**IN THE SUPREME COURT OF FLORIDA**



WARFIELD RAYMOND WIKE, :

Appellant, :

v. : CASE NO. 86,537

STATE OF FLORIDA, :

Appellee. :

_____/

ON APPEAL FROM THE CIRCUIT COURT,
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

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**IN THE SUPREME COURT OF FLORIDA**

WARFIELD RAYMOND WIKE, JR.,

Appellant,

vs. CASE NO 86,537

STATE OF FLORIDA,

Appellee.

_____/

# INITIAL BRIEF OF APPELLANT

## PRELIMINARY STATEMENT

This is the direct appeal of a resentencing proceeding in which the First Judicial Circuit Court in and for Santa Rosa County, Florida, imposed the sentence of death on appellant Warfield Raymond Wike, Jr., for the crime of first-degree murder in the death of Sara Rivazfar. The Record on Appeal consists of ten volumes: four of record and six of transcript. References to the record shall be made as "R", and references to the transcript shall be made as "T".

## STATEMENT OF THE CASE

Mr. Wike was charged by indictment with first-degree premeditated/felony murder of Sara Rivazfar, kidnapping of Sara Rivazfar, kidnapping of Sayeh Rivazfar, capital sexual battery of Sayeh Rivazfar, attempted first-degree premeditated/felony murder of Sayeh Rivazfar. The crimes were alleged to have occurred on

or about September 22, 1988. R29-32. The trial court entered judgments of guilt as to all charges. Mr. Wike received the death sentence for the murder, and concurrent sentences of life imprisonment for sexual battery, 22 years' imprisonment for kidnapping, and 22 years' imprisonment for attempted first-degree murder. The convictions and prison sentences were affirmed on direct appeal, but the death sentence was reversed and remanded for resentencing before a new jury. Wike v. State, 596 So. 2d 1020 (Fla. 1992). On remand, the trial court reimposed the sentence of death, but this Court reversed and remanded for resentencing before a new jury panel. R1-28; Wike v. State, 648 So. 2d 683 (Fla. 1994).

The second resentencing, which is the subject of this appeal, took place before the Honorable Paul A. Rasmussen. Jury proceedings were held August 14-18, 1995. The jury returned a 12-0 recommendation of death on August 18, 1995. R482; T1149-53. The court entered a judgment of guilt, R538-39,[1] and imposed the death sentence on September 18, 1995. R500-13, 705-37.

In his sentencing order, the judge found four aggravating circumstances: (1) prior capital or violent felony conviction based on a Pennsylvania robbery conviction in 1974, and the attempted murder, kidnapping, and sexual battery of Sayeh ("prior

[1] The judgment was erroneously entered given that the original judgment was affirmed and only the sentence was reversed. Accordingly, this Court should vacate the judgment entered on September 18, 1995, as a nullity. Rhodes v. State, 638 So. 2d 920, 927 (Fla.), cert. denied, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

violent felony"), R503, 718-19;[2] (2) committed for the purpose of avoiding or preventing lawful arrest ("avoid lawful arrest"), R503-05, 719-21;[3] (3) heinous, atrocious, or cruel ("HAC"), R505-06, 721-23;[4] and (4) cold, calculated, and premeditated ("CCP"), R506-07, 721-23.[5]

As to statutory mitigation, the judge expressly rejected extreme emotional or mental disturbance, R507-08, 725-26;[6] and that Mr. Wike's capacity to conform his conduct to the requirements of law was substantially impaired, R508, 726-27.[7] The judge may or may not have found age mitigation, giving his age of 32 "little if any weight," R508-09, 727-28. The judge may or may not have found age mitigation, giving his age of 32 "little if any weight," R508-09, 727-28.[8]

As to nonstatutory mitigation, the judge found the following mitigators: (1) Mr. Wike's deprived and traumatic childhood is entitled to little weight (factor includes his mental and/or emotional disturbance at an early age that went untreated; the emotional instability of his family during developmental years; he never felt a part of family and was deprived of family

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[2] § 921.141(5)(b), Fla. Stat. (1987).

