IN THE SUPREME COURT OF FLORIDA

RICHARD EUGENE HAMILTON,

Appellant,

v.

CASE NO. 86,02 1

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR HAMILTON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Richard Hamilton is the Appellant in this capital appeal. Anthony Wainwright is a co-defendant, and his case is also pending before this court. The record on appeal consists of 27 volumes. References to the record and transcripts will be by the usual "T."

This case is somewhat unusual in that both defendants were tried together before separate juries. This means that portions of the Record on Appeal apply to both defendants while others have relevance to only one. The transcripts indicate when the "Wainright jury" or the "Hamilton jury" was present, but there is some inherent danger that appellate counsel or this court may inadvertently rely on portions of Wainwright's record in its argument or opinion in Hamilton's case. The possibility that Wainwright's

record may "contaminate" Hamilton's appeal has prompted appellate counsel to insure that cited references pertain only to those portions of the record relevant to Hamilton's case.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Hamilton County on July 15, 1994 charged the Appellant, Richard Hamilton, and Anthony Wainwright with one count of first degree murder, sexual battery, robbery, and kidnaping (R 2671-72). All of the charged crimes involved a firearm, He pled not guilty to those offenses (R 2674), and the case proceeded to trial in a manner typical for matters of this sort. Specifically, the state or the Defendant filed the following motions or notices relevant to this appeal:

1. Notice (by the State) of its intent to offer evidence of other crimes, wrongs or acts (R 2689). This notice included events that allegedly occurred before and after the charged offenses (R 2689-90).

2. Motion in Limine regarding the offenses Hamilton and Wainwright allegedly committed in North Carolina and Mississippi before and after the charged offenses (R 3471-76). Granted as to one burglary in Mississippi, denied as to the other crimes that happened in that State and North Carolina (R 3602).

3. Motion for Severance of Defendants (R 3463). The trial court, on motion of the state (R 3169), ordered the Defendants tried at the same time, but before separate juries (R 3601).

4. Motion, Supplemental, and Second Supplemental Motion to Change Venue (R 3356, 3399). The court initially deferred ruling on the requests until jury selection (R 3603). After some effort had been made to find an impartial jury in Hamilton County, it

ordered venue moved to Clay County (R 3635-36).

5. Motion to Suppress Statements (R 353 1). Denied (R 3608).

As mentioned, the court moved the venue of Hamilton's and Wainwrights trials from Hamilton County to Clay County. Both Defendants were tried before Judge Vernon Douglas, and after the juries had heard the evidence, law, and argument, they found them guilty as charged on all counts (R 3879-388 1).

Hamilton proceeded to the penalty phase portion of the trial. He objected to several of the penalty phase instructions (R 3883,393 1-3935, 4020, 4024), which the court denied (T 2147). The jury, after hearing evidence from the state and the Defendant, the law, and arguments, recommended, by a vote of 10-2, that Hamilton die (T 4106). The trial judge, following that recommendation, sentenced Hamilton to death. In aggravation, it found:

1. Hamilton was under sentence of imprisonment.

2. He had a prior conviction for aggravated assault on a law enforcement officer, and two convictions for robbery.

3. The murder was committed during the course of a robbery, sexual battery, and kidnaping.

4. The murder was committed to avoid lawful arrest.

5. It was especially heinous, atrocious, or cruel.

6. It was committed in a cold, calculated, and premeditated manner without any

pretense of moral or legal justification.

The court found that none of the statutory mitigators applied, but it concluded that the following non-statutory mitigation was present:

1 , Hamilton had grown up in a drug-ridden, crime infested neighborhood.

2. His mother was mentally ill.

3. He had suffered various traumas, including losing an eye from being shot by a B-B gun.

4. He had good work habits and had earned a living.

5. He assisted the police in locating the victim's body.

As to the other convictions, the court, departing from the recommended sentences (R 4 129-3 1), imposed the following punishment:

1. Armed robbery: life in prison without the possibility of parole for twenty-tive years. $15,000 fine.

2. Armed Kidnaping: life in prison without the possibility of parole for twenty-five years. $15,000 fine.

3. Armed Sexual Battery: Life in prison without the possibility of parole for twenty-five years. $15,000 fine. A three year minimum mandatory sentence was also imposed for using a firearm during the sexual battery (R 4 133-4 143).

All sentences are to be served consecutively.

This appeal follows.

STATEMENT OF THE FACTS

About 7:30 in the morning of April 24, 1994 Richard Hamilton and Anthony Wainwright escaped from a North Carolina prison. They were at a minimum custody unit, and simply walked away (T 346-47, 896). Some friends or acquaintances picked them up, took them to a motel, and bought some clothes for them. The pair stole a green Cadillac the next day, and drove to a small town in North or South Carolina where they broke into a house and stole several guns and ammunition, including a .22 caliber single shot rifle and a 16 gauge semi-automatic shotgun (T 900). They eventually worked their way south, and by the morning of April 27 were in the Daytona Beach area. They stay cd there only a short while before deciding to head to New Orleans along the interstate highways (T 90 1-902).

By the time they approached Lake City, the Cadillac was overheating, so the pair pulled into a Winn Dixie parking lot to get another car (T 903). After watching the area for fifteen minutes Wainwright spotted Carmen Gayheart leaving the grocery store. As she put her groceries in her car (a Ford Bronco), Wainwright approached her, and using one of the stolen shotguns, forced her into her vehicle (T 904). He got in with her and drove away with Hamilton following in the Cadillac (T 905). A short while later he abandoned that car and got into the Bronco with Wainwright (T 638-39).

They headed north on 1-75, and during the next forty minutes Hamilton tried to calm Gayheart by assuring her they only wanted her car, and would let her go (T 907,

925). Sometime later, he had sex with her (T 908).

Traffic on I-75 had slowed to a stop, and Wainwright, fearing the police had set up a road block, turned the car around (T 907, 2306). He left that highway, eventually parking the car on a road. He had sex with Gayheart, and afterwards he told her to get out of the car and walk behind it and lay down (T 910). He then shot her twice in the back of the head with the stolen .22 caliber rifle (T 911).[1] He told Hamilton that "I killed her. I finally killed one." (T 911) Relieved, he said he had "gotten one out of the way." (T 911) Wainwright drug the body into the nearby woods, and Hamilton did nothing to assist him (T 912). Indeed, Hamilton had no idea what Wainwright intended to do until he had killed Gayheart (T 926).[2]

The pair left the area, and as they drove west they threw away Gayheart's clothes, some of her jewelry, and the rifle (T 913). On April 28, they drove the car through Brookhaven, Mississippi. A state Highway Patrol officer saw the vehicle, and noted that it had tinted windows darker than allowed by Mississippi law (T 402). As he followed it he decided to pull it over when it failed to reduce its speed as it drove through the town (T 403). Wainwright (who was driving) fled, and as the trooper gave chase Hamilton fired a

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[1]Gayheart's body was so decomposed when the medical examiner performed the autopsy that she could only conclude that the cause of death were the gunshot wounds (T 842, 846, 869). Hamilton said Wainwright had tried to strangle her before shooting her (T 910, 1810).

[2]Wainright told the police about two weeks after his arrest that "Hamilton said, 'You know what we've got to do?"' And he understood "that yes, I know we've got to kill her." (T 1032)

shotgun at him two or three times (T 404-405), the pellets hitting the windshield and front end of the car. The Bronco eventually turned down a dead end street, and the officer waited for them to come back. He got out of his car and fired his shotgun four times at the approaching vehicle (T 413). It never slowed down, and as it passed him, it hit his car (T 413). Wainwright lost control of the Bronco, and it hit a tree (T 414). Both men got out. Hamilton had a shotgun and "looked as if he was trying to pump a shell into the barrel." The trooper shot him (T 415). Wainwright was found a few minutes later (T 464).

They were taken to a nearby hospital and their wounds treated (T 2264). While there the police tried to talk with Hamilton, but he refused to waive his right to remain silent (T 2325-26).

Eventually the defendant and Wainwright were transferred to a local jail where Hamilton admitted kidnaping, raping, and robbing Gayheart, and seeing Wainwright strangle and shoot her (T 645, 2306). He also tried to escape (T 556, 729-30). He wrote Wainwright that they had to flee, and might have to kill someone to do so (T 557-58, 692-95).

When questioned initially by the police, Hamilton refused to sign the rights waiver form, but he talked with them anyway (T 2253-54). He said they had found the Bronco at rest stop on the Interstate, and did not know what had happened to Mrs. Gayheart (T 2258). At later questionings he changed his story and became very cooperative (T 665).

He admitted having sex with her, and said Wainwright had killed her (T 2306). He also returned to Florida to help find Gayheart's body, and he provided a map which aided the Sheriffs Office in Hamilton County to find it (T 647,677, 2242).[3]

[3]He was the more cooperative of the two men (T 653).

SUMMARY OF THE ARGUMENTS

Hamilton raises nine issues in this capital appeal. Eight of them present guilt phase arguments and one deals with a bad penalty phase jury instruction.

Anyone familiar with the facts of this case can only naturally be revolted by what happened and angry at the Defendants for what they allegedly did. Two escaped convicts come to Florida, kidnap a young mother, brutally rape her, and then kill her for no reason. It would seem that if ever the death penalty was deserved, Hamilton and Wainwright had earned it.

