6] This mitigating circumstance has been established by the evidence and has been given minimal weight.

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[6] However,' this writer encourages any reviewing court to listen to the tape-r&corded record of the hearing at which the Defendant made the statement, rather than merely reading the cold transcript, to hear the specific content and tone of the Defendant in evaluating the weight to be accorded. Further, the *fact* that the Defendant was crying when he viewed a videotape of the victim's funeral was established. Dr. Cheshire's *opinion* that it showed remorse was not. There are a variety of other conclusions that can be drawn from that evidence, not the least of which is simply the Defendant's sorrow at his own predicament and the loss of the companionship of his children.

2. Acted on impulse.

The Defendant had an on-going marital dispute with his wife. Per Defendant's Exhibit #15, the Defendant had previously threatened to kill his wife as a result of a disagreement over access to his children. The night before this homicide, the Defendant went out looking for a gun. He was very angry that he was prevented from seeing his children that day (October 10, 1993). The testimony of Bonnie Scagliarini reflects how upset the Defendant was at that turn of events.[7] On October 11, 1993, the Defendant went to the victim's home with a loaded gun, entered the curtilage with it, shot his way into the home, and murdered his wife. This mitigating circumstance was not established.

3. Positive adult relationship with neighbors.

The Defense claims this circumstance was established through testimony that the Defendant had an on-going live-in relationship with Bonnie Scagliarini. At the sentencing presentation, defense counsel agreed that the evidence on this circumstance was "less than glaring". This mitigating circumstance was not established.

4. Cooperation with police.

Shortly after the Defendant murdered his wife and took his two small children, he voluntarily surrendered to Officer Wynn.

[7] However the statement of David Blouin (Defendant's Exhibit #14), who at the time lived with the Defendant and Ms. Scagliarini, reflects the degree to which she overstated the situation.

The Defendant then gave the officer the name **and** telephone number of a person to take custody of the children. The Defendant stated he surrendered to avoid the children suffering physical harm. This mitigating circumstance has been established by the evidence and has. been, given-minimal weight.

5. Organic brain damage.

6. Mental health problems.

As **discussed above,** these factors rely on the opinions of Dr. Cheshire. As discussed above, the evidence does not establish that the Defendant has any brain damage. Thus, the mitigating circumstance of organic brain damage **was** not established.

There **was testimony** that the Defendant was somewhat depressed as a result of his inability to have access to his children. To that extent, the mitigating circumstance of mental health problems has been established by the evidence and has been given minimal weight.

7. Heated domestic dispute.

a. History of conflict.

9. On-going quarrel.

10. Previous altercation with victim and Defendant was obviously disturbed.

These factors essentially relate to the same component of this case and the Defendant's relationship with his wife and in-laws.

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The testimony and evidence in this case reflects that the Defendant had a poor relationship with his in-laws that existed for quite some time. The evidence does not show why that situation originally started. The transcript of Allison Prescod Wright (Defendant's Exhibit #15) reveals that the difficulty between the Defendant and her family exacerbated the difficulties between the Defendant and the victim. That conflict escalated to the point that in 1986 the Defendant threatened to kill his wife. It is unclear what other factors may have been involved, however, as in this case, the Defendant's desire to see his children was certainly a component of it. The victim had filed for divorce on September 21, 1993 (see Defendant's Exhibit #16). Carol Pate's testimony also confirmed this history of marital difficulties.

The evidence in this case clearly reflects that this was a domestic dispute over child visitation. Mitigating circumstances (7 through 10) were established by the evidence, and have been given moderate weight. However the circumstance "obviously disturbed" is-a duplication of circumstance (6) above.

11. Good employment record.

The Defense cites to the testimony of Doris Jones (Defendant's Exhibit #10), Carla Jones (Defendant's Exhibit #11) and Howard Siegel to support this factor.

In the early 1970's the Defendant had a close relationship with the 'Jones family, He regularly worked in the family's dry cleaning business. He was an honest, dependable and

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hard worker. He also worked at that time as a painter, however the extent of that work was not established by the evidence. The Defendant, in Florida, performed work for Mr. Siegel's family. The evidence from Mr. Blouin (Defendant's Exhibit #14) reveals that in recent history the Defendant worked occasionally. Further, Mr. Blouin identified an incident where the Defendant was hired for a job and did not complete it.

This mitigating circumstance is established to the extent that prior to his military service, the Defendant had a good employment record. It has been given minimal weight.

12. Regularly attended church.

The transcript of Carla Jones' statement reflects that the Defendant attended church and sang in the choir. It is important to note that Ms. Jones did not relate much data about the Defendant for the time period after the Defendant's entry into the military. In fact, she did not hear from the Defendant between 1985 and 1990 and had little contact with him after that. Her knowledge of the Defendant as an adult is minimal at best.