[3] Id. § 921.141(5)(e).

[4] Id. § 921.141(5)(h).

[5] Id. § 921.141(5)(i).

[6] Id. § 921.141(6)(b).

[7] Id. § 921.141(6)(f).

[8] Id. § 921.141(6)(g).

nurturing; and he had a close personal relationship with his father whose sudden death when Mr. Wike was ten years old caused him emotional disturbance), R510-11, 730-31; (2) his history of alcohol and drug abuse is entitled to some weight, R511, 731-32; (3) being under the influence of alcohol at the time of the crime, although not corroborated, is entitled to little weight, R511, 731-32; (4) Mr. Wike maintained gainful employment prior to the crime, giving it little weight, R511, 732; (5) the current sentence of life imprisonment with a 25-year minimum mandatory before parole eligibility, combined with the court's authority to impose another such sentence consecutively, is entitled to some weight, R511-12, 732; (6) Mr. Wike's health problems are entitled to little weight, R512, 733; and (7) Mr. Wike's steadfastly maintaining his innocence is entitled to little weight in view of the conviction and evidence, R512, 733. The judge gave "little, if any weight" to Mr. Wike's mental and/or emotional disturbance developed as the result of his father's death and continuing through the date of the crime, or that he has led a troubled and emotionally unstable life in recent years, R511, 731. The judge also gave "little or no weight" to the fact that Mr. Wike has adapted well to prison life and can most likely continue to make a satisfactory adjustment to that life, finding his likelihood of future dangerousness to be "speculative at best," R512, 732-33.[9]

A timely notice of appeal was filed on September 26, 1995. R543.

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[9] A copy of the written sentencing order is attached in the Appendix to this brief at pp. A1-14.

## STATEMENT OF THE FACTS

Sayeh Rivazfar, eight years old at the time of the offenses, and her sister Sara Rivazfar, six years old at the time, were carried out of their Pensacola home and into a car at night by the appellant, a friend of their mother. T689-91. They drove off on a paved road and eventually turned onto a dirt road. When they stopped, the girls got out, relieved themselves, and reentered the car. T691-93. The appellant bound Sara's hands and legs. He took Sayeh out behind the car, took off her pants and underwear, and placed her on the trunk. He then pushed his penis into her vagina, injuring her and causing her to bleed. T693-96. Afterward, he dressed Sayeh, changed his own clothes, and placed Sayeh back in the car. T695-97.

They made contact with the driver of another vehicle, who conversed briefly with appellant. T697-98. Appellant then reentered his car and drove along on a dirt road. He stopped and took the girls out of the car, walking them into the woods. He put Sara down beside a tree, walked back to Sayeh with a knife in his hand, told her to say her prayers, and cut Sayeh's throat. She dropped to the ground. Sara started screaming. He walked over to Sara and cut her throat. T699-701. Sayeh did not actually see him cut Sara's throat, but she said she heard it. T704-05. Then he ran off. Sayeh got up, walked over to her sister, and saw that she was dead. Sayeh then walked out to the dirt road where she waved down people in a truck, who took her to a hospital for treatment. T701-02.

Sara's body was discovered lying face up in pine thicket. She was wearing a sweater and underwear. Her hands were bound together behind her with tape. T499-501. Her throat had been slashed. T509. The cause of death was multiple incised wounds of the throat, having been cut by a sharp knife. There was massive bleeding; the respiratory system was cut off; the knife actually removed the larynx or voice box from the throat area where it is normally attached; air leaked into the vein, went down into the heart causing the heart to stop functioning, and the blood supply to the head was cut off. At least six knife strokes were applied, perhaps more. T662-64. The resulting trauma would have taken about a minute to produce death. T664. Several superficial wounds inflicted would not have been fatal. The medical examiner could tell neither when the fatal wound was applied nor the order or sequence in which the strokes had been applied; but they would have been applied within a matter of minutes. T664-65. The wounds would have resulted in a rapid death. If the first stroke had cut the major artery, Sara would have been rendered unconscious in a matter of seconds. Sara would have experienced a lot of pain prior to becoming unconscious. T665-66.