This understandable revulsion at the Defendants and what they did provided the emotional backdrop for this case, and it permeated the trial from the beginning to the end. It became evident early on when the court changed the venue, and it remained until the end when the jury recommended death. This emotional reaction to the murders had unfair help from the State, and for the reasons presented in this brief, this court should reverse Hamilton's Judgment and sentence and remand for a new trial.

Rather than seeking to quell the animosity towards the Defendants the State strengthened its case against Hamilton by improperly relying on inflammatory evidence or argument. In Issue I, a State rebuttal witness told the jury that Hamilton and Wainwright had killed some other people in North Carolina after their escape from prison there. The court recognized that such evidence inflamed, but it did nothing to reduce its impact on the jury. That was error.

This same witness also said Wainwright admitted he had strangled Mrs. Gayheart, but that testimony was different than what the State expected. Over objection, the prosecutor impeached its witness and got him to agree that the Co-defendant had said, "We strangled her." It was error to allow the State to do this because it enabled him to use as substantive evidence what should have been admissible only as proof that its witness lied. This error became more serious because this witness provided the only evidence Hamilton had done anything to kill Mrs. Gayheart. (ISSUE II.)

The State continued its attack on Hamilton's character by allowing the state to elicit from its witnesses that Hamilton had lied to the police on specific instances. The State can attack his character only if he had put it in issue, which he had not, and then only by evidence of his reputation, Destroying his character with instances of bad character is improper. (ISSUE III.)

This character attack became more effective because the court refused to instruct the jury on the only defense Hamilton wanted to present: withdrawal. While he admitted kidnaping, robbing, and raping the victim, he had repeatedly told her they had no intention of killing her. Indeed, they only wanted her car and intended to let her go. Wainwright acted on his own when he killed her because Hamilton had withdrawn from or never intended to participate in her death, Withdrawal, contrary to what the State argued, is a legitimate defense. Hamilton presented sufficient evidence to justify allowing the jury to consider it. (ISSUE IV.)

Taking advantage of the court's refusal to instruct on his only defense, the State in its closing argument blamed Hamilton for the victim's death by claiming he had to assume "a little bit of the responsibility for it" by bringing her to the "point of death." Not only was that error, the State continued its "sub rosa" character argument by contrasting the Defendant's despicable character with that of the victim. Just before her death, all she "talked about was her children." Such emotional pleas are inappropriate generally and more so in this case because of the inherent sympathy we have for the victim and her family. (ISSUE V.)

The State had prepared the jury for this argument during the trial when a day care worker said that Mrs. Gayheart habitually picked up her children around noon. That she did not do so on the day of her death was relevant, the State argued, to establish the time of the crime. Such evidence, however, could not show that because what she did habitually she did not do on the day she disappeared. That is, evidence of habit can only confirm other evidence to show that a person likely acted according to that habit on the day in question. It cannot show that because she did not act according to habit, something was wrong. That she had two children in day care had relevance only to create sympathy for her. (ISSUE VI)

The court also erred in denying Hamilton's motion to suppress statements he had given various police officers. Initially, he told them he did not want to talk with them. They whisked him away from the hospital where he had just undergone surgery, and took

him to the local jail. Within hours they were questioning him again, this time getting a confession from a "very cooperative" suspect. The police never "scrupulously honored" this injured and groggy Defendant's right to remain silent. (ISSUE VII.)

Perhaps the State used its emotional argument because its case against Hamilton, that he had participated in the murder of Gayheart, was weaker than it appears. After all, it had called Wainwright a "bald face liar," and he presented the most damaging evidence of the Defendant's intentions regarding the murder. Its case against Hamilton for sexually battering Mrs. Gayheart suggests the State had more problems than apparent. Without Hamilton's confession that he had raped her, it had insufficient evidence of any sexual battery. That is, the prosecution failed to produce enough evidence of the corpus delicti for that crime to allow his admissions. (ISSUE VIII.)

If the State could get a conviction it must have realized, as Hamilton did, that a death sentence was almost assured. Indeed, the Defendant's only penalty phase argument involves a challenge to the revised jury instruction on the "cold, calculated, and premeditated" aggravating factor. It still suffers the infirmities of being vague, particularly in its definition of premeditation. (ISSUE IX.)

Thus, this court should closely examine the guilt phase issues. There is a strong emotional undercurrent sweeping this case along, and when the trial judge refused to allow Hamilton to argue his only viable defense, the result was predictable. This court should stop this rush to find the Defendant guilty of Mrs. Gayheart's murder and reverse

for a new trial.

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING HAMILTON'S MOTION FOR MISTRIAL AFTER A STATE WITNESS TOLD THE JURY THAT WAINWRIGHT ADMITTED TO HIM THAT HE AND HAMILTON HAD KILLED "SOME BLACK PEOPLE" AFTER THEIR ESCAPE, A VIOLATION OF THIS DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

After Hamilton had presented his case, the state called, as part of its rebuttal, a Robert Murphy. He had been an inmate at the Taylor County Jail the same time Wainwright had been housed there (T 1799). Indeed, both were in disciplinary confinement (T 1799). The state wanted Murphy to relate that Wainwright had talked to him about how he and Hamilton had kidnaped, raped, and ultimately murdered Mrs. Gayheart, The witness initially said Wainwright admitted that only he had murdered her. Unsatisfied with that response the State "refreshed" his recollection or impeached his witness,[4] so that he now admitted that Wainwright had told him "we strangled her." (T 1803)

The state then changed the focus of its inquiry.

> Q. Did he [Wainwright] say whether or not she was naked or clothed when she was killed?
> A. Naked
> Q. Did he tell you that he killed anybody else?

[4]Hamilton and Wainwright objected to the state impeaching its witness (T 1800- 180 I).

> A. He did. He mentioned something about after they had escaped on the way down from wherever they had escaped from, South Carolina, or North Carolina, somewhere, that they run across some black people, a drug dealer or whatever, they robbed and killed them. He didn't go into no detail about that. That was about it.

(T 1803-1804).

Hamilton's lawyer objected to the allegation of the other murder. "It is highly improper and extremely prejudicial. The Court has allowed incredible testimony related to crimes for which the defendant is not on trial." (T 1804-1805).

The prosecutor responded by saying that he was also surprised about the testimony of the North Carolina murders. "I expected Mr. Murphy to testify to the killing of a Mississippi State highway patrolman, and I was quite surprised by what he said. I was offering that testimony to show that Mr. Wainwright is a bald faced liar." (T 1805)

The court noted the state's blind spot, "He's not on trial for that, neither one of them are on trial for killing the trooper, either." (T 1805)

The court asked the state if they believed a curative instruction would do, and the prosecutor, quick to see which way the wind blew, admitted, "No sir, I don't object to a curative instruction. I think the curative instruction will do it." (T 1806)

Hamilton, however, was not so easily satisfied even when the prosecutor offered to stipulate there was no North Carolina murder (T 1806-1807).[5] He saw problems not only

[5]Indeed, the stipulation would have accomplished what the state wanted: to show that Wainwright was a "bald faced liar." (T 1805, 1 SOS).

with the jury's consideration of an allegation he could not disprove (T 1806), but also with the fact finder using it as an aggravator during the penalty phase portion of the trial (T 1807). "[T]hat is one of the strongest aggravating circumstances that the State could ever present."

The court dropped the matter by saying, "All I can do, Mr. Hunt, if you were in this situation, all you could do is the best curative instruction you can do and leave it for the appellate." (T 1807-1808). Accordingly, the court denied Hamilton's motion for mistrial and told the jury: "Members of the jury, you are to disregard the last statement by this witness. It is not to play any part in your decisions in this case." (T 1810)

That was not all the court could have done. First, even if Murphy had given the expected testimony, the prosecution could not use specific instances of Wainwright lying to prove his character. Second, the "curative instruction" was not "the best curative instruction you can do." And, in any event, the trial judge should have granted Hamilton's motion for mistrial (T 1805), so this court would not now have to reverse for a new trial.

A. The evidence had no relevance other than to show Hamilton's bad character.

The fundamental problem the state created came from its desire to show Wainwright to be a "bald faced liar." Even if Murphy said Wainwright had confessed to killing a Mississippi Highway Patrol Trooper, that evidence would have been inadmissible. The state wanted to prove that Wainwright had the character of a used car

salesman, which it could do.[6] It created reversible error in the way it sought to do it. Section 90.405 Fla. Stats. (1994) provides the exclusive method for establishing a person's reputation:

> (1) Reputation. When the evidence of the character of a person or of a trait of that person's character is admissible, proof may be made by testimony about that person's reputation.
> (2) Specific Instances of Conduct. When character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of his conduct.

Thus, except when a person's character is an essential element of a charge, reputation testimony provides the sole means of establishing a person's character. Opinion testimony is inadmissible to prove it. So are specific instances of bad character. See, Ehrhardt, Florida Evidence, Sections 90.405.2, 405.3 (1996 edition). "Evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness." Fulton v. State, 335 So. 2d 280 (Fla. 1976). Hitchcock v. State, 413 So. 2d 74 1,744 (Fla. 1982) A party can offer specific instances of misconduct only when character is an essential element of a charged offense. Such cannot be alleged here since the state wanted to show that Wainwright, not Hamilton, was the liar

This prohibition against using specific instances of bad character arose, not because such evidence had no relevance, but that it had too much. Anderson v. State, 549

[6] But one wonders why it wanted to do so since it relied so heavily on his testimony.

