IN THE SUPREME COURT OF FLORIDA

DARCUS WRIGHT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 85,070

REPLY BRIEF OF APPELLANT

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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.

Appellee does not challenge the decision of Waters v. State, 486 So. 2d 614 (Fla. 5th DCA 1986) rev. den. 494 So. 2d 1153 (Fla. 1986) which holds that the right to be present must be interpreted so that a defendant must be able to view, and not merely hear, the use of evidence against him and the restriction of the defendant's ability to see the witnesses use the exhibits is reversible error:

> 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 (emphasis added).[1] However, Appellee does raise the issue whether Appellant's absence constitutes fundamental error. Clearly, a defendant's absence during an essential stage of his trial (such as the presentation of evidence against him) constitutes fundamental error. Salcedo v. State, 497 So. 2d 1294 (Fla. 1st DCA 1986) rev. den. 506 So. 2d 1043 (Fla. 1987).

Appellee specifically argues that Appellant should have personally objected to not being able to see the witnesses use the exhibits and thus waived the present issue. However, prior

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[1] It should be noted that the practical effect of Appellant not being able to see witnesses testify through exhibits is the same as putting him in a separate room hearing a radio broadcast of the testimony. Coy v. Iowa, 108 S.Ct. 2798 (1988) (placing screen between witness and defendant violated constitutional right to confrontation firmly rooted in constitution); D.A.D. v. State, 566 So. 2d 257 (Fla. 5th DCA 1990) (testimony via speakerphone did not permit the defendant to be aware of what witness was testifying to and this type of proceeding would not pass constitutional muster).

to the first witness ever testifying in this case the trial court made it clear that he was not going to listen to any objections or requests that Appellant personally made T1592. The trial court later repeated to Appellant that he only wanted to hear from Appellant if the attorney was not rendering effective assistance of counsel:

> THE COURT: ... the only thing that I want to hear from you during the course of this trial is, number one, if you think your attorney is representing you ineffectively and you need me to make a Nelson inquiry to determine whether or not you are receiving ineffective assistance of counsel; or, number two, if you have decided you want to represent yourself. I am not going to entertain your objections.

T1810. Appellant's complaint was that, despite his request, his attorney failed to bring to the court's attention that Appellant "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. Where Appellant was prohibited from directly making requests or objecting by the trial court, it cannot be legitimately said that Appellant waived his presence.

Appellee also claims that the trial attorney waived Appellant's presence by failing to object. Such a claim is without merit. First, the waiver of the right to be present must be done explicitly and cannot be done through silence. See Francis v. State, 413 So. 2d 1175, 1178 (Fla. 1982) (silence did not constitute waiver, state must show a knowing and intelligent waiver of the right to be present); Larson v. Tansy, 911 F.2d 392, 396 (10th Cir. 1990) (presumption against waiver of fundamental constitutional rights and thus defendant's silent acquiescence to removal from courtroom did not constitute waiver of right to be present).[2] More importantly, the attorney cannot waive the defendant's right to be present. The waiver

[2] Citing to Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) for the proposition that courts must indulge in every reasonable presumption of waiver of fundamental constitutional rights and will not presume waiver by acquiescence.

must be personally made by the defendant. E.g. Id.; Amazon v. State, 487 So. 2d 8, 11 (Fla. 1986) (valid waiver by defendant where he specifically authorized waiver of his presence, the authorization was knowingly, intelligently and voluntarily made, and the defendant ratified the waiver); State v. Melendez, 244 So. 2d 137 (Fla. 1971); Redman v. State, 377 A.2d 441 (Md. 1975) (defense attorney's acquiescence not considered waiver of defendant's right to be present which is an absolute right personal to the accused); State v. Gray, 256 N.W.2d 74 (Minn. 1977) (no waiver even though attorney specifically says he has no objection). Moreover, Appellant's attorney never attempted to waive the presence of Appellant. Certainly, Appellant never ratified any supposed waiver of his presence. Thus, the present issue cannot be deemed waived.

Finally, Appellee makes the bald assertion that the error is harmless. However, when the situation is analyzed, it cannot be said that Appellant's absence was harmless. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); Traylor v. State, 596 So. 2d 957, 973 (Fla. 1992).

By being absence Appellant was unable to assist his counsel during the witnesses' testimony via the exhibits. Appellant's potential to assist counsel is obvious. Many of the witnesses used exhibits to show the state's theory of what occurred and to show what was found at the crime scene. A key issue in this case was whether Appellant had intended to commit an offense when he entered the residence. It has been noted that intent is not capable

of direct proof, but can be shown through circumstantial evidence. In this case there was no eyewitness brought before the jury to testify about Appellant's actions.[3]

The state relied heavily on exhibits to show the jury its theory of how the shooting occurred and to claim that Appellant intended to assault Allison Prescod when he entered the residence. This theory would be relied on for both the premeditation and felony murder theories for first degree murder.[4] The exhibits used included charts, pictures and physical evidence from the crime scene. For example, a number of exhibits related to the firing of the gun and whether the firing occurred during a struggle. These exhibits included a sketch depicting the state's theory as to the path of the bullet T746-49. A mattress was presented to the jury with dowels demonstrating the state's theory as to the path of the bullet T2112-16. The mattress was turned over during the testimony so that the jury could see what the state witnesses were testifying to T2112, 2116. The trial court even made a finding that by standing next to the jury box to view the exhibits as used by the witnesses, one had a view of the evidence which could not otherwise be understood T2124. The medical examiner stepped over to the jury to show a diagram of the victim and his theory of the injuries and path of the bullet T2032-33. Without seeing the exhibits that the medical examiner was testifying to, it is next to impossible to determine what he is testifying to. There were many other exhibits used by

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[3] State witness Carmelita Prescod did not witness the shooting. She only saw Appellant at the front door and the next time she saw him was after the shooting. She claimed that Appellant threatened to kill her, but this was contradicted by a 911 tape which recorded the conversation but showed no such threat T1976-77.

[4] The underlying felony for felony murder would be burglary which requires that the state prove Appellant intended to commit an offense when he entered the residence. The state utilized testimony from exhibits to theorize Appellant intended to commit the offense of assaulting Allison Prescod.

the state witnesses against Appellant. The right to confrontation should at a minimum mean that the defendant knows what is being used against him.

Appellant was the only person in the courtroom who was at the shooting. If Appellant had been able to see the witnesses testify via the use of exhibits he could inform his attorney of any inaccuracies regarding things like the theory of the path of the bullet or where objects were located at the crime scene. The exhibits certainly were an important part of this case as evidenced by the fact that during the testimony a juror wanted a closer look at the floor plan T2134. Appellant should also have seen the evidence used again him.