Sayeh had been severely traumatized with a laceration to the anterior neck and a stab wound below it. The stab wound was the more serious of the injuries, stopped by the bone itself. It came within one millimeter of the carotid artery and within a millimeter of the jugular vein. T555-58, T594. She survived this trauma only by "The grace of God." T558. Sayeh also

suffered injuries to her vagina, which had a deep, irregular cut, like two cuts, from the front of the vagina close to the urethra and down to the rectum area. The trauma was consistent with having been caused by penetration of a penis but it could be consistent with anything else. T593-96.

## SUMMARY OF THE ARGUMENT

ISSUE I:

After years of dissatisfaction with counsel, and after the trial court rebuffed repeated attempts to substitute counsel before and during this penalty phase, Mr. Wike's personal feelings boiled over into a full-blown violent personal conflict that climaxed when he struck and pushed counsel in open court. As soon as defense counsel became Mr. Wike's shaken and embarrassed victim, Mr. Wike no longer had the presumptively loyal, zealous representation to which he was constitutionally entitled. Counsel properly sought to withdraw because counsel could no longer ethically and effectively represent Mr. Wike, but the trial court forced counsel to remain in the case. The prejudice arising from this violent personal conflict must be presumed, requiring reversal. Even if prejudice is not presumed, reversal is required because evidence of prejudice is apparent in the record, the trial court did not conduct a sufficient inquiry, and the trial court did not take sufficient remedial steps to attenuate the prejudice even if that was possible. See United States v. Hurt; Witherspoon v. United States; Government of Virgin Islands v. Zepp; Commonwealth v. Fontana; People v. Lewis; Gray v. Estelle.

ISSUE II:

The State proved the aggravating circumstance of prior violent or capital felony conviction by introducing judgments of conviction for the kidnapping, sexual battery, and attempted murder of the victim's sister, Sayeh Rivazfar, and an unrelated conviction. Nonetheless, the State presented fourteen witnesses in this resentencing proceeding including Sayeh herself; two doctors whose inflammatory testimony focused exclusively on the lurid details of Sayeh's extensive injuries, never even mentioning the murder victim; another witness who testified exclusively about Sayeh's suffering and experiences immediately after her sister's murder; and a host of other witnesses who testified in large part about Sayeh, her injuries, and evidence derived therefrom. Mr. Wike already had been punished for the crimes committed upon Sayeh. Although evidence concerning Sayeh had some relevance to the aggravating circumstances, the trial judge erroneously permitted the State to needlessly make the injuries suffered by Sayeh the feature of the penalty phase. This inflammatory evidence was unduly prejudicial, far outweighing its probative value, and it diverted the jury's attention from the murder of Sara, which should have been the focus of the State's case. See Finney v. State; Hitchcock v. State; Wuornos v. State; Duncan v. State; Rhodes v. State; Freeman v. State.

ISSUE III:

The judge failed to give any definition whatsoever of premeditation in the cold, calculated, and premeditated

instruction, a fundamental reversible error. See Anderson v. State; Rojas v. State; Jones v. State.

The judge attempted to give the vague and overbroad standard instruction as to the heinous, atrocious, and cruel aggravating circumstance, and in so doing he misread the instruction to enable jurors to wholly disregard an essential fact the State was required to prove. See Maynard v. Cartwright; State v. Dixon.

The instruction as to prior violent felonies enabled the jury to erroneously quadruple its findings and weighing of this single circumstance despite Mr. Wike's request for a limiting instruction. See Provence v. State, Castro v. State. It also erroneously directed the jury to find this circumstances proved, relieving the State of its burden and invading the exclusive province of the jury. See Wright v. State; Sarduy v. State.

The standard instruction as to the avoid lawful arrest circumstance was vague and overbroad, failing to tell jurors that it can be applied only in limited circumstance where the sole or dominant motive for the murder was elimination of the witness; that strong proof beyond a reasonable doubt also must be inconsistent with any other reasonable hypothesis; and that it cannot be inferred from speculation, proof of a plan to commit, or the actual commission of, another felony. Even if this Court's narrowing construction might clarify the statute in a case-by-case application, the instruction merely mirrored the statute and provided no guidance. See Maynard v. Cartwright. The constitutionality of the standard instruction should be

reviewed under the principles recently recognized in Jackson v. State.