So. 2d 807, 812 (Fla. 5th DCA 1989). As the Anderson court explained,

> In other words, when the issue in a case is whether or not the defendant did or did not do a particular bad act, when the prosecutor is allowed to show to the jury that in other instances the defendant did a similar bad act, then the jury will not only readily believe that the defendant is morally capable of doing the bad act charged but also that the defendant has a general character defect or propensity to do this type of a bad act and, accordingly, it is highly probable that he did the particular bad act charged. This jury inclination is so strong that on the balance between admissibility because of relevancy and inadmissibility because of the strong likelihood of prejudice, such evidence should be excluded as a matter of law.

Id. at 812 (footnotes omitted.)

In Paquette v. State, 528 So. 2d 995, 996 (Fla. 5th DCA 1988), the same court made the same point, using stronger language:

> The tremendous probative value of similar fact evidence to establish the defendant's propensity and bad character in the mind of the jury plus the overwhelmingly convincing power of such evidence (which is the very reason for the strict general rule excluding such evidence) constrains against expanding the scope of Heuring v. State 5 13 So. 2d 122 (Fla. 1987) which, to some extent, relaxed the'general rule of exclusion.

Id. at 996 (Footnote omitted. Emphasis supplied.)'

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[7]Wigmore similarly justified excluding specific acts of character. "It may almost be said that it is because of this indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable, not because it has no appreciably probative value, but because it has too much." 1 Wigmore, Evidence, Section 194 at 646 (3d ed. 1940): See also, 1 Jones on Evidence, Section 4: 18 at 418 (6th ed. 1972); McCormick on Evidence, Section 190 at 447 (2d ed.1972); 1 Underhill, Criminal Evidence, Section 205 at 447

In Hodges v. State, 403 So. 2d 1375 (Fla. 5th DCA 1981), the court provided three reasons this type of evidence universally finds no favor in the courts of this state and around the nation:

> Evidence of particular bad acts to show the accused's character as evidence of his commission of an act is inadmissible because of: (1) the undue prejudice from the over-strong tendency of a jury to believe an accused guilty because he is a likely person to have done such an act, (2) the undue prejudice from the tendency to condemn because the accused may have escaped unpunished from other offenses and (3) the unfair surprise and injustice in charging one with one offense and then collaterally attacking him with other wrongs for which he may be unprepared to defend. Over the last three centuries this policy of exclusion of bad character evidence has received judicial sanction more emphatic with time and experience.

Id. at 1377 (Footnotes omitted.)

Even if the state sought to show the Defendant had lied, it could not use evidence that he had done so in other instances since his character was not an essential element of the charges he faced.

Thus, the state committed a major faux pas, and on appeal, Hamilton expects it to admit as much. It will try to salvage the issue, however, by claiming that whatever error it made below had no impact on the jury's verdict of guilt or recommendation of death.

(5th ed. 1956); 2 Louise11 and Mueller, Federal Evidence, Section 140 at 113 (1978); Hodges v. State, 403 So. 2d 1375 (Fla. 5th DCA 1981), rev. denied, 413 So. 2d 877 (Fla. 1982) and the dissent in Beasley v. State, 503 So. 2d 1347 (Fla. 5th DCA 1987) and in Jackson v. State, 538 So. 2d 533 (Fla. 5th DCA 1989).

In light of the quoted passages that argument has little persuasive weight. That is. Murphy's testimony that Wainwright and Hamilton had committed other murders was inadmissible, according to Wigmore because it had "too much relevancy." The Fifth District said such proof had "tremendous probative value," "overwhelming convincing power." Barquette, cited above, is excluded at a matter of law because of the "strong likelihood of prejudice." Anderson, cited above. In Gonzales v. State, 559 So. 2d 748 (Fla. 3d DCA 1990) , the court found such evidence "enormously prejudicial." Finally, in Hodges, the court said such evidence not only confuses the issues, it leads the jury "naturally and inevitably . . . to give excessive weight to a vicious record of crime." Id. at 1377.

The allegation that Hamilton had committed other murders also struck at the heart of his defense. He never denied kidnaping, raping, or robbing Gayheart. Indeed, he admitted doing those vile acts. He argued, or rather wanted to argue, however, that he had never intended to kill her, that he did not do so, and that he had withdrawn from or never participated in Wainwright's plan and acts that resulted in her death (T 3870-74, 1914-17, 1919, See ISSUE IV)

Murphy's testimony sucked the validity that argument may have had out of this defendant's sails, and left him adrift in a sea of unsupported allegations of multiple murders. That is, the state's witness did not say these defendants had taken a package of gum from a convenience store, or run a red light. He made the most serious accusation

possible: Hamilton and Wainwright had murder one or more persons only days before they killed their latest victim. If we listen close we can hear the gasps from the jurors when they heard this allegation. Whatever defense Hamilton may have raised, no matter how strong, fell flat with that revelation.

Not only did this error infect the reliability of the jury's determination of guilt, it also fatally undermined their death recommendation, As Hamilton's lawyer said when he objected to Murphy's revelation, "Quite frankly, I think any reasonable jury that has in the back of its minds that the accused not only committed the murder for which he has been found guilty, if that comes down to the case, but also was involved in another murder, that is one of the strongest aggravating circumstances that the State could ever present. And here they have by design or misfortune, and Mr. Dekle says misfortune, and I accept that, but whatever means have now presented what would be one of the most devastating aggravating circumstances that could be dreamed up in the guilty face (sic) of the trial." (T 1807) The error in failing to grant the mistrial infected the penalty phase portion of Hamilton's trial.

Likewise, for the reasons mentioned as to why the error was not harmless, the court's anemic instruction to "disregard the last statement by this witness" in no way cured the enormity of the prejudice deliberately created by the state.* Not only arc such

*Hamilton asserts the State deliberately created this mistake because it was surprised only that Murphy said the Defendants had committed a murder in North Carolina. The prosecutor apparently thought he would say Wainwright admitted killing a Mississippi Highway Patrol

instructions notoriously ineffective, as this court noted in Geralds v. State, 601 So. 2d 1157 (Fla. 1992), the one here failed to convey to the jury the "gross impropriety" of the state's deliberate error. Deas v. State, 119 Fla. 839, 161 So. 729, 73 1 (1935).[9]

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

Trooper (T 1805). Had Murphy said that, such testimony would have still been inadmissible.

[9]"[T]he trial judge should not only sustain an objection at the time to such improper conduct when objection is offered, but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by the improper arguments." Deas, at 731.

[10]For similar reasons the evidence would have been irrelevant in the sentencing phase of the trial. Additionally, since Murphy's testimony amounted to an unproven (and indeed. false) allegation of a crime, it would have been inadmissible.

ISSUE II

THE COURT ERRED IN ALLOWING THE STATE TO IMPEACH ITS OWN WITNESS WHEN HE HAD NOTHING SUBSTANTIVE TO SAY OTHER THAN HIS IMPEACHED TESTIMONY, A VIOLATION OF HAMILTON'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The State had other problems with Murphy. It wanted him to say two things: 1) That the co-defendant said both he and Hamilton had strangled Mrs. Gayheart. and 2) That Wainwright claimed to have killed a Mississippi police officer. Its witness did neither. This issue deals with the first point, and ISSUE I dealt with the second.

Murphy said the co-Defendant recounted how he and Hamilton had escaped from North Carolina and kidnaped, raped, and killed Mrs. Gayheart. When asked if Wainwright had said "I strangled her" or "We strangled her" the state's witness said Wainwright had confessed that "I strangled her." (T 1800-180 1).

Unsatisfied with that answer, the prosecutor began to impeach Murphy with a prior statement he had made to an investigator some months earlier, Hamilton objected on three grounds: 1) The prosecutor was impeaching his own witness, 2) He had called this inmate only to impeach him, and 3) the investigative report was not "his statement" (T 1801- 1802). The court admitted the evidence, but it erred in doing so.

Section 90.608(1) Fla. Stats. (1995) controls this issue, and it provides:

> Any party, including the party calling the witness, may attack the credibility of a witness by:

> (1) Introducing statements of the witness which are inconsistent with the witness's present testimony.

Hamilton, thus, was wrong in claiming the state could not impeach its own witness. He was correct, however, that it could not call Murphy "for the purpose of impeaching him." (T 1801) Said another way, the State could not call Murphy so it could present its impeaching evidence before the jury as substantive proof.

Even though section 90.608 has been amended to allow a party to impeach its own witness, only in limited circumstances can the impeaching evidence be used for substantive purposes. Unless those conditions are met, prior statements, when used to impeach a witness, have no substantive use. Williams v. State, 443 So. 2d 1053 (Fla. 1st DCA 1984).[11] Indeed, federal courts have condemned the tactic the state used here of calling a witness to impeach him with the evidence it really wanted admitted.

> The most frequent situation in which a limitation has been recognized is when a party calls a witness for the primary purpose of placing before the jury the impeaching evidence, which is usually a prior inconsistent statement. The federal courts have condemned this practice when the impeachment of a party's own witness is a "mere subterfuge" for placing before the jury a prior statement or other evidence attacking the character of the witness.

"Apparently, an investigative report contained the statement the state expected Murphy to repeat at trial. If so, what this witness said there would have been inadmissible, since it would not have been an "other proceeding" as required by section 90.801(2)(a) Fla. Stats. (1995). J.H.H. v. State, 651 So. 2d 1239 (Fla. 5th DCA 1995)(Prior inconsistent statements made during a police interrogation are not admissible as not hearsay under 90.801(2)(a) because the questioning is not an "other proceeding" in which the guarantees of reliabi I i ty attach.)