Since Appellant was competent to stand trial it must be assumed that he was capable of assisting counsel. Larson v. Tansy, 911 F.2d 392, 395 (10th Cir. 1990). Clearly, Appellant's absence was prejudicial. At best, Appellee's argument amounts to a claim that one cannot assess how much Appellant could have benefitted by seeing the witnesses utilize exhibits against him. However, as this Court has explained, if one is unable to evaluate the prejudice -- the error cannot be deemed harmless. Francis v. State, 413 So. 2d 1175, 1179 (Fla. 1982) ("We are unable to assess the extent of prejudice." Thus, the absence without waiver by consent or subsequent ratification requires a new trial). Also, as explained previously, the right to be present is essential to the integrity of the judicial process.

In addition, the absence of Appellant from watching the witnesses testify by use of exhibits would be prejudicial due to the psychological impact on the jury. The jury would naturally wonder if something was wrong because Appellant did not move to see the witnesses testify using the exhibits. An innocent man would want to see the evidence that was being used against him. The jury might wonder of Appellant was not interested or did not care about the evidence presented against him. The jury might wonder if Appellant did not move because

he was untrustworthy or dangerous. Or the jury simply could believe that Appellant did not need to see the evidence against him because he knew he was guilty.

Courts have recognized that, aside from not being able to confront evidence and assist counsel, there is also prejudice due to the psychological influence on the jury because "there is a reasonable possibility that the jury speculated adversely to the defendant about his absence." E.g. Wade v. United States, 441 F.2d 1046, 1050 (D.C. Cir. 1971); Larson v. Tansy, 911 F.2d 392, 396 (10th Cir. 1990). In Wade, supra, the Court held that to hold the error harmless was "too speculative" because one cannot reconstruct what would have happened with the degree of certainty essential to conclude that the error was harmless. 441 F.2d at 1051. Likewise, the absence in Larson, supra, could not be deemed harmless as the defendant "might have assisted his counsel and defendant's mere presence could have exerted a psychological influence on the jury." 911 F.2d at 396. The Court in Larson also noted that it was not a case involving a disruptive defendant or a defendant who repeatedly ignored the trial court's admonitions. 911 F.2d at 397. Likewise, in this case the error cannot be deemed harmless where Appellant was unable to see the use of the evidence against him. Appellant was unable to assist his counsel about the evidence, and the jury might speculate about his apparent disinterest. Nor is this a case where Appellant was disruptive so as to justify his not seeing the evidence used against him.

In addition, there is also prejudice to Appellant not being able to see the witnesses use of the exhibits where the witnesses can be more confident and feel less likely of being contradicted when they are not scrutinized by the one person who was at the shooting --

Appellant.[5] In holding it was a violation of the confrontation clause by placing a large screen between the defendant and the state witness, Justice Scalia made it clear that face to face confrontation lessens the likelihood of distortion:

> The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when looking at the man whom he will harm greatly by distorting or mistaking the facts.... It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw his own conclusions.

Coy v. Iowa, 108 S.Ct. 2798, 2803 (1988). The witness is less likely to exaggerate and enhance his testimony if the defendant can see what the witness is testifying to. Id. It cannot be said beyond a reasonable doubt that the error was harmless.

Throughout its brief Appellee argues that any error is harmless due to overwhelming evidence. However, the harmless error test is not an overwhelming evidence test. State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). More importantly, although the evidence indicated that Appellant shot his wife, the evidence was far from convincing that the shooting was a first degree murder. The state theorized felony murder with the underlying felony of burglary. Of course, burglary requires the state to prove that Appellant entered the residence with the intent to commit an offense. The state theorized that the offense Appellant intended to commit was the shooting of Allison Prescod and/or an assault on Carmelita Prescod. The prosecutor conceded that there was no direct proof of what Appellant intended to do in the residence (i.e. -- one cannot look inside Appellant's head T2302), but relied on witnesses'

[5] Such as where the police and other state witnesses testified to the path of the bullet and the crime scene.

testimony from use of exhibits showing the bullet path and crime scene to claim that Appellant had intended to shoot Allison Prescod.

With regard to the alleged intent to assault Carmelita Prescod, there is far from convincing evidence that Appellant had entered the residence with the intent to assault Carmelita Prescod. There was no evidence that Appellant's purpose for going to the residence was to assault Carmelita. In fact, the alleged threat to Carmelita occurred after the shooting. If the intent to assault was an afterthought to the shooting, the burglary would not have occurred until after the murder. Thus, the jury could have rejected felony murder based on the afterthought of intent to assault Carmelita. See Clark v. State, 609 So. 2d 513, 515 (Fla. 1992) (error to find killing occurred during felony where the felony was an afterthought to the killing); Jones v. State, 580 So. 2d 143 (Fla. 1991). Also, the 911 tape fails to show any threat to kill Carmelita T1976-77, despite Carmelita's claim that the threat occurred during the 911 recording T1965.

The state's theory that Appellant intended to shoot Allison Prescod when he entered the residence was in large part based on the state's hypothesis of how the shooting occurred.[6] In closing argument, the prosecutor referred to the testimony through the use of exhibits to support its theory regarding exactly what occurred and that Appellant intended to kill. In fact, the prosecutor told the jury that the exhibits showed what went on in the bedroom and Appellant and Allison were the only people who knew what happened:

> PROSECUTOR: In this picture Officer Brazas is pointing to where these lead bullets and fragments landed under the bed. we know that there was a bag of

[6] Throughout its brief, Appellee refers to the fact that Appellant had a gun as conclusive evidence that he intended to murder Prescod. However, it is more, or equally, likely Appellant had the gun for his own protection. Appellant had been threatened and physically attacked by his in-laws at the residence in the past AW191,213-214.

> photographs under that bed with bullet holes going through them. There's bullet holes through, bullet holes through [indicating]. This tells you more -- this evidence tells you more about what went on in that bedroom, because there are only two people that know, Allison and the defendant.

T2313 (emphasis added). As explained earlier, Appellant was never able to see the state witnesses using these exhibits against him. The testimony via the exhibits could have been the very evidence which swayed the jury into finding first degree murder instead of a lesser degree offense such as manslaughter or even not guilty.[7] The error cannot be deemed harmless.

There was other evidence countering the state's theory as to the nature of the shooting. For example, the evidence showed that Allison Prescod was shot in the lower buttocks region (rear right upper thigh at junction of torso T2029,2041,2045). The medical examiner could not eliminate any possible positions that the body was in when shot T2079. In order to get the trajectory of wounds to line up the gun had to be within 6 inches and pointed at the lateral aspect of the hip T2055. There was also a wound to the wrist that was from a shot fired at a very close distance T2030. These type of wounds are inconsistent with an intentional execution of a helpless victim. Brown v. State, 569 So. 2d 1320, 1321 (Fla. 1st DCA 1991) (impossible to infer premeditation from a shooting in the leg at close range). Rather, these wounds and the bullet angles are more consistent with the firing of a gun during a struggle.