Even though some of these errors may not have been preserved, the cumulative effect of giving erroneous, vague, overbroad, and misleading instructions to the jury as to each of the aggravating circumstances constitutes fundamental reversible error. See Anderson v. State; Rojas v. State; Kearse v. State; Jones v. State.

ISSUE IV:

The judge found the avoid lawful arrest aggravating circumstance despite the absence of evidence of motive, and the judge's ultimate findings were conclusory, speculative, and based on an erroenous standard. Although there is evidence as to what Mr. Wike's actions were and that he intended to kill, there is no evidence as to his motivation. He made no statements at the scene or afterward to give even a hint of motive, contrary to most cases where motive is proved. See Hannon v. State; Harvey v. State. The judge also did not consider other reasonable hypotheses to explain motive. See Knowles v. State; Arbelaez v. State; Klokoc v. State. Other cases on similar or worse facts, where the victims were transported to the places of their deaths, did not present evidence sufficient to find this circumstance proved beyond a reasonable doubt. See Jackson v. State; Dailey v. State.

The judge compounded the avoid lawful arrest error by doubling that circumstance with CCP even though both were

underpinned by the same aspects of the crime. See Provence v. State.

The judge also was ambiguous about his finding and weighing of three mitigating circumstances, thus making unclear whether he gave them appropriate consideration. See Campbell v. State.

These errors individually and collectively violated Mr. Wike's rights under the United States and Florida Constitutions to a fair penalty phase trial, due process, and his protection against cruel and/or unusual punishment.

## ARGUMENT

ISSUE I: WHETHER THE COURT ERRONEOUSLY REFUSED TO PERMIT COUNSEL TO WITHDRAW AFTER MR. WIKE'S VIOLENT, PHYSICAL, CRIMINAL ATTACK ON COUNSEL IN OPEN COURT, THEREBY DEPRIVING MR. WIKE OF THE ZEALOUS ASSISTANCE OF LOYAL, CONFLICT-FREE COUNSEL, AND A FAIR PENALTY TRIAL.

Many times before and during this penalty phase, Mr. Wike put the court on notice that he believed his appointed assistant public defenders had been ineffective and that he was dissatisfied with their performance. When his pleas of ineffectiveness continued to go unheeded, the problem degenerated into a personal conflict. The pot boiled over when Mr. Wike exploded, attacking defense counsel B.B. Boles by striking and pushing him in open court in the middle of the penalty phase. Defense counsel's role suddenly and dramatically changed from Mr. Wike's zealous advocate to his victim. Mr. Wike no longer had the representation of a presumptively loyal, zealous advocate to which he was entitled. Instead he was being represented by an openly shaken person upon whom he had committed a violent,

physical crime in public view. This was an extraordinary circumstance that required an extraordinary remedy. Counsel should have been permitted to withdraw, and substitute counsel should have been appointed. The trial court's decision to force Mr. Wike to proceed with the representation of a shaken and no doubt embarrassed lawyer upon whom he just committed a violent crime had the effect of depriving Mr. Wike of his constitutional rights to the assistance of counsel, a fair resentencing trial, due process, and protection against cruel and/or unusual punishment. U.S. Const. amends VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

**A. Factual background.**

Mr. Wike contended that he had long received ineffective representation from his assigned counsel, assistant public defenders B.B. Boles and Henry Barksdale, dating back to earlier proceedings in this case in which they had represented him. Due to the long-standing problem, he made a number of motions beginning with a pre-trial pro se motion to be co-counsel, R210-11 (filed June 23, 1995). He anticipated that his lawyers would refuse to ask relevant questions and file pertinent motions, giving rise to his need to act on his own behalf. R605-06. The court denied that motion, informing Mr. Wike that he had the right to waive counsel and seek self-representation. R606-13.