Ehrhardt, Florida Evidence, 1994 Edition, Section 608.2 (Footnote omitted.)

In this case, Murphy's testimony that only Wainwright strangled Gayheart differed from what the prosecutor expected him to say: that Wainwright and Hamilton had strangled her. When he did not follow the game plan, the State presented to the jury, by way of impeachment, the substantive, damning testimony of the Defendant's direct involvement in this murder, To do so as impeachment was "mere subterfuge" and wrong. Williams v. State, 443 So. 2d 1053 (Fla. 1st DCA 1984); Pitts v. State, 333 So. 2d 109 (Fla. 1st DCA 1976).

Compounding that mistake, the court never instructed the jury that the inconsistent statement had relevancy only as impeachment and not to prove Hamilton's guilt. Ivery v. State, 548 So. 2d 887 (Fla. 2d DCA 1989).

Murphy's testimony implicated Hamilton in the Gayheart murder far more directly and intimately than any other testimony. Until he testified, no one had even suggested that the Defendant had strangled the victim. This rebuttal witness did, and it was damning evidence. As such, the court's error in letting the State "impeach" Murphy without any instruction limiting the use of that discrediting evidence likely had some effect on the jury's verdict and death recommendation. This court should, accordingly, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THE COURT ERRED IN ALLOWING THE STATE TO ELICIT TESTIMONY THAT INDICATED THAT HAMILTON HAD LIED TO OR DECEIVED THE POLICE, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

As part of the State's case, the prosecutor called Robert Kinsey, an agent with the Florida Department of Law Enforcement, to testify about a statement Hamilton had given him. During cross-examination, the law enforcement officer admitted that Hamilton had assisted the police by drawing a map where the body was, and he had agreed to come to Florida to help locate it (T 919). Kinsey also admitted that he had no evidence contradictory to what the Defendant told him, except that he had given them the wrong name of the motel he and Wainwright had stayed in South Carolina after their escape (T 924). Hamilton also told Kinsey that he had told Gayheart that they intended to "turn her loose." (T 925). He also did not realize that Wainwright intended to kill her until "it did happen," they had not talked about murdering her, and he had no part in her death. (T 926) Additionally, Agent Kinsey found nothing at the crime scene, because the body was so badly decomposed, to corroborate or disprove what Hamilton had told him (T 928). More specifically, "The only people who know who actually done the shooting would be the two of them." (T 929)

Before the state began its redirect examination, it told the court it wanted to elicit from the agent that "Mr. Hamilton would lie after the murder and I feel Mr. Hunt opened

the door to me asking that line of questioning about his repeated assertions that Hamilton was so truthful and corroborated so well. , . . Mr. Hunt made the statement as gospel according to the statement of Richard Hamilton, and there are some false things there that haven't been covered, and I would like to find out. " (T 930-32)

The court identified what the prosecutor wanted to do: "The truthfulness of the defendant, Richard Hamilton, is an issue in this line of questioning?" The State agreed, and the court allowed the questioning (T 932).

On redirect, Agent Kinsey told the jury that Hamilton had pointed out where the murder weapon had been thrown away (T 932). It was an area near Colquit, Georgia. In fact, however, the weapon was found east of Quitman, about "seventy-five or eighty" miles away (T 933). Hamilton also said Wainwright drove the Cadillac from North Carolina until the pair got to the Winn Dixie parking lot at which time Hamilton took over and Wainwright drove Gayheart's vehicle (T 933-34).

Then, after Hamilton had presented his case, the State offered as rebuttal the testimony of Officer Branson Fisher that Hamilton had admitted "we kind of covered her up with some leaves and stuff." (T 1843)[12] The Defendant objected to that testimony because it went to his "truthfulness and veracity." The court allowed it anyway.

It erred, however, in allowing the State's re-direct examination and rebuttal testimony.

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[12]Hamilton did not testify at trial,

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

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

Thus, the state cannot refer to a scar on the defendant's neck only for the purpose of insinuating that the defendant has a violent character. Von Carter v. State, 468 So. 2d 276,279 (Fla. 1st DCA 1985). Nor can a co-defendant tell the jury that the defendant threatened to kill him if the former went to the police. Fasenmever v. State, 383 So. 2d 706, 708 (Fla. 1st DCA 1980). Unless the defendant introduces the issue of his good character or makes that trait an issue, the state cannot produce evidence of it or comment about it. Jordon v. State, 107 Fla. 333, 144 So. 669 (1932).

While Hamilton can argue that his cross-examination of Agent Kinsey or the testimony presented during his case never introduced his character for truthfulness, the stronger position comes from the way in which the state proved it. The prosecutor could impugn it only by presenting evidence of his reputation as a liar generally. Section 90.405(1) Fla. Stats. (1994). A court errs when it allows the prosecution to elicit, as it did here, testimony that the Defendant had lied on specific occasions See, Dupont v. State, 556 So. 2d 457,458 (Fla. 4th DCA 1990).

This attack played a large part of the State's closing argument, Hamilton lied about almost every detail of the murder (T 1939-41). He did so to minimize his guilt and "put all the blame on his accomplice, Mr. Wainwright." (T 1939) The "lie" about where the stolen gun was thrown away became a strong anchor in its attack on Hamilton's character.

> And what is the reason for lying about that fact? If the police believed it, and then they find out that Hamilton was one of the ones that pulled the trigger, then it doesn't make any difference, because she's already dead. It minimizes his guilt. But it's a lie.
>
> He lied about where the gun was. He had them looking for the gun in Colquitt, Georgia, right over near the Alabama/Georgia line. The gun was near Quitman, seventy some odd miles away. Why would he lead them that far a distance to show them where the gun was? He didn't want them to find it. Now, why didn't he want them to find it? Because if they found it soon enough, it would be in shape to be able to lift fingerprints off of it, to prove that he pulled the trigger.

(T 1941).

Thus, in order to reduce the effectiveness of Hamilton's defense that Wainwright killed Mrs Gayheart after he had withdrawn any intention to do so, it attacked the defendant's character with specific "evidence" that he had lied about where the gun was discarded and his involvement in the killing. Such an attack would have been significantly less effective had the jury not known that Hamilton "lied." 'The court's error, therefore, in letting the prosecutor ask Agent Kinsey questions about specific

instances of the Defendant "lying" cannot be harmless beyond all reasonable doubt.

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

ISSUE IV

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY, AS REQUESTED, ON THE DEFENSE THAT HAMILTON WITHDREW FROM THE PLAN TO MURDER MRS. GAYHEART, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

During the charge conference at the end of the guilt phase of Hamilton's trial, the Defendant requested the court instruct the jury on the defense of withdrawal. In support of that request, he provided two instructions from which the court could choose to use in providing guidance to the jury on this issue (R 3870-74).

The State objected to this request, arguing that in "Smith v. State, 424 So. 2d 726 [Fla. 1983], the Supreme Court of Florida invented a defense, They recognize the, quote. "common law defense of withdrawal," close quote. And they cite as authority for that Hortons's Criminal Law and 40 CJS Homicide Section 9. We all know the citation for CJS is the last resort of an advocate who doesn't have a case on point." (T 1906- 1907) He also criticized this court for "engag[ing] in some inadequate analysis on the issue of withdrawal," (T 1909)

It presented lower appellate court cases "supporting" this position, but it particularly relied on what it claimed was this court's decision in Miller v. State, 503 So. 2d 929 (Fla. 3d DCA 1987) that approved a trial court's refusal to give a withdrawal instruction, "saying basically that actions speak louder than words." (T 1908).

Hamilton responded by noting that "Smith is still good law." (T 1914) In response to the State's claim that court's have rejected the defense of withdrawal on appeal, he said, "Judge, that may be because the Court has given the instruction when there's evidence to support it. Mr. Dekle [the prosecutor] can turn the volume up to a hundred and fifty decibels, but that doesn't make him right. In the Smith case that I cited, withdrawal is a defense, and if you've got evidence to support it. it has to be given." (T 1918)

The court granted the prosecutor's objection and refused to give the jury any instruction on the defense of withdrawal (T 1922-23). During its closing argument, the state argued against any such defense, despite an objection, and a renewed request for the jury instruction (T 2002-2006). The court denied that protest, ruling that the prosecutor had merely made a fair comment on the evidence (T 2015). The court erred first in refusing to give Hamilton's requested instruction, and it aggravated that mistake by allowing the state to comment on the Defendant's failure to withdraw from the murder.

As Hamilton argued, a court should instruct the jury on the Defendant's theory of' defense if he has presented any evidence to support it. Hooper v. State, 476 So. 2d 1253 (Fla. 1985); Smith v. State, 424 So. 2d 726 (Fla. 1983). Applying that well settled law to this case, if Hamilton presented any evidence on the defense of withdrawal the court should have instructed the jury on it. Smith, at 732.

This court has recognized this defense. Smith,

> To establish the common-law defense of withdrawal from the crime of premeditated murder, a defendant must show that he abandoned and renounced his intention to kill the victim and that he clearly communicated his renunciation to his accomplices in sufficient tie for them to consider abandoning the criminal plan, . . . For a defendant whose liability is predicated upon the felony murder theory, the required showing is the same and the defense is available even after the underlying felony or felonies have been completed. Again the defendant would have to show renunciation of the impending murder and communication of his renunciation to his co-felons in sufficient time to allow them to consider refraining from the homicide.