It has also been pointed out that Appellant may have brought the gun to the residence. This is not conclusive of any intent to assault anyone. Under the circumstances of the situation, it would be quite understandable if Appellant brought a gun to the residence for self-defense purposes. Some sort of protection would not be out of the question when one considers

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[7] The prosecutor also referred to other demonstrations and use of exhibits in front of the jury for which Appellant was absent such as photos and diagrams use by Dr. Diggs to show the position of the victim when the bullet was fired (T2311-12), the demonstrations of positions by Dr. Diggs (T2312), the exhibits showing locations of projectiles and other objects relevant to show the state's theory of how the shooting occurred (T2313).

that Appellant had been threatened and attacked by his in-laws previously AW191,213-214. Moreover, if Appellant had planned to kill Allison and take off with the children as the state hypothesizes, why would he turn himself in shortly after the shooting? Turning himself in is inconsistent with such a plan and more consistent with reflecting after one's emotions have calmed down. Because the evidence could be viewed that Appellant did not go to the residence with the intent to assault the Prescods, it cannot be said that the evidence of guilt was so overwhelming so as to make Appellant's absence and the infringement of his rights of confrontation harmless. 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.

Appellee first claims that Appellant's absence was waived by his failure to request to be present. However, silence does not constitute a waiver to be present. See Francis v. State, 413 So. 2d 1175, 1178 (Fla. 1982); Turner v. State, 530 So. 2d 45 (Fla. 1987); State v. Melendez, 244 So. 2d 137 (Fla. 1971).

Appellee also claims that the error was harmless because Appellant could not add anything to the bench conference hearing (i.e. would be but a mere shadow) citing to Rose v. State, 617 So. 2d 291 (Fla. 1993). Rose is inapposite to the present issue. In Rose, it was recognized that a defendant has a due process right to be present even where evidence is not be presented if the presence would contribute to the proceedings. In Rose it was clear that "Rose could not have added anything of benefit to this discussion" from which he was absent. 617 So. 2d at 296. The present case is much different. It certainly cannot be said that Appellant could not add anything to the conference on the prosecutor's displaying of a

hangman's noose drawing to Appellant. Appellant was the key witness who saw the prosecutor showing the hangman's noose. He could have explained exactly what he saw the prosecutor do with the drawing and whether it was exposed to the jury. Only Appellant was in the position to explain what impact the drawing had on him and could have on him during trial.

Appellee also claims the error was harmless because there were no findings or inquiry made. It is agreed that the trial court did not do an adequate inquiry. See Point III. A proper inquiry could not be done without Appellant being present. See paragraph above. However, the trial court did make one finding -- there was no impact on Appellant due to the prosecutorial misconduct. The trial court cannot legitimately make such a finding without hearing from Appellant. Due process requires that Appellant should have been present and be given the opportunity to explain to the trial court the impact the drawing had on him.[8] Appellant relies on his Initial Brief for further argument on this point.

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.

Appellee claims that inquiries into prosecutorial misconduct are not required. Appellee's brief at 14. Appellee cites no cases for such a proposition. The cases cited by Appellant in the Initial Brief are for the general proposition that allegations of prosecutorial, defense, or juror misconduct must be inquired into. Appellee fails to cite any cases holding otherwise. Clearly, the trial court was required to inquire into the misconduct.

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[8] Potential impact could involve a fear of testifying; psychological trauma which could impact the ability to assist counsel; or other impacts which do not necessarily manifest themselves outwardly.

Appellee next claims that no inquiry was required because the trial court made a finding that Appellant was not prejudiced. The problem is that the trial court was in no position to make such a finding without first holding an inquiry. There should have been an inquiry with Appellant having the right to be heard before the trial court made a finding that there was no prejudice to Appellant. See Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990) ("Due process envisions a law that hears before it condemns [decides], proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties"). The trial court erred by making a decision that Appellant was not prejudiced without first conducting an inquiry.

Finally, Appellee states that the jurors were never exposed to the hangman's noose. This is not fact. Without a proper inquiry we have no information as to whether the jury was exposed to the noose. Where it was exposed to Appellant, there is nothing indicating that the jury was not also exposed to the noose.[9] It cannot be said that the jury was not impacted by the prosecutorial misconduct.[10] Certainly, there should have been an inquiry of Appellant to determine how he was exposed to the noose.[11] Also, such an inquiry could determine whether Appellant was personally impacted by the noose. Merely because Appellant acted with proper courtroom decorum and did not shout or throw items does not mean he was not psychologically

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[9] The one thing that is certain is that the prosecutor did draw a hangman's noose. When confronted with the allegation, the prosecutor did not deny drawing the noose, but argued that she had not exposed it to Appellant T1052. However, the question still remains -- how would Appellant have seen the noose if the prosecutor had not been exposing it to Appellant.

[10] The drawing of the hangman's noose by the prosecutor could have several ways of impacting the jury including, but not limited to, a symbol of the prosecutor's personal belief about the case. Jones v. State, 449 So. 2d 313 (Fla. 5th DCA 1984).

[11] Depending on the results of the inquiry, one could eliminate, or find, that the jury was also exposed to the noose.

impacted by the prosecutor's actions. For all we know, it could have impacted his decision not to testify due to the trauma of knowing that he was to face cross-examination by a prosecutor who was goading him by drawing hangman's nooses. There could also have been short term effects which could impact his ability to follow the trial and assist counsel. The bottom line is that we do not know for sure because the trial court declined to inquire into the prosecutorial misconduct.

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.

Appellee's analysis highlights the problem with Appellant being absent from the bench conferences. First, Appellee misreads Rose v. State, 617 So. 2d 291 (Fla. 1993) to conclude that if penalty or guilt phase evidence is not presented the defendant's absence does not affect the fairness of the proceedings. In Rose, it so happens that nothing occurred that could affect the fairness of proceedings.[12] However, it was earlier noted in Rose that discussions about things other than evidence in the defendant's absence can violate due process. 617 So. 2d at 396 (emphasis added) ("the right of presence is protected to some extent where the defendant is not actually confronting witnesses or the evidence against him"). In this case Appellant would not have been a "mere shadow" at the conferences.

Appellee attempts to justify Appellant's absence from the bench conferences in part due to the allegation that Appellant was "difficult." Obviously, if a defendant is disruptive the trial court would be within its powers to exclude him from certain proceedings. However, Appellant

[12] The discussions in Rose's absence dealt strictly with guilt phase matters -- and Rose had already been found guilty. Thus, there is nothing that Rose could have contributed to the discussions.

was never disruptive in this case. Appellant never spoke in court except when the trial court specifically called on him to speak. Appellant's conduct was exemplary. There was no valid reason for excluding Appellant.