On August 8, Mr. Wike followed up that motion with a pro se motion to dismiss the public defender's office, R269-72, arguing, among other things, that his lawyers had inadequate contact with him, that they refused to subpoena a witness he thought would

provide relevant evidence, and that they had not furnished him with discovery materials. After inquiring of counsel at a hearing on August 11, the court found insufficient evidence of ineffectiveness to warrant discharge of counsel. R580-93.

On Monday, August 14, the first day of the penalty phase, just before the day's last witness testified, Mr. Wike renewed his complaints about counsel. He alleged that counsel refused to ask a series of questions Mr. Wike thought were important to show, at a minimum, that he had been wrongly convicted and that a State witness had changed her testimony from a prior proceeding. The court took his complaint as an allegation of ineffectiveness, inquired of Mr. Wike and counsel Boles, and ruled that no basis to discharge appointed counsel due to ineffectiveness existed. The judge also informed Mr. Wike of his right to self-representation, but Mr. Wike declined to exercise that right. T480-91. The judge also said "there is apparently a concern" about possible outbursts, and he said he would bring in a video camera if need exists. R491. However, there is no factual basis whatsoever in this record to support the judge's apparent concern at that time.

By Wednesday, August 16, Mr. Wike's problems with his attorneys reached the boiling point. In open court, in front of the judge and jury, Mr. Wike twice struck defense counsel Boles with an open hand and pushed him. T809-15.[10] After removing the

[10] A copy of the transcript excerpt featuring this incident and the ensuing colloquy is attached in the Appendix to this brief at pp. A15-54.

jury, the judge said "it was obvious to everyone that you just struck your attorney, sir." T809. Asked to show cause why he should not be held in contempt, Mr. Wike explained that he had had a conflict with his lawyers dating back at least until 1992; that he was being railroaded by his own attorneys; that his lawyers already had proved they did not know the law, evinced by the Supreme Court's decision expressly recognizing that his current trial counsel's failure to know a clear and long-established rule of criminal procedure applicable to the penalty phase led to reversal after the last case, Wike v. State, 648 So. 2d 683 (Fla. 1994); that counsel had refused to bring certain persons in to court to testify; that they had not asked questions he wanted asked; and that his pleas for different counsel had continued to fall on deaf ears. T809-12. The judge found Mr. Wike in direct criminal contempt because of the violent personal crime he committed on his attorney, sentencing him to 179 days' imprisonment consecutive to any other sentence he is serving. T812.[11]

Immediately after being struck, defense counsel moved to withdraw the public defenders' office from representation. T814. Boles stated that he could not ethically continue to represent someone who had just committed an act of physical violence on him in public, the first time he had seen that happen in his more than twelve years of practice. T815. "I don't think that I am injured, but certainly startled would be a mild way of putting

[11] No written finding, judgment, and sentence for contempt has been made part of this record.

it," Boles said. T815. Defense counsel's credibility had been completely destroyed, especially in light of the fact that their previous witness testified that Mr. Wike lacked the potential for future dangerousness, Boles said. T815. No matter what the defense may argue or present in evidence, the jury is "going to look at me and chuckle or snort and not believe anything I said," Boles said. "In spite of how I may personally feel about Mr. Wike he is entitled to have counsel not burdened by the lack of credibility in the eyes of the jury that has to decide his fate." T817. Regardless how or why the problem arose, the appearance of impropriety now existed and made continued representation improper. Boles asked the judge to appoint substitute counsel. Boles also asked the judge to order a mistrial. T814-15.

Boles specifically asserted that co-counsel Barksdale "is not prepared to go forward with the balance of the case," T815, because all of their preparation had been geared toward Boles -- not Barksdale -- controlling the presentation of mitigation. T817. As the record reflects, Boles and Barksdale had clearly distinguished their respective roles: Barksdale handled the defense side of the State's case, which had already concluded, see T442, 452, 467, 475, 543, 577, 624, 653, 665, 677, 703, and Boles handled the defense's case for mitigation, which had just gotten under way, see T724, 746. When this incident occurred, the bulk of the defense's case in mitigation had yet to be presented, no charge conference had been held, and closing arguments had not been made.