Id. at 732.[13]

The question presented in this issue is whether there was "any evidence" Hamilton had withdrawn from the plan to kill Mrs. Gayheart. If so, the court should have instructed

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[13] Contrary to the State's argument, none of the cases it cited questioned this court's ruling in Smith. In Nerev v. State, 585 So. 2d 427 (Fla. 3d DCA 1991), the trial court gave an instruction on withdrawal. Nerey complained that it was not the one he wanted. In Andrade v. State 564 So. 238 (Fla. 3d DCA 1990), the instruction given on the withdrawal defense'explained the law. In addition, the Defendant had presented insufficient evidence justifying giving it.

In Etheridae v. State, 4 15 So. 2d 864 (Fla. 2d DCA 1982) and State v. Bauman, 425 So. 2d 32 (Fla. 4th DCA 1982), the courts focussed on whether a Defendant can withdraw from a conspiracy after an agreement has been reached. The Etheridae court said no, while the Fourth District reached the opposite conclusion.

Even Miller, which the State erroneously believed had come from this court, provides little support for its position, In that case, the only evidence justifying an instruction on withdrawal came from a single self-serving statement by the Defendant. His extensive involvement in the burglary/murder/attempted robbery, which occurred after his statement, however, belied any intention to withdraw from those offenses. The Third District never questioned the legitimacy of this court's conclusion in Smith that withdrawal was a defense. It merely said that the Defendant in the former case had presented insufficient evidence to support giving the jury specific guidance it.

the jury on the defense. Of course, the evidence justifying the instruction may have been weak or contradicted, but that does not matter. When determining if the trial judge should have given the requested defense instruction, the reviewing court should view the evidence in the light most favorable to giving the instruction. See, Campbell v. State, 577 So. 2d 932, 935 (Fla. 1991); Smith v. State, 424 So. 2d 726, 732 (Fla. 1982) ("A defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instruction.")

What evidence, then, supported giving the defense requested instruction? During the State's case in chief, the prosecution called Russ Williams, an investigator with the Columbia County Sheriffs Office. He had questioned Hamilton while he was in a Mississippi hospital recovering from his injuries. In a taped statement that was played at trial, Hamilton said: ". . , you know, both of us raped the girl, and, you know, and started talking about she had seen our face and, ah, bla, bla, bla, and he said he was going to have to kill her. I just wanted to let the girl go, you know. . ." (T 639) Ah you know, on the way there, she just kept saying, you know, 'What are ya'll going to do'?' I said. 'Well you know, we just want the car.' And, ah, you know, she just wanted to pick up her kids. And I told her, you know we're just going to get the car and, you know, we're going to let her go, and she could, you know, be able to do that." (T 640-4 1)

Robert Kinsey, an agent with the Florida Department of Law Enforcement, interrogated Hamilton at the Columbia County jail, and what the latter told him was also

introduced at trial as part of the prosecution's case. This witness said Mrs. Gayheart "asked why they were doing that, and [Hamilton] indicated that they need a vehicle." (T 907)

As part of the Defendant's case, Hamilton called Dennis Givens, an inmate at the Taylor County jail, who had met Wainwright while both were housed there. Wainwright told him that he had told "Hamilton to get the gun, Hamilton wouldn't get the gun. He got it. . . . He said Hamilton was a pussy. Because he didn't kill the girl." (T 1771). Another defense witness and jail inmate, William Bispham, related that Wainwright told him "they didn't know what to do with the body. Mr. Hamilton wanted to let her go, but he said my crime--he called Mr. Hamilton my crime partner, you know, he said let her go, but he said I wasn't that f' g dumb, He said I wasn't going to let her go." (T 1787) In response to a question about Hamilton being in favor of killing Gayheart, Bispham said Wainwright told him the Defendant was "against killing her." (T 1789)

Finally, Mallory Daniels, a Deputy Sheriff for Hamilton County, testified for the State on rebuttal, and in response to a question by the prosecution, he told the jury that "'Hamilton told Gayheart several times they were not going to kill her and were going to let her go." (T 1822)

These several statements coming from prosecution and defense witnesses and some repeating what Wainwright (not Hamilton) had said, provided enough proof to justify a withdrawal instruction. Using that testimony, Hamilton "abandoned and

renounced" his intention to kill Mrs. Gayheart. Indeed, this evidence shows he never entertained the idea of killing her. Additionally, Wainwright knew that the Defendant had no intention to kill her or even help in her murder (T 1005). Thus, while there may have been evidence contradicting Hamilton's defense of withdrawal, he presented "any evidence" so that the court should have read the jury a withdrawal instruction.

If Hamilton failed to provide enough proof of his intent, the State, in its closing argument, provided a reason for the court to have read the instruction. During its final closing, the prosecution repeatedly argued that Hamilton should have done something to stop the murder if he had no intention to kill her. More than that, he argued, he had a duty to do so. "By bringing her to the point of death, you know, he assumed a little bit of the responsibility, assuming what he says is true." (T 2002)

Hamilton immediately objected, noting particularly that the trial judge had refused to instruct the jury on the withdrawal defense (T 2003). The Prosecutor then made an admission contrary to its earlier position that withdrawal was not a defense: "I think if there is such a defense as withdrawal, that that is his exact duty put on the defendant to avail himself. . . ." (T 2003). Hamilton noted the inconsistency, "Judge, the Court has refused to give that [instruction on withdrawal]. . . . "(T 2003) Undaunted, the State continued to maintain its inconsistency. "If he wants to absolve himself of first degree murder, he better do something to prevent the killing." (T 2004) The court denied the Defendant's motion for mistrial, refused to give any curative instruction, and asked the

State to "soft-pedal that issue" and proceed on the "felony murder rule." (T 2004-2005)

Disregarding the court's admonition to "soft-pedal" the issue, the State roared ahead, and immediately after the judge denied Hamilton's objections and request for a mistrial the prosecutor emphasized the point, "If he did not want her to die, he could have stopped her dying." (T 2006). Hamilton objected again. The court made the "same ruling." (T 2006)[14] With its blessing the State then proceeded to demolish Hamilton's non allowed defense of withdrawal (T 2006-20 10).

In Hooper v. State, 476 So. 2d 1253 (Fla. 1985), the defendant requested a voluntary intoxication instruction. This court approved the lower court's refusal to provide that guidance, but Justice Overton, dissenting on that point, said, "Although the defendant did not assert intoxication as his primary defense, it was clearly the principal theory of the prosecutor, who argued to the jury that the defendant "did these acts in an intoxicated rage." Id. at 1261. (Emphasis in opinion.)

The prosecution raised the issue of withdrawal in its closing argument. If Hamilton presented insufficient evidence to meet the "any evidence" standard then the court should have prevented the State from repeatedly whipping the Defendant with the argument he had not withdrawn from Wainwright's intent to kill Mrs. Gayheart.

In short, the court had several reasons to justify giving the instruction, and the

[14] Hamilton argued Wainwright committed the murder, and he had opposed the victim's murder (T 1974, 1990).

State only bolstered that conclusion by its repeated argument that Hamilton never withdrew from the plan to kill the victim.

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

ISSUE V

THE COURT ERRED IN OVERRULING SEVERAL OF HAMILTON'S OBJECTIONS TO THE PROSECUTOR'S CLOSING ARGUMENT, WHICH WAS DESIGNED TO ELICIT SYMPATHY FOR THE VICTIM, A VIOLATION OF THIS DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

At the beginning of the State's initial closing argument in the guilt phase of the trial, it said the following:

> She was kidnaped, raped, murdered. And her only crime was to stop off at the store to pick up dog food and pizza. For this sin, she lost everything. She lost her car, her clothing, her dignity, and her life. The loss that concerned her the most, the loss that tormented her mind as her captors tormented her body, was the loss of her children, In those final moments of her life, that was what she talked about was her children.
>
> MR. HUNT [Defense counsel]: . . . [T]he argument that he's making is improper argument and it's designed to appeal to the emotions and prejudices of the jury and bias to my client by directing himself to the sympathy aspect of the case. that she was a mother, that she was concerned about her children.
> . . .
>
> MR. DEKLE [Prosecutor]: It goes to the issue of premeditation. She begged and plead for her life, and she said, '"Do anything you want to me, but let me please go back to my children."
>
> THE COURT: I'll allow reasonable comments on that. You're about through?
>
> MR. DEKLE: Yes, sir.

Resuming its argument, the state re-emphasized the objected to comment:

> MR. DEKLE: "Do anything you want to me," she said, "'just let me go back to my children." And what was the response of her captors? They promised her release falsely, to abuse her sexually, to kill her and throw her body away like so much garbage.

(T 1936-37).

After Hamilton had presented his closing argument, the state had its final say, and during it, it told the jury two things, which the Defendant objected to:

> By bringing her to the point of death, you know, he assumed a little bit of the responsibility, assuming what he says is true. There was a 30-30 there, There was a .16 gauge shotgun there. If he wanted--
>
> MR. HUNT: I have an objection and I'd like to be heard at the bench.. . . Judge, Mr. Dekle argued to the jury that the Defendant has affirmative duties to take actions to prevent the killing in this case. That's not the law, It is an unfair comment on the evidence. It is an implication that the law requires that the defendant actually and physically prevent the killing in this case. That's not the law. . . . the Court has refused erroneously in my view giving the instruction on withdrawal. To compound that error to allow the State to argue that the defendant had the duty not only to withdraw, but also to go forward and prevent the killing, is wrong.