Moreover, assuming arguendo, that Appellant was a so-called difficult client -- disagreements as to strategy between attorney and the client is not a valid reason for excluding him from proceedings. In fact, Appellant's presence was especially important where the attorney was alleging things concerning the defendant that could influence the trial court.[13] If Appellant had been present at the bench conference, the trial court's misunderstanding might have been prevented.

Appellee has essentially conceded that the trial court's conclusion that Appellant was "difficult" probably played a role in the trial court's later decisions in this case:

> In considering Appellant's complaints the trial court properly considered Appellant's history of conflict with his attorneys.

Appellee's Answer Brief at 82. As stated earlier, this should play no role in any decision making. Appellee's own logic must dictate that where the trial court was concluding at the hearing that Appellant was difficult, based on a false premise, and it would use such a conclusion in making future rulings, the fairness of later proceedings would be impacted by Appellant's absence from the hearing.

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[13] At each of these bench conferences the trial court made conclusions about Appellant being a difficult client on the basis of some misinformation that Appellant could have corrected had he been present. For example, the trial court concluded that Appellant "couldn't get along with Fran Ross" T2772. However, Fran Ross was highly complementary of Appellant and specifically noted that he was not hampering her efforts, but was helping T51. Ross eventually left the case because she was expecting a baby T172. Outside Appellant's presence, the trial court found that Mr. Lamos was the fourth attorney "assigned" to Appellant's case T2148. However, Mr. Lamos was the second attorney assigned. The Public Defender's Office acted as Appellant's first attorney.

The same logic applies to the bench conference during the penalty phase where the defense counsel brought up the subject of Appellant's being difficult. Where the trial court relied on Appellant being a difficult client to make future rulings, Appellant's absence cannot be disregarded. Also, contrary to Appellee's characterization, the defense attorney was discussing the type of evidence Appellant wanted to present in mitigation and was attacking it. Thus, the defense attorney was berating some of the evidence Appellant wanted to use in mitigation at sentencing. It was not a discussion of past guilt phase events as in Rose. It was a discussion of the alleged worthiness of evidence that Appellant wanted to use in the future. Appellant was not present to defend his position on the evidence which he wanted to present. Appellant's presence at such a discussion would not be a mere shadow. Appellant relies on his Initial Brief for further argument on this point.

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.

It should first be noted that Appellee discusses the excusal of jurors Miller, Freeman, Deegan, Moore, Lewis, Hutyanski, Carroll, Tarach, Beachle, Blakeney and Villafone. This discussion is irrelevant where none are included in the list of jurors excluded by agreement of the parties on page 39 of the Initial Brief.

Appellee claims that all the jurors on page 39 of the Initial Brief were properly excluded under Section 40.013. However, this is not true. The trial court explained to both counsel that these jurors would not be excused unless both parties were in agreement T769. Appellant needed to be present to agree to these discretionary excusals by agreement.

On page 28 of its brief, Appellee claims that the trial court "would have" been within its discretion to excuse the jurors on his own. This point is academic. The trial court did not even consider excusing these jurors on his own. One cannot argue no abuse of discretion where the trial court did not choose to exercise discretion.

Finally, Appellee claims that the error is harmless because there is nothing Appellant's presence could have added. However, if Appellant had been present it is certain that the defense would not have agreed to exclude black juror Betty Robinson where one of the primary concerns of Appellant was the fact that blacks were being excluded in this case in all forms -- (judges, prosecutors, jurors, etc.) and that he was tried with an "all-white jury" 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).

POINT VI

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

Appellee claims the burglary could be deemed stealthy because there was curtilage.[14] Such a claim is specious. There was absolutely no evidence presented regarding Appellant's entry onto the curtilage, much less showing that such an entry at noontime in broad daylight

[14] The prosecution below never argued that the burglary entry was by the curtilage. Rather, it was argued that the burglary entry was by smashing through the glass door. Curtilage entry was not even alleged R2. The state cannot make a different argument on appeal than it made in the trial court. State v. Adams, 378 So. 2d 72 (Fla. 3d DCA 1979).

was stealthy.[15] Moreover, smashing through the door negates any evidence that the entry was stealthy, secretive, silent, etc. Frazier v. State, 20 Fla. L. Weekly D2102 (Fla. 4th DCA Sept. 13, 1995).

Appellee claims that the error is harmless because there was other evidence which was sufficient to demonstrate Appellant's intent to commit an offense. Such a claim is without merit. The harmless error test is not a sufficiency of the evidence test or even an overwhelming evidence test.[16] State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). Instead, the test is whether the improper evidence could have influenced the jury and the focus is on the impropriety. State v. Lee, 531 So. 2d 133, 137 (Fla. 1988). Here, the improper giving of the stealthy entry instruction could be misused by the jury to find a contested element of this case. E.g. Frazier, supra. The error cannot be deemed harmless.

POINT VIII

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

Throughout its answer brief on this point Appellee misstates the nature of the requested instruction. The requested instruction does not justify violence in any manner T2222-23,R773. Rather, the instruction goes to the entry element of the burglary. In other words, if there is an erroneous good faith belief of a right to enter the property one may not be convicted of the

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[15] The lack of evidence of stealthy entry at bar distinguishes this case from Baker v. State, 636 So. 2d 1342, 1343 (Fla. 1994) wherein "there was ample evidence of Baker's stealthy entry onto the curtilage."

[16] The facts to which Appellee refers are far from overwhelming evidence. A statement of historical fact that Appellant shot his wife is not dispositive of intent before the shooting. There is also a question of whether the officer's rendition of the alleged statement was accurate to begin with. Certainly, it does not make the error harmless. Also, Appellant's possession of a gun for protection is not very persuasive evidence and could be viewed by the jury as insignificant. See page 9, supra. This evidence would not make the error harmless.

burglary. One may still be liable for offenses other than burglary if violence occurs within the premises.[17]

Appellee also construes the evidence and inferences in a light most favorable to the state to conclude that the evidence was insufficient to support the instruction. However, if any of the inferences from the evidence could support the instruction, no matter how weak they may be, the instruction must be given. E.g. Hansbrough v. State, 509 So. 2d 1081, 1085 (Fla. 1987). As explained on pages 54-55 of the Initial Brief, there was evidence, and inferences from the evidence, to support the instruction.

Finally, Appellee claims that the error is harmless because there was evidence to support a premeditation theory. However, to make such a claim Appellee utilizes inferences from the evidence that the jury may well have rejected[18] -- including claims that are totally unsupported by the record.[19] The error cannot be deemed harmless on the basis of the evidence. See page 9, supra.