This mitigating circumstance is established by the evidence to the extent that prior to his entry in the military, the Defendant regularly attended church. It has been given minimal weight.

13. The Defendant was an abused or battered child.

14. The Defendant suffered from a poor upbringing.

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15. The Defendant grew up without a father.

16. The Defendant was raised by a mother who worked.

The Defense relies heavily on the statements of Doris Jones and Carla Jones to establish these factors. Doris Jones is the mother of Carla Jones. Until the Defendant enlisted in the military, the Defendant spent a great deal of time with the Jones family. Doris Jones treated the Defendant like her own son. The Defendant treated Carla Jones and her sisters like they were his own sisters. The Defendant would occasionally spend the night in the Jones home,

Doris Jones opined that the Defendant appeared to be afraid of his stepfather. The stepfather said cruel things about the Defendant to others, in the Defendant's presence. Ms. Jones did not have any further factual data about the Defendant's life or his mother's, father's or sister's behavior toward the Defendant. Ms. Jones never asked the Defendant about those subjects. Her opinions were speculation. Further, Doris Jones has only spoken to the Defendant two times since he moved-to Florida'.[8]

Carla Jones grew up with the Defendant. The Defendant is slightly older than Carla. She viewed the Defendant as a brother. The Defendant did not talk about his home life other than to convey that he loved his mother, that she was a nice person, and that he was close to his two sisters. Carla Jones never saw the Defendant with his stepfather. She never saw the Defendant's mother acting in an affectionate manner to the Defendant. Carla Jones heard from

[8] Per Defendant's Exhibit #15, that was in 1985.

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other parties that the Defendant's stepfather was physically and mentally abusive to the Defendant yet she did not see any evidence of physical abuse.

This writer was unable to locate any evidence that the Defendant was raised by a mother who worked. Thus the evidence did not establish that mitigating circumstance. There was no evidence presented concerning the Defendant's natural father. The evidence did establish that the Defendant was mentally abused on occasion by his stepfather. Thus, these mitigating circumstances are established to the extent that the Defendant was occasionally mentally abused by this stepfather and was raised in an environment that apparently permitted him, as a youngster, to stay at another person's home overnight on a fairly regular basis.[9] It has been given minimal weight.

17. Good neighbor, son, nephew, brother and parent.

The testimony of Doris Jones and Carla Jones established that the Defendant loved his children deeply. The testimony of Bonnie Scagliarini also established that fact. Defendant's Exhibit #15 established that in 1986 and 1987 the Defendant failed to fully financially support his children although he could do so. Further, the Defendant murdered-the mother of his children.

There was no evidence regarding the Defendant's behavior as a neighbor, son, nephew or brother. This mitigating

[9] Defendant's Exhibit # 6 shows the Defendant as a smiling and apparently happy child.

circumstance was not established.

18. Specific sood deeds.

The evidence revealed that prior to his entry in the military, the Defendant drove Carla Jones to and from school daily. He also did painting work for the Jones family without charge, and in general was a regular help to the Jones family. This mitigating circumstance was established by the evidence to the extent mentioned herein, and has been given minimal weight.

III. CONCLUSION

As is apparent from the contents of this Order, this Court has extensively and carefully considered and weighed the aggravating and mitigating circumstances to determine the appropriate sentence on Count I. This writer is acutely aware of the fact that a human life is at stake. This writer is also fully aware of his responsibility to *independently* weigh the aggravating and mitigating circumstances. King v. State, 623 So.2d 486 (Fla. 1993). That weighing process has resulted in the aggravating circumstances being given great weight. The mitigating circumstances, individually and collectively, are found to be of minimal weight. The weight of the aggravating circumstances far exceeds the minimal weight of the mitigating circumstances.[10] Thus,

[10] It is important to note that even had the evidence established every *one* of the mitigating circumstances proposed by the Defense, the additional minimal weight they would add would not

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this Court agrees with the advisory sentence of the jury on Count I. It is hereby

ORDERED AND ADJUDGED that the Defendant is sentenced to death on Count I. Further, this Court has carefully considered the evidence and departs from the sentencing guidelines on Count II due to the conviction for the capital felony, and imposes a sentence of life on Count II, with the three year mandatory prison term for the firearm, with credit for one year and 63 days on this count. The Defendant is sentenced on Count III to 60 days in jail , with credit for 60 days.

The Defendant is committed to the custody of the Florida Department of Corrections for execution of this sentence as provided for by law.

DONE AND ORDERED this 9th day of December, 1994, in Chambers, in Fort Pierce, St. Lucie County, Florida.

LARRY SCHACK
CIRCUIT JUDGE

The Clerk shall provide copies as follows:

David Lamos, Esq.
Darcus Hodge
Lynn Park, Attorney In Charge, Office of the State Attorney
Nita Denton, Assistant State Attorney

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change the balance or the sentence imposed.

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