(T 2002).

The state responded by noting that if withdrawal existed as a defense (which he had successfully argued there was not, See ISSUE IV), he had that duty. Hamilton's counsel disagreed that he had any "duty to prevent the killing." (T 2003-2004)

The court allowed the argument as a "fair comment on the evidence," refusing any

curative instruction as well as denying the Defendant's motion for mistrial (T 2005 2006).

A few minutes later, the prosecutor told the jury:

> [Hamilton] shot at John Leggett because at that time Wainwright happened to be driving and he couldn't shoot. And in the final analysis that probably dictated who shot Carmen Gayheart that first time.

(T 2012).

Hamilton's lawyer objected because the court had admitted the evidence of the Mississippi shootout "to show that the defendant fled the scene of the offense, and evidence of his flight is something that he was guilty, or is guilt of charges here in Florida. The State should not be allowed, , , .to argue that in fact the evidence as to collateral crimes is an indication of the character of the defendant and his propensity to commit crimes. . . .[T]his shows the character of the defendant." (T 2013-14)

The state responded that "It is relevant, material and admissible on the issue of premeditation." (T 2014). The court denied Hamilton's motion for mistrial and refused to give a curative instruction.

Then, as part of its penalty phase closing argument, the prosecutor continued to build its case for sympathy for the victim:

> And, you know, it occurred to me that someone else argued a mitigating circumstance very similar to that back on April the 27th, when Carmen Gayheart was kidnapped, and she said, "Please don't kill me, I'm a wife and I'm a mother."

(T 2119).

Hamilton's lawyer objected (T 2119), and in response, the State said it was a fair comment, and "The next thing I plan to say is Mr. Hamilton found that an insufficient mitigating circumstance to spare the life of Carmen Gayheart.

Defense counsel objected to that, and the court agreed (T 2120), gave a curative instruction, but refused the motion for mistrial (T 2 12 1).

The court erred in denying the Defendant's several objections, and when considered in the aggregate they become so serious to require a new trial, or a new penalty phase hearing.

The law in this area is simple, and its application straight forward. Closing argument should assist the jury in analyzing and applying the evidence presented at trial. United States v. Door, 636 F. 2d 117, 120 (5th Cir. 1981) It "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). Such argument exceeds the "wide attitude" this court has granted trial judges in monitoring summations, Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982), as it diverts the jury's attention from an objective evaluation of the evidence and encourages an inflamed, passionate decision. When the argument becomes "so prejudicial as to vitiate the entire trial" the trial court should order a new trial. If it does not, a reviewing court must do so. Cobb v. Stats;, 376 So. 2d 230,232 (Fla. 1979).

Comments invoking memories of children and family naturally and properly involve our deepest and most profound feelings, and it is because those arguments so easily arouse our passions that appellate courts have regularly reviewed but only infrequently reversed cases in which the prosecutor has used them to win a conviction. By themselves, most offensive comments just do not seem to justify the expense and effort of retrying a defendant. Some cases will illustrate how this and other appellate courts in this state treat improper comments involving children and the family.

In Johnson v. State, 442 So. 2d 185 (Fla. 1983) the prosecutor said, as part of' his closing argument, " Another family, perhaps you haven't become closely associated with, that is the [victim's] family, will be facing this holiday season one short." This court condemned that obvious play for sympathy but it refused to reverse because the state made only one objectionable comment and that in response to the testimony of the Defendant during the sentencing phase of a capital trial.

In Watts v. State, 593 So. 2d, 203 (Fla. 1992), another capital case, the prosecutor told the jury, "We are here today because Glenda Juardo's [the victim's] life will never be the same." (Watts had killed her husband.) Although this court agreed that this isolated comment was irrelevant in determining the Defendant's guilt, and only served to "improperly inflame the jury's emotions, " it nevertheless affirmed his conviction because there was "no reasonable possibility that the comment affected the verdict." Id. at 203.

Similarly, in Williams v. State, 544 So. 2d 1114 (Fla. 3d DCA 1989), the single

reference to the "tears of the victim's parents," although improper, failed to sufficiently impress the Third District that Williams should get a new trial.

Other comments, however, prompted that court to order a new trial. In Edwards v. State, 428 So. 2d 357, 359 (Fla. 3d DCA 1983) the prosecutor made a calculated appeal to the juror's sympathy when he told them "I ask you for justice both on behalf of myself and the people of the State of Florida, also on behalf of the [victim's] wife and children." The lower court not only should have sustained Edwards' objection to that argument, it should also have "affirmatively rebuke/d] the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments." Id.

In Harper v. State, 411 So. 2d 235 (Fla. 3d DCA 1982), the court condemned the prosecutor telling the jury that "[Harper] is sorry and so is the [victim's] wife and three children. They are sorry too."

In this case, the state said that Mrs. Gayheart's pleas for her children moments before her death reflected on the Defendant's premeditation. First, she made those comments while traveling in the truck (T 641, 907), not immediately before her death. Second, the State's justification, that Mrs. Gayheart's pleas showed Hamilton's intent, proves the Defendant's point. That is, following the prosecutor's logic, Hamilton must have intended to kill Mrs. Gayheart because he showed no sympathy for her when she pled to see her children again. Yet, whatever weak logic or relevance that may have had certainly paled into insignificance by the tremendous emotional message also given to the

jury: that they should show the children the sympathy Hamilton refused to and find him guilty. That plea had no legitimate pertinence to this case, and the court erred in allowing the state to make it repeatedly.

Whatever relevance it lacked in the guilt phase also infected the penalty portion of Hamilton's trial. Making the error more pervasive, the State re-emphasized that Gayheart was a wife and mother in its penalty phase argument (T 2119). Such comments could only have inflamed the jury, and converted the victim impact nature of those facts into unenumerated and emotional aggravating factors.

Of course, the State can argue, as it is has successfully done in other cases, that whatever error occurred was harmless. This court agreed with that approach in Johnson, mentioned above. There, however, Johnson himself had first raised the sympathy issue during the penalty phase of his capital trial, The state's comment, therefore, amounted to little more than a fair response. Whitfield v. State, 479 So. 2d 208, 216 (Fla. 1985).

Here, some of the prosecutor's comment came at the beginning of his guilt phase closing. Hamilton never asked the jury for sympathy, so the state has no "fair reply" excuse to justify the call for sympathy.

Similarly, its reminder that Gayheart's call for "mitigation" at the time of her death because she was a wife and mother (T 2119) during the State's closing penalty phase argument never was prompted by an analogous plea for mercy for Hamilton.

Moreover, as other issues illustrate, the State had infected the trial with an unfair

emotional pitch when it had Mrs. Hosford testify that Mrs. Gayheart failed to pick up her children the day she was killed. Its other witnesses said the Defendant had murdered others, and that he had helped strangle the victim in this case, (ISSUES I-III.)

In that context, then, the comments become more outrageous because the state had introduced evidence during its case that naturally would have angered the jury, and it played on that understandable emotion by reminding them of Mrs. Gayheart's children in closing, See, Crump v. State, 622 So. 2d 963, 972 (Fla. 1993).

That the reminder came at the beginning of the closing also set the tone for the rest of the state's closing argument in both the guilt and penalty phase portions of the trial. The powerful emotions, once let loose, could be controlled only with difficulty. Thus, however tame and unemotional the rest of the state's arguments may have been, Davis v. State, 604 So. 2d 794, 797 (Fla. 1992), they created the foundation for the rest of what the prosecutor had to say. More significantly, it put the jury in a distinctly and unfairly hostile mood when Hamilton's counsel stood to make his sole closing statement.

If the prosecutor's sympathy ploy, however, does not convince this court that Hamilton should get a new trial, consider the other mentioned comments it made in its closing arguments. First, that because Hamilton shot officer Leggett two days after the murder of Gayheart, "in the final analysis that probably dictated who shot Carmen Gayheart the first time." (T 2012) Huh? What happened two days after the murder "dictated" the earlier homicide? Hardly. This comment had relevance only to remind the

jury of the Defendant's bad character, an impermissible reason for admitting the evidence at trial, and one just as bad to comment on in closing argument.

This case, then, becomes one of those rare ones this court must reverse because of the cumulative, prejudicial error created by the State during its closing argument in the guilt and penalty phase portions of Hamilton's trial. That it developed and aggravated its emotional theme when it presented its case only further justifies the conclusion that the error here must result in a new trial for this Defendant.

ISSUE VI

THE COURT ERRED IN ADMITTING THE TESTIMONY THAT MRS. GAYHEART HABITUALLY PICKED HER CHILDREN UP FROM A DAY CARE CENTER, BUT ON APRIL 27, 1994 SHE DID NOT, A VIOLATION OF HAMILTON'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The state called Ms. Carolyn Hosford, the owner/operator of County Kids Day Care to testify that Mrs. Gayheart's children had stayed with her. In addition "She[Mrs. Gayheart] would drop them off usually at the normal time, 8:00, 8:30, and she would pick them up after they had lunch, which would be between 12:00 and 12:30." (T393-94). On April 27th, however, she never picked them up, and not until about five p.m. did her husband and aunt get the children (T 934). Defense counsel objected to what she had to say, arguing that the evidence first was irrelevant (T 390), and second, it only created sympathy for the victim and her family (T 391).