PENALTY PHASE

POINT XIV

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

Appellee first claims that the instant cases does not involve a domestic dispute and there was no quarrel or confrontation but that "Appellant simply got tired of waiting on the legal

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[17] In Presley v. State, 388 So. 2d 1385 (Fla. 2d DCA 1980) (a case which also involved an aggravated battery), the Court noted that voluntary intoxication was a valid defense to burglary. The key is that a good faith belief of the right to be present at the premises, whether it be based on voluntary intoxication or advice of counsel, negates the specific intent element of lack of permission to be present.

[18] See pages 8-9, supra.

[19] For instance, there was no evidence that the children were in the bedroom during the struggle and shooting. It appears they were in another bathroom.

process" Appellee's Brief at 56. Such a claim is without merit. The trial court in its sentencing order specifically recognized that this case involved a domestic dispute:

> 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 ...

R813.[20] Moreover, the prosecutor below acknowledged that this case involved a long standing domestic dispute:

> [MS. PARK] ... "Your Honor, we are not contesting that there's an ongoing dispute from this prior event."
>
> * * *

T2439.

> [MS. PARK] ... "Now there's no question there's an ongoing quarrel."

T2814.[21] Appellee cannot legitimately claim that this is not a case of aroused emotions occurring during a domestic dispute. If this case does not involve a domestic dispute, nothing does.[22]

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[20] The mitigating circumstances 7-10 to which the trial court referred to were:

7. Heated domestic dispute.
8. History of conflict.
9. On-going quarrel.

R812.

[21] The state may not take one position in the trial court that there was an ongoing quarrel and then try to change its position on appeal. See State v. Adams, 378 So. 2d 72 (Fla. 3d DCA 1979).

[22] 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 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 this that the death penalty is not proportionally warranted. E.g. Garron, supra.

Appellee tries to distinguish the domestic disputes in Garron v. State, 528 So. 2d 353 (Fla. 1988) and Blakley v. State, 561 So. 2d 560 (Fla. 1990) on the ground that those cases had vocal disputes at the time of the killing while the instant case does not. However, one does not need a vocal argument for there to be a domestic dispute or confrontation. In Garron the wife was "threatening to take the children away" from the defendant. 528 So. 2d at 354, and then the defendant killed her. What occurred in this case was much more of a domestic dispute than in Garron. Here, instead of using words to threaten to keep Appellant from his children, actions and deeds were actually used to keep Appellant from his children. Appellant's wife disregarded the agreement to go to McDonald's with the children so Appellant could have visitation. Next when Appellant believed that police would enforce the visitation agreement he received only a citation. Finally, after Appellant had gotten what he perceived as permission to be with his children, he would only see his wife grab the children and run away. The action of keeping Appellant away from his children created a domestic dispute or confrontation far greater than any vocal threat to do so as was the case in Garron. It cannot legitimately be claimed that the instant case was not a highly emotional domestic dispute which resulted in the death of Appellant's wife.[23]

Appellee also claims there is no logical reason for distinguishing domestic cases where the prior violent felony aggravator is related to the capital offense. However, there is a very

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[23] The trial court even recognized in its sentencing order the extreme emotional disturbance Appellant was acting under due to the domestic dispute as represented by the 911 tape:

> 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.

R808.

legitimate reason for doing so. When the prior violent felony is separate and distinct from the capital offense it represents a propensity for violence. However, where the capital and prior violent offenses are related, and there is no other violence in the defendant's past, they represent isolated out-of-character behavior. Appellant's violence was isolated out-of-character behavior due to the domestic dispute with his wife over custody of the children.

The reason the prior violent felony is damaging is because is represents an individual's propensity for doing violence so that it cannot be said that the capital offense is an isolated circumstance. However, where the prior violent felony and the capital offense are both part of an ongoing domestic dispute the prior felony does not represent a propensity to do violence so as to say the person cannot live in prison peacefully. For example, because there is an ongoing dispute which culminates in violence does not mean that the person is violent in general. In the present case the only violence in Appellant's life is when his wife was keeping his children from him. This is exactly the same ongoing situation for the prior violent felony and the capital offense.[24] This is not the same situation in the cases referred to in Appellee's brief where the prior violent felony represents separate violence. In all the cases cited by Appellee the prior violent felonies are unrelated to the capital offense. None involved the situation where the capital offense grew out of, and was an ongoing part of, the prior violent felony.[25]

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[24] The trial court found hat this was "a domestic dispute over child visitation" R813, and that this was an "on-going quarrel" R812. Also, the prosecutor below acknowledges that the killing was the result of "an ongoing dispute from this prior event [the prior violent felony] T2439.

[25] In the cases of Ferrell v. State, 21 Fla. L. Weekly S166 (Fla. April 11, 1996), Duncan v. State, 619 So. 2d 279 (Fla. 1993), Porter v. State, 564 So. 2d 1060 (Fla. 1990) and Lemon v. State, 456 So. 2d 885 (Fla. 1984), there were separate and distinct murders which constituted the prior violent felony and other aggravators and unique situations which called for the death penalty.

Moreover, none of the cases cited by Appellee involve a factually similar domestic dispute to the instant case. The instant domestic dispute is much closer to the cases in which the death penalty has been found not to be proportional. See Garron v. State, 528 So. 2d 353, 354 (Fla. 1988) (Garron kills wife and daughter after wife was "threatening to take the children away"); Blakley v. State, 561 So. 2d 560, 561 (Fla. 1990) (Blakley bludgeoned wife to death with hammer, the killing was the "result of a long-standing domestic dispute" and the main conflict "appears to have been the children"); Downs v. State, 574 So. 2d 1095, 1096 (Fla. 1991) (Downs obtained a gun, went to wife's house to see his children and after wife grabbed the children and refused to release them -- Downs shot her 3 times with the children in her arms).[26]

Likewise, this case has similarities to Farinas v. State, 569 So. 2d 425 (Fla. 1990), a more egregious situation, in which the death penalty was found to be disproportionate in a domestic dispute. The victim moved out of Farinas' home. 569 So. 2d at 431. Farinas would become upset when unable to see her. Id. Farinas was obsessed with having the victim return to live with him. Id. Farinas would later kidnap the victim and as she tried to get away from him he shot her in the back causing instant paralysis. 569 So. 2d a 427. Farinas then fired

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[26] Appellee only notes that Downs dealt with a jury override. However it should be noted that the facts in Downs were more aggravated than in the present case and this Court noted due to the emotions involved that the death penalty is unwarranted in domestic cases:

> 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 (1987), *receded from on other grounds, Pentecost v. State*, 545 So. 2d 861 (Fla 1989); *Irizary v. State*, 496 So. 2d 822 (Fla. 1986); *Chambers v. State*, 339 So. 2d 204 (Fla. 1976).