The prosecutor said, "I intend for this witness to be very brief. . . . . But the fact that she was expecting her there at 12:30 as her custom was, to be very prompt and punctual. Her testimony about expecting her at 12:30 corroborates the last witness, and it establishes the time of this crime, and we think it is relevant." (T 391) The court admitted the evidence because "'it will be more probative than inflammatory." (T 391) It erred, however, in letting her mention anything about Gayheart's "customary practices."

Section 90.406 Fla. Stats. (1994) comes as close as any statutory law to addressing

the problems presented by this issue.

> Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice."

People, however, do not have "routine practices." They have habits, so strictly, that section has no applicability to the problems presented here. Professor Erhardt, however, believes differently. Erhardt, Florida Evidence, Section 406.1 (1995 edition). Evidence of a person's habit tends to show that what a person did habitually he probably did in a specific instance, Significantly, Florida courts have allowed such evidence when it corroborates the event. State v. Wadsworth, 210 So. 2d 4, 6 (Fla. 1986) (Evidence of alcoholism can corroborate that the defendant was drunk on the day in question. It cannot, however, by itself establish that fact); North Broward Hospital District v. Johnson, 538 So. 2d 871 (Fla. 4th DCA 1989). That is, habit evidence, by itself, cannot prove the event, it can only support other proof establishing it.

That is important for this case because the state used Mrs. Gayheart's habit, not to prove that on April 27th she acted as she normally did, but to show that she did not, The state would have had a stronger case if it had wanted to prove that on that day she had

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[15] Section 90.404 Fla. Stats. (1994) declares that "Character evidence is generally inadmissible to prove what action a person took.", Hedges v. Stag, 667 So. 2d 420 (Fla. 1 st DCA 1996). If habit amounts to character evidence, that section would prevent the court from admitting it in this case.

picked up her children, as was her habit. Instead it sought to prove a negative: something was wrong because she failed to do so, which was contrary to her habit.

Thus, the evidence that she had two children in day care had relevance only to create sympathy for the victim, an obviously impermissible justification for admitting what Ms. Hosford had to say.

Additionally, in the penalty phase portion of the trial, the evidence that Mrs Gayheart had two young children would have been inadmissible to prove any of the aggravators. Moreover, the court would have excluded it as improper victim impact evidence under the strict admissibility requirements of Section 92 1.141(7) Fla. Stats. (1994). Thus, the error infected not only the reliability of the jury's guilty verdict but their death recommendation and the court's death sentence.

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

ISSUE VII

THE COURT ERRED IN ADMITTING SEVERAL STATEMENTS HAMILTON MADE TO THE POLICE BECAUSE THEY HAD NOT "SCRUPULOUSLY HONORED" HIS RIGHT TO REMAIN SILENT, A VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENTS RIGHTS, AND THOSE ACCORDED HIM UNDER ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

After his apprehension, Hamilton was taken to a local Mississippi hospital for treatment of the wound he had received. About a day later, several police officers tried to talk with him. They read him his Miranda rights, and he signed a form acknowledging that he knew what they were (T 2324). He refused, however, to sign the portion of the form the police used indicating he was willing to waive those rights (T 2252, 2325). Indeed, he told at least one of the officers he did not want to speak with them (T 2326).

He was taken from the hospital to the local jail so the police could let him have "a couple of hours to relax." (T 2329) Then, about four hours later (T 233 I), they approached him again, read him his rights, and this time his "demeanor changed totally from the atmosphere at the hospital to the jail. He was very cooperative." (T 2332) During the subsequent interrogation, Hamilton admitted participating in the robbery, kidnaping, and sexual battery of Carmen Gayheart. He also admitted being present when she was killed. (T 910- 11) He gave inculpatory statements to police officers on May 3, 1994, and to a polygrapher at some later date. In each instance, the police read him his

rights, and he acknowledged them and agreed to waive them (T 2273-74, 2304-2305).

Hamilton filed a motion to suppress the statements, alleging, among other things, that the law enforcement officers had failed to scrupulously honor his right to remain silent (R 353 1). The court, while acknowledging he had invoked his Fifth Amendment right not to talk to the police, ruled that he had freely and voluntarily done so later (T 239 1-92).

> On the second issue, on the waiver of the right to remain silent, the Court finds the Defendant Hamilton waived his right to remain silent after a sufficient lapse of time pursuant to the case law that has been cited and considered by the Court and a tape recorded statement. All three statements, the Court finds, were made freely and voluntarily after a waiver of rights and will allow those statements.

(T 2292-93).

The court erred in making that ruling because the police had not "scrupulously honored" Hamilton's right to remain silent, as required under the Fifth and Fourteenth Amendments to the United States Constitution.

The United States Supreme Court opinion in ~~Michigan v. Mosely,~~ 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 3 13 (1975) and this court's decision in ~~Traylor v. State,~~ 596 So. 2d 957 (Fla. 1992) control this case. In the former case, the police had arrested Mosely for committing several robberies. When they tried to question him about that offense, he invoked his right to remain silent. About two hours later, another officer brought the Defendant to another cell block in the jail, and after reading him his rights, questioned

him about a murder unrelated to the robberies. Within a short while he confessed to the homicide.

Affirming his subsequent conviction for the murder, the United States Supreme Court ruled that the admission could be used against him. "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off question" was "scrupulously honored." Mosley at 103 (Footnote omitted.) The facts of the case, which the court emphasized, however, helped define the limits of that ruling. Once Mosley had invoked his right to remain silent, Detective Cowie immediately ceased the interrogation and did not try either to resume the question or in any other way to persuade Mosely to reconsider his position. After an interval of more than two hours, Mosley was question by another police officer at another location about an unrelated holdup murder. He was given complete Miranda warnings at the outset of the second interrogation. Id. at 106.

The analysis, then, looks to the totality of the circumstances to determine if the police meticulously respected the Defendant's invocation of his right to be left alone, to cut off questioning. Hem-v v. State, 574 So. 2d 66, 69-70 (Fla. 1991). No single factor, even providing fresh Miranda warnings, by itself will save the results of questioning if the police otherwise failed to honor the Defendant's right to remain silent. Snradlcv v. State, 442 So. 2d 1039 (Fla. 2d DCA 1983).

In this case, the court ruled that they had respected that constitutional right, but it

used opinions that had depended heavily on only one factor: the interval between the questionings. State v. Chavis, 546 So. 2d 1094 (Fla. 5th DCA 1989) (90 minute interval); Scott v. State, 619 So. 2d 401 (Fla. 3d DCA 1993) (same); McNickles v. State, 505 So. 2d 633 (Fla. 4th DCA 1987 (45 minute delay). While the police may have waited four hours before reinitiating their interrogation (T 2331), other factors combine to show that they talked with Hamilton without any intention to respect his right to remain silent.

Unlike the scenario in Mosely, the same officers who questioned him in the hospital approached him once he had been removed to the local jail (T 2331).[16] Similarly, these policemen talked with him about the same crime, unlike what the new officer in Mosely had done. He was grilled in the jail, a more coercive location than the hospital. Indeed, there is a Kafka-esque quality to Captain Nydam's concern after Hamilton refused to talk with the police "to get him out of the hospital environment, let him have a couple of hours to relax at the Moorehaven jail." (T 2329) The police may have re-initiated their interrogation at a different location, but it was more coercive than the hospital.

Finally, unlike the Defendant in Mosely, the one here was recovering from surgery, and felt sick. "I had a head injury and , you know, the room was spinning, and I was coming off those drugs from the operation." (T 237 1-72). He was not fully alert as a result of his injuries and the surgery (T 2373).

[16] Also unlike the situation in Mosely, several officers(not one) questioned Hamilton.

Thus, it is evident the police never intended to "scrupulously honor" Hamilton's right to remain silent. Their "intentions were to let him go back to the jail in Brookhaven and interview him at the jail where the atmosphere was a little different that the hospital setting he was in." (T 2328) Within hours of surgery, they had whisked him away to their turf and they went at him again, free from any interference from nurses or doctors. There is no evidence other than the unavoidable time delay and a perfunctory reading of his rights, that the police "scrupulous honored" his already invoked right to remain silent. The taint of their refusal to respect Hamilton's rights to remain silent infected the subsequent confessions, even though the Defendant may have ostensibly waived his rights then. Kipp v. State, 668 So. 2d 214 (Fla. 2d DCA 1996). This court should reverse the trial court's judgment and sentence and remand for a new trial,

ISSUE VIII

THE COURT ERRED IN ADMITTING ANY STATEMENTS HAMILTON MADE THAT HE HAD SEXUALLY BATTERED MRS. GAYHEART BECAUSE THE STATE FAILED TO ESTABLISH THE CORPUS DELICTI FOR THAT OFFENSE, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Hamilton made several statements the he had sexually battered Mrs. Gayheart. The State, however, had the problem that it had no other evidence he had committed that crime. The Medical Examiner who examined the badly decomposed remains of the victim could not find any evidence of a sexual battery. Having failed to prove that offence with evidence other than what Hamilton said, the state could not introduce this defendant's statements that he had done so. The court erred in failing to exclude those confessions, and it compounded the error by denying his motion for a Judgment of Acquittal regarding the sexual battery allegation. The error became worse because the court used the subsequent sexual battery conviction in sentencing Hamilton to death. This court should reverse the trial court's judgment and sentence and remand for a new trial.