576 So. 2d at 1099.

two shots to the back of her head. Id. Despite the existence of two aggravating circumstances (including HAC), this Court found that the death penalty was not proportionally warranted:

> We find it significant, also, that the record reflects that the murder was the result of a heated, domestic confrontation. *Wilson v. State*, 493 So. 2d 1019 (Fla. 1986). Therefore, although we sustain the conviction for the first-degree murder of Elsidia Landin and recognize that the trial court properly found two aggravating circumstances to be applicable, we conclude that the death sentence is not proportionately warranted in this case. *Wilson; Ross v. State*, 474 So. 2d 1170 (Fla. 1985).

569 So. 2d at 431. Like in Farinas, the instant case involved the victim moving out and Appellant being unable to have contact with his children. Like in Farinas, Appellant had an obsession. The obsession was to see his children. Also, like in Farinas, Appellant was found to be under the influence of extreme mental or emotional disturbance.[27] Like in Farinas, the death penalty is not proportionally warranted in this case.

In White v. State, 616 So. 2d 21 (Fla. 1993) White and the victim ended their relationship. White entered the victim's apartment and hit her companion with a crowbar. 616 So. 2d at 22. White was convicted of aggravated battery. Id. While in jail, White threatened to kill the victim. Id. Once out of jail White got a gun from a pawnshop. Id. White went and shot the victim. Id. After the victim fell, White fired a second shot into her back killing her. Id. Even though there existed a prior violent felony, the death penalty was not proportionally warranted. See also Kramer v. State, 619 So. 2d 274 (Fla. 1993) (death not proportional despite existence of a non-contemporaneous prior violent felony and HAC aggravator); Chaky v. State, 651 So. 2d 1169 (Fla. 1995) (death not proportional despite existence of non-contemporaneous violent felony of attempted murder).

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[27] The trial court specifically found this R807-808. Unlike in Farinas, this case also has over a dozen non-statutory mitigating circumstances. See Initial Brief at pages 71-72.

In each of the cases cited above, the circumstances of the case made the prior violent felony factor less weighty. For example, in Chaky, a prior attempted murder occurred in Vietnam and mitigated the weight normally given to this factor. In White, the prior aggravated battery was related to the domestic dispute which led to the victim's death and thus did not carry the weight normally given to this factor. Likewise, in this case the prior felony over ability to visit the children was clearly related to the domestic dispute and thus does not carry the weight normally given to this factor.

Finally, this Court has recognized that the death penalty is not warranted where the homicide, even though deplorable, is not in the category of the most aggravated and least mitigated for which the death penalty is reserved:

> "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. *Id.; Kramer v. State*, 619 So. 2d 274, 278 (Fla. 1993). We conclude that this homicide, though deplorable, does not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate.

Terry v. State, 21 Fla. L. Weekly S9, 12 (Fla. January 4, 1996). In Terry, this Court held that the death penalty is not proportionally warranted where the circumstances surrounding the actual shooting were unclear and the aggravation was not so extensive given the totality of the underlying circumstances. Id. In this case there was no witness to the actual shooting. It is known that the victim was shot in the buttocks, but how this occurred is merely speculation. Also, the aggravating circumstances of prior violent felony is not so extensive when one considers that it was part and parcel of the instant homicide. The death penalty is not proportionally warranted in this case. Appellant relies on his Initial Brief for further argument on this point.

POINT XV

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

Appellee's argument on this issue is at pages 71-73 of its Answer Brief. Prior to discussing the continuance issue, Appellee recites 11 pages of facts relating to events which are not being appealed. Appellee's justification for this is clarity. However, except for pages 71-83, the other pages (60-71) refer to certain events which take the focus off the true issues and take them out of context.[28] In order to focus on the issues on appeal, Appellant will reply to the portion of Appellee's Brief (pages 71-73) dealing with the continuance motion.

Appellee argues on pages 71-73 of its brief that it was proper to deny the continuance because there was no definite commitment that Appellant's sister, Janet Wright, would come to Ft. Pierce to testify. Such a claim is without merit. There was a definite commitment by Appellant's sister. Appellant's sister had flown from West Virginia to Florida specifically to testify on Appellant's behalf. This represents a definite commitment. As explained by Appellant, there was no reason for his sister to travel to Florida other than to testify for him T2777. There was no one in Florida that his family knew T2777. Why would Janet Wright ask for directions to the courthouse if she weren't going to come T2759? The actions of flying down to Florida represent much more of a commitment than any mere promise would.

Appellee next claims that there was no definite time for Appellant's sister to arrive and thus it was proper not to wait for her to drive from West Palm Beach to Ft. Pierce. Specifically, Appellee claims that the continuance would have to be for a number of days and

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[28] For example, on pages 60-61, Appellee lays out the background for the issue of Appellant's requests to be co-counsel. These issues have not been raised on appeal. By raising these as issues, Appellee is creating a strawman for the purpose of confusing the issues on appeal.

would extend over Thanksgiving. Such a claim is specious. The continuance would only be for a few hours for Appellant's sister to rent a car and drive from West Palm Beach to Ft. Pierce[29] -- it was not a continuance for a few days or a week.

Appellee tries to distinguish Wike v. State, 596 So. 2d 1020 (Fla. 1992) by again claiming there was no commitment that Appellant's sister would come to Ft. Pierce. However, as noted above, Appellant's sister's only reason to come to Florida was to testify for Appellant. There could be no firmer commitment. In Wike, there was no such commitment. In Wike, there was no evidence that the family member was on the way other than a claim he was "due to arrive that night." 596 So. 2d at 1025. In fact, Wike requested a one week continuance and this Court held it was error not to give a continuance if only for a few days so additional mitigation witnesses could be present. Id. In the present case we know Appellant's sister was on her way (after flying down to Florida from West Virginia), whereas in Wike, they merely knew that the relative was "due to arrive" in town sometime that night. Here, the continuance would only be for a few hours, whereas in Wike it would be for a week. Certainly, a continuance of a few hours would be much less cumbersome than that requested in Wike. Also, the denial of the continuance in this case was more damaging than in Wike. In Wike, the continuance was needed to bring in "additional" mitigation witnesses. In this case, Appellant's sister would have been the only family member to testify.

Besides not hearing mitigating evidence from a family member, without Appellant's sister being present the jury is left with the false impression that Appellant's family would not

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[29] The continuance was not a request for several days so other relatives, who were out at a funeral in West Virginia, could arrive. Moreover, where a man's life is on the line, it would not have been unreasonable to ask for a continuance for a few days. Wike v. State, 596 So. 2d 1020, 1025 (Fla. 1992).

even support him in his time of need. Jurors could believe the family would not support Appellant because they did not believe he was worthy of support. Nothing could be more devastating. Especially in this case where the jury recommendation was 8-4 without presenting any mitigating evidence from Appellant's family. Testimony from a family member could have swayed the jury to a life recommendation. Where a man's life is on the line, the trial court abused its discretion in not waiting a few hours for Appellant's sister to drive from West Palm Beach to Ft. Pierce. After all, this trial, from beginning to end, took over two weeks. Another few hours would not have been unduly taxing.

POINT XVI

APPELLANT'S RIGHT 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.

Appellee's argument on this issue is at pages 73-75 of its Answer Brief. Appellee first claims that Appellant's absence was waived by his failure to request to be present. However, silence does not constitute a waiver to be present. See Francis v. State, 413 So. 2d 1175, 1178 (Fla. 1982); Turner v. State, 530 So. 2d 45 (Fla. 1987); State v. Melendez, 244 So. 2d 137 (Fla. 1971).

Appellee's analysis highlights the problem with Appellant being absent from the bench conferences. First, Appellee misreads Rose v. State, 617 So. 2d 291 (Fla. 1993) to conclude that if penalty or guilt phase evidence is not presented when the defendant is absent the absence does not affect the fairness of the proceedings. In Rose, it so happens that nothing occurred that could affect the fairness of proceedings.[30] However, it was earlier noted in Rose that

[30] The discussions in Rose's absence strictly dealt with guilt phase matters -- and Rose had already been found guilty. Thus, there is nothing that Rose cold have contributed to the discussions.

discussions about things other than evidence in the defendant's absence can violate due process. 617 So. 2d at 396 (emphasis added) ("the right of presence is protected to some extent where the defendant is not actually confronting witnesses or the evidence against him"). In this case Appellant would not have been a "mere shadow" at the hearing.

Appellee's claim that this hearing, from which Appellant was absent, was merely a status check is without merit. The trial court focused on Appellant's complaint that defense counsel had not contacted penalty witnesses ("As for as your client's conversations earlier ..." T2649) and ruled "I feel perfectly comfortable with your representations to me that you have made attempts to contact these people ..." T2650. Appellant must be present when the trial court rules on his complaint about trial counsel. Furthermore, it should be noted that Appellant's complaints about defense counsel not contacting some of his penalty phase witnesses were valid. Defense counsel fully admitted, by stating that he had investigated some and attempted to contact several witnesses, that he had not attempted to contact all of the defense witnesses:[31]

> MR. LAMOS: Your Honor, I have -- on some of those people I have fully documented through investigative things that have gone one, either those witnesses know nothing or are not willing to testify or don't have any sufficient basis that I cannot proceed along through other means that are available.
>
> I have attempted to contact several of those witnesses and have never heard back from them at all.

T2545 (emphasis added). Appellant would not have been but a shadow at the hearing. He could have challenged the trial court's erroneous conclusion that defense counsel had tried to contact all the witnesses.

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[31] By stating that he had attempted to contact some of the witnesses, defense counsel necessarily did not attempt to contact all the witnesses -- meaning there were some witnesses he did not attempt to contact.

POINT XVII

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

Appellee's argument on this issue is at pages 75-76 of its Answer Brief. Appellee claims that there was no waiver of mitigating evidence. Such a claim is specious. Appellant waived presenting certain evidence to the jury. The parties and the trial court fully recognized this and tried to conduct a Koon inquiry. However, the inquiry was not adequate.

Appellee next claims there was a waiver of mitigating evidence pursuant to an adequate inquiry pursuant to Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). Appellee argues that defense counsel's explanations to Appellant outside of court was sufficient for the inquiry. However, as explained in the Initial Brief (pages 75-76) this is only part of the required inquiry. There must be an explanation to the trial court as to exactly what the mitigating evidence would be.[32]

Here, there was no definition as to what the mitigating evidence was (i.e. was it mental health problems, good character, drug abuse, etc.). The only discussion was the manner through which it was to be presented -- depositions. But the mitigation itself (content of the depositions) was never discussed at the inquiry. Thus, as explained more fully in the Initial Brief, how could the trial court make a decision about the waiver without first being aware of what was being waived. Appellant relies on his Initial Brief for further argument on this point.

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[32] This would permit the trial court to know what exactly was being waived and would ensure that the trial court knew that the defendant knew exactly what was 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).

POINT XVIII

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

Appellee claims the evidence at trial contradicted the facts relied on by Dr. Cheshire. However, as explained in the Initial Brief, the facts relied on by Dr. Cheshire were the facts introduced at trial. The trial court had no quarrel with the facts relied on by Dr. Cheshire.[33] Appellee fails to refer to any of the facts listed on page 77 of the Initial Brief that were controverted or untrue. Instead, Appellee speculates on inferences unsupported by the record to conclude that Appellant's sole reason for going to the Prescod residence was to kill his wife.[34] Contrary to Appellee's speculation, the facts indicate that it was Appellant's compulsion to get his children, after unsuccessful repeated efforts to do so through legal means, that increased his stress and frustration that upon seeing his wife grab the children and turn away that he lost the ability to conform his conduct T2516,2563.

Appellee argues that all factual conflicts should be resolved in favor of not finding this mitigator. However, there were no factual conflicts. As explained in the Initial Brief it was error to reject this mitigating circumstance.

Finally, Appellee claims the error of rejecting mitigating circumstances is harmless because the prior violent felony aggravator deserves great weight. However, that aggravator

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[33] As fully explained on pages 78-79 of the Initial Brief, the trial court erred in rejecting this mitigator based on uncontroverted facts supplied by expert opinion testimony.

[34] As fully explained at page 9 of this brief, the shooting in the buttocks clearly is not indicative of an intent to kill. Appellee also claims that Allison Prescod saw Appellant with a gun. However, there is absolutely no evidence presented to support this claim. Moreover, the evidence showed that if Appellant brought a gun to the residence it would be for his possible protection due to the fact that his in-laws had threatened him and attacked him before AW191,213-214.

should not be given great weight under the circumstances. As the prosecutor conceded below, the prior violent felony was part of an ongoing dispute related to the instant case T2439,2814, p.19, supra.

Appellee also claims that this Court routinely yields its authority to determine whether error was harmless to the trial court's boilerplate statements. This is not true and none of the cases cited by Appellee can legitimately be used to support such a proposition.[35] As explained at pages 80-81 of the Initial Brief this Court has soundly rejected the use of anticipatory language to find harmless error. See Griffis v. State, 509 So. 2d 1104, 1105 (Fla. 1987); Hildwin v. Dugger, 654 So. 2d 107, 112 (Fla. 1995) (Justice Anstead, specially concurring) (confidence in death penalty process is undermined if trial court takes the position of imposing death if there is any basis for doing so). The error cannot be deemed harmless.

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.

Appellee has not contested Appellant's explanation on page 82 of the Initial Brief that there were external provocations in this case.[36] It is clear that there was external provocation.