The law surrounding confessions and the corpus delicti is simple. "Proof of corpus delicti is a prerequisite for the admission of a confession." Stone v. State, 378 So. 2d 765 (Fla. 1979). Said another way, "An individual's confession to a crime is insufficient evidence of a criminal act where no independent evidence exists to substantiate the

occurrence of the crime." State v. Allen, 335 So, 2d 823 (Fla. 1976). This proof need only be circumstantial evidence, Id.,[17] but the state can carry its burden by showing "'substantial" evidence besides the Defendant's confession that every element of the charged offense occurred. Id. at 825.[18] It need not, however, show the Defendant committed the offense, only that it was done. Id. at 826; Buenoano v. State, 527 So. 2d 194, 197 (Fla. 1988); State v. Ochoa, 576 So. 2d 854, 859 (Fla. 3d DCA 1991).

Thus, considering the evidence other than Hamilton's confessions, did the State prove Mrs. Gayheart was sexually battered'? First, from the instructions on sexual battery with great force given the jury in this case, the state had to prove

1. The victim was 12 years of age or older.

2. The Defendant committed an act upon her in which his sexual organ penetrated or had union with the vagina of the victim.

3. During the process, he used or threatened to use a deadly weapon, or actually used force likely to cause serious personal injury.

4. The act was done without her consent.

(T 3971).

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[17]Unlike the law on proving guilt solely by circumstantial evidence, the rule governing corpus delicti provide that the state need not conclusively rebut every hypothesis inconsistent with guilt. Id. at 826.

"Said differently, the state must present a prima facie case someone committed the charged offense. Schwab v. State, 636 So. 2d 3, 6 (Fla. 1994); Frazier v. State, 107 So. 2d 16 (Fla. 1958).

The crucial element, at least for this issue, focuses on the second element, that of union or penetration of the victim's vagina with someone elses sexual organ. Hamilton concedes the state presented at least a prima facie case of the other three elements.

The state presented the following evidence to prove the corpus delicti for sexual battery:

1. Sperm or semen was found on the rear seat cover of the Ford Bronco (T 1406, 1530-34). Blood groups A and 0 were also found on the seat cover (T 1408). Gayheart had A blood type, and Hamilton and Wainwright had 0 type (T 1408).

2. Her DNA was also found on part of the seat cover, but it could not be determined what part of her body it had come from (T 1625).

3. Gayheart apparently had shorts on when killed because her body was found with them on (T 7 17).

4. The body was badly decomposed, and the medical examiner found no evidence of sperm in her vagina (T 875).

5. The body may have been disturbed by humans, and certainly by animals (T 813).

Such evidence showed only that Gayheart had been in her car, and that semen stains had gotten on a seat cover. It hardly shows any penetration or other sexual contact. with Gayheart.

In T.S. v. State, 65 1 So. 2d 1292 (Fla. 2d DCA 1995), the state charged TS with

having sexual intercourse with his sister. The only evidence (other than his confession) supporting that allegation came from his stepgrandfather and a medical doctor. The former once saw the defendant in a bedroom fully clothed and the victim wearing a dress and whose underwear was around her ankles. The doctor examined her a month later and found that her hymen was absent, evidence of penetration by some object.

Based on that evidence, the Second District reversed the conviction for lewd and lascivious acts. "T.S's step-grandfather did not see him having intercourse with his sister or committing any act at all. The doctor's testimony that the victim's hymen had been penetrated did not establish that another person was responsible for the injury. He also did not connect the physical damage he observed in February to the alleged incident on January 1, 1992." Id. at 1294.

Here, the evidence showed less than that in T.S.. The state presented no proof of any penetration, and the semen found on the seat cover was never connected to a sexual battery other than its presence in the car. There is no "substantial" evidence of any sexual battery. Said otherwise, the state failed to present a prima facie case that Mrs Gayheart was sexually battered.

If the State failed to prove the corpus delicti in the guilt phase, the deficiency also infected the penalty phase of the trial. The court found that Hamilton committed the murder to during the course of a robbery, sexual battery, and kidnaping as provided by Section 94 1.12 1 (5)(d) Fla. Stats (1994). It also used the sexual battery to justify finding

he killed Gayheart to avoid lawful arrest. Section 921.141(5)(e), and he did it in an especially heinous, atrocious, and cruel manner. Section 921.141(5)(h) Fla. Stats. (I 994).

Finally, as to the harmlessness, a large part of the State's case involved statements Hamilton made to the police, and significant portions of them dealt with the sexual assaults Hamilton made on Gayheart. It is hard to believe, that as detestable as that offense is, that it had no impact on the jury's deliberation in the guilt phase. Similarly, it must have infected their penalty phase deliberations. This court cannot say with easy confidence that Hamilton's statements about the sexual battery would have had no impact on the results in either the guilt or penalty phase portions of the Defendant's trial. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

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

ISSUE IX

THE COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR USING THE REVISED JURY INSTRUCTION ADOPTED BY THIS COURT, IN VIOLATION OF HAMILTON'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Before trial, Hamilton filed a motion objecting to the "old" standard jury instruction on the cold, calculated, and premeditated aggravating factor ('I' 3913-28).[19] He argued that it was unconstitutionally vague. The court refused (T 2060), and that was error because the revised guidance on that aggravator still lacks the precision required to pass constitutional muster.

The jury instruction on CCP was vague and imprecise in that it failed to adequately define heightened premeditation to this resentencing jury, which never had the benefit of being told what premeditation means under Florida law.

The trial court gave the standard jury instruction for cold, calculated, and premeditated murder, section 921.141(5)(I), Florida Statutes (1987), as set forth in Jackson v. State, 648 So. 2d 85, 89 n.8 (Fla. 1994). The instruction read:

> THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. IN ORDER FOR YOU TO CONSIDER

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[19] "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."

> THIS AGGRAVATING FACTOR, YOU MUST FIND THE MURDER WAS COLD, AND CALCULATED, AND PREMEDITATED, AND THAT THERE WAS NO PRETENSE OF MORAL OR LEGAL JUSTIFICATION. "COLD" MEANS THE MURDER WAS THE PRODUCT OF CALM AND COOL REFLECTION. "CALCULATED" MEANS THE DEFENDANT HAD A CAREFUL PLAN OR PREARRANGED DESIGN TO COMMIT THE MURDER. "PREMEDITATED" MEANS THAT THE DEFENDANT EXHIBITED A HIGHER DEGREE OF PREMEDITATION THAN THAT WHICH IS NORMALLY REQUIRED IN A PREMEDITATED MURDER, A "PRETENSE OF MORAL OR LEGAL JUSTIFICATION" IS ANY CLAIM OF JUSTIFICATION OR EXCUSE THAT, THOUGH INSUFFICIENT TO REDUCE THE DEGREE OF HOMICIDE, NEVERTHELESS REFLECTS THE OTHERWISE COLD AND CALCULATING NATURE OF THE HOMICIDE.

(T 2 14 1) (underscoring supplied). This instruction was unconstitutionally vague and over broad. Jackson defined "calculated" in the standard instruction to be a careful plan or prearranged design to commit the murder, "Premeditated," i.e., "heightened premeditation," cannot mean the same thing as "calculated," for each part of the statute has to have independent meaning and significance; otherwise the language is pure surplusage, which at the very least renders the instruction confusing. But if "heightened premeditation" is not a prearranged design, what is it? The standard instruction does nothing to enable reasonable jurors to understand that each element has a separate, distinct meaning, whatever their respective meanings may be.

Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1980)

illustrates precisely why the premeditation portion of this instruction fails constitutional muster. Maynard rejected the state's contention that the word "especially" in the Oklahoma instruction of "especially heinous, atrocious, or cruel" cured the vagueness and overbreadth problems because

> To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." Godfrey [v. Georgia], 446 U.S. 420, 428-29, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)]. Likewise, in Godfrey the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

Maynard, 486 U.S. at 364. Just as adding "especially" could not cure the vagueness of the words in the Oklahoma instruction, the present instruction describing "premeditation" as "a higher degree of premeditation than that which is normally required in a premeditated murder" does not sufficiently clarify and narrow the vague, over broad, and undefined term in the CCP instruction given here.

This Court apparently recognized some of the inadequacies of the Jackson instruction's definition of premeditation and attempted a cure in a newly revised instruction. Standard Jury Instructions in Criminal Cases (95-2), 665 So. 2d 212 (Fla. 1995).[20] The instruction given was inadequate both as a matter of statutory construction

[20] Standard Jury Instructions in Criminal Cases (95-2), 665 So. 2d 212 (Fla.1995), defined heightened premeditation as:

and pursuant to constitutional requirements of due process and cruel and/or unusual punishment.

CCP was an issue at trial (T 2114-16, 2 129) , rendering the erroneous instruction of significance. Defense counsel pre-trial contested the standard instruction, (T 39 13-28) and at the charge conference, the court denied his objection and gave the Jackson CCP instruction. (T 2 142-43). Giving that guidance was error,

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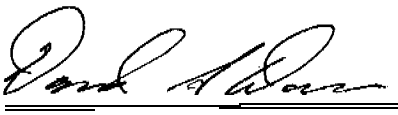
> [As I have previously defined for you] a killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

CONCLUSION

Based on the arguments presented here, the Appellant, Richard Hamilton, respectfully asks this honorable court to reverse the trial court's judgment and sentence and remand for a new trial or reverse the trial court's sentence of death and remand for a new sentencing hearing.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell., Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, RICHARD EUGENE HAMILTON, #123846, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 22 day of October, 1996.

DAVID A. DAVIS