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[35] For example, in Lowe v. State, 650 So. 2d 969 (Fla. 1994) this Court indicated that the trial court did not err in evaluating the evidence and not that there was an error but it was harmless because the trial court indicated any error would be harmless. The same applies to all the other cases cited by Appellee.

[36] Appellee merely claims that in Fead v. State, 512 So. 2d 176 (Fla. 1987) the defendant did not suffer from "extreme duress." However, in Fead this Court stated:

> Second, we find that the jury reasonably could have concluded that Fead acted under extreme mental and emotional disturbance and duress....

512 So. 2d at 179 (emphasis added). The external provocation in Fead included "seeing her dancing with other men" on the evening of the killing.

IB at 82. Thus, it was error to reject this mitigation. Appellant relies on his initial brief for further argument on this point.

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.

Appellee's argument on this issue is at page 76 of its Answer Brief. Appellee argues that no Nelson inquiry was required on Appellant's claim of incompetency of counsel. However, if a defendant makes a specific claim of incompetency of counsel an inquiry must be held. See Lowe v. State, 650 So. 2d 969, 975 (Fla. 1994) ("a trial judge's inquiry into a defendant's complaints of incompetence of counsel can be only as specific and meaningful as the defendant's complaint"); Smith v. State, 641 So. 2d 1319 (Fla. 1994) ("A trial court must conduct an inquiry only if a defendant questions an attorney's competence").[37] Furthermore, Appellant was told by the trial court that the only matters he could bring up were Nelson inquiries T1810. Thus, when Appellant complained about his attorney, it was in the context of requesting a Nelson inquiry. Thus, a Nelson inquiry was required.

Appellee also makes the claim that Appellant merely expressed a dissatisfaction with counsel and not a claim of incompetence of counsel. However, Appellant specifically alleged that defense counsel was not contacting or investigating his penalty phase witnesses T2544, 2556-57,2753. Failure to investigate or contact potential penalty phase witnesses constitutes incompetence of counsel. E.g. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Grooms

[37] This is consistent with the requirements of due process. See Fitzgerald v. Estelle, 505 F.2d 1334, 1337 (5th Cir. 1974) (the court noted that the trial court has an affirmative duty under the Due Process Clause to intervene to assure that the accused receive a fair trial); U.S. v. Malekzedah, 855 F.2d 1492, 1498 (11th Cir. 1988).

v. Solem, 923 F.2d 88 (8th Cir. 1991); Highsmith v. State, 617 So. 2d 825 (Fla. 1st DCA 1993); Young v. State, 511 So. 2d 735 (Fla. 2d DCA 1987). Thus, there was a sufficient claim of incompetence.

Appellee claims that defense counsel's claim on page 2544-45 of the transcript[38] was sufficient to find that there was no reasonable basis for finding ineffective assistance of counsel. Appellee's Brief at 80. Appellee is incorrect. Instead of the defense attorney's remarks lessening the fear of incompetent representation by failure to investigate -- the remarks were proof of incompetence. Defense counsel fully admitted, by stating that he had investigated some and attempted to contact several witnesses, that he had not attempted to contact all of the defense witnesses:[39]

> MR. LAMOS: Your Honor, I have -- on some of those people I have fully documented through investigative things that have gone one, either those witnesses know nothing or are not willing to testify or don't have any sufficient basis that I cannot proceed along through other means that are available.
>
> I have attempted to contact several of those witnesses and have never heard back from them at all.

T2545 (emphasis added). This admission of a failure to contact some of the these witnesses required further inquiry. The trial court erred by relying on the statement showing prima facie incompetence to rule that there was no incompetence.

Appellee seems to justify the lack of an adequate inquiry on the erroneous basis that Appellant was difficult.[40] As explained at page 13-14 of this brief, this perception may not have

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[38] Which he relied on later by saying "same response as I said before" T2753.

[39] By stating that he had attempted to contact some of the witnesses, defense counsel necessarily did not attempt to contact all the witnesses -- meaning there were some witnesses he did not attempt to contact.

[40] Appellee states that "the trial court properly considered Appellant's history of conflict with his attorneys" in making his ruling. AB at 82.

been true, but more importantly, should not be used as an excuse to infringe on the right to due process.

Finally, Appellee claims the error is harmless because proper investigation and the presentation of mitigation witnesses would not make a difference. Such a claim is specious. This was a close case in which the jury's recommendation was 8-4. An adequate Nelson inquiry could have paved the way for mitigation witnesses. It cannot be said that additional mitigation could not have swayed the jury in this case.

POINT XXI

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

Appellee's argument on this issue is at page 76 of its Answer Brief. Appellee claims that there was no need to inquire about Appellant's complaints about counsel that are outlined in this point. Specifically, Appellee states that Appellant could have told the trial court himself about his not being able to view evidence and his religious views regarding holding court on Sunday. However, Appellant could not do so. Appellant was specifically ordered by the trial court not to bring up any matters other than Nelson inquiries T1810. It was error for the trial court not to hold a Nelson inquiry when Appellant informed the trial court that his attorney was not doing his duty by bringing matters to the court's attention that Appellant was forbidden to bring up personally.

POINT XXV

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

Appellee argues that it was proper to introduce the facts used as a basis of the prior attempted murder charge because "Appellant was not totally acquitted of the prior attempted murder charge." Appellee's Brief at 95. Appellee is wrong. Appellant was totally acquitted

of attempted murder. The fact that he was found guilty of attempted battery does not change the fact that he was acquitted of attempted murder. There is a big difference between the two crimes. The facts argued by the prosecutor in the prior case to show the attempted murder was the alleged pointing of the gun at the head. See Initial Brief at Appendix 20 ("if it weren't for the jamming of that gun this would have been a first degree murder"). These facts did not go to an attempted battery. Since Appellant was acquitted of the attempted murder, these facts should not have been permitted. Burr v. State, 576 So. 2d 278 (Fla. 1991).

Appellee has not disputed that it was error to introduce the details of the prior offense under Rhodes v. State, 547 So. 2d 1201 (Fla. 1989) where the prejudicial value of the evidence outweighed the probative value.

Finally, Appellee claims that all the evidence of the attempted murder should be allowed because the acquittal may have been based on a compromise verdict. That is pure speculation. The one thing we do know is that the jury acquitted Appellant of attempted murder. The evidence that the state was using for attempted murder was the pointing of the gun. Evidence of a crime for which a defendant is acquitted is inherently unreliable. Burr v. State, 576 So. 2d 278 (Fla. 1991). Such evidence represents the state's theory and is not based on what the jury found. Since the evidence of the facts of the acquitted offense may have added to the weight given to the aggravating factors, a new sentencing is required. Id.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARA D. BAGGETT, Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401-2299, by courier this 27th day of June, 1996.

Jeffrey L. Anderson

Of Counsel