Barksdale echoed Boles' concerns and added that in a matter of life and death Mr. Wike could not possibly get a fair judgment under the present circumstances. T816, 821. Barksdale noted that the court had available to it both the resources and the legal authority to prevent this problem from being repeated on retrial, including appropriate restraints. T816-17. Barksdale said in practical terms, the case "is over with right now. This is the end. There is nothing that the defense can do to offset what has happened in this courtroom." T821. Barksdale pointed to the personal conflict that now existed. T821.

The State opposed the motions, saying that defense counsel "just has to gather himself up as a professional and proceed forward. And he can do that." T818. The State argued that Mr. Wike should not be allowed to benefit from his own misconduct by granting a mistrial. T818. The State said the trial should proceed with the same lawyers because of the rights of the victims and the community. T818-19.

The State also claimed that Mr. Wike had been warned repeatedly about his conduct, T818, but that allegation was refuted by defense counsel, T819-20, and, as stated before, there are no acts reported in this record suggesting even a hint of misconduct on Mr. Wike's part prior to the moment he attacked counsel.

The court denied the defense motions, ruling that "it would be a manifest miscarriage of justice to the victims and the citizens of this community to declare a mistrial under the circumstances herein when the circumstances have been created by

the defendant himself." T823. The court then recessed for lunch.

During the break, defense counsel -- primarily Barksdale -- conferred with Mr. Wike for ten or fifteen minutes. Defense counsel then renewed their motions to withdraw, for the appointment of substitute counsel, and for a mistrial, citing the conflict, the appearance of impropriety, and the extinguishment of counsel's credibility in the presentation of evidence and argument. T825-26. Mr Wike personally concurred with counsel's motions, stating "there is definitely a conflict of interests there." T827. Again the judge denied the motions, relying on Florida Rule of Professional Responsibility 4-1.16 to make a finding that withdrawal of counsel "at this point in time would materially adverse or have an adverse material affect on the rights of the defendant when we are this late in the proceeding." T827-28.

The judge then inquired of Mr. Wike and defense counsel as to allegations of ineffectiveness in their conduct of the defense prior to the attack (matters not at issue in this appeal), including issues of inadequate client contact; inadequate investigation; failure to call witnesses and conduct appropriate witness examinations; and bias or misconduct on the part of a defense investigator. T829-39. The judge concluded that "there is no reasonable cause to believe that counsel has been ineffective." T839-40. Mr. Wike again reasserted his need for different counsel and he declined to exercise his right of self-representation. T839-40. While maintaining his position that he

should be permitted to withdraw, Boles said he was physically and psychologically able to endeavor to fulfill his ethical duty to represent Mr. Wike if required to do so. T842-43.

Having their motions rejected, defense counsel moved for individual voir dire of the jurors to ascertain whether their ability to remain impartial had been poisoned in light of the violent criminal conduct they had just witnessed. As a fall-back position, counsel moved for a jury instruction admonishing jurors not to consider anything in the courtroom other than the testimony and exhibits. The judge denied the motion for individual voir dire but agreed to give an instruction. T841-45. When the jury returned, the judge instructed the jury to consider only the testimony, exhibits, and the court's instructions, and asked the jury as a whole if anyone would have a problem following those instructions. The jurors moved their heads, responding in the negative. T847-48.

Thereafter, Boles personally handled the examination of seven of the eight remaining witnesses that afternoon, T848, 857, 861, 911, 924, 939, 945, leaving Barksdale to examine Mr. Wike, T867. Boles and Barksdale together participated in the subsequent charge conference, T987-1064, and Boles did the closing argument, T1099-1123.

**B. Overview of the legal landscape.**

The starting point for analysis must begin with the unassailable, fundamental constitutional rights to due process and effective assistance of counsel in capital penalty proceedings. These rights are guaranteed by the fifth, sixth,

eighth, and fourteenth amendments to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see, e.g., Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978); Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). The Florida Constitution provides the accused even greater protection to the right to counsel. Haliburton v. State, 514 So. 2d 1088 (Fla. 1987) (Florida Constitution provides more protection than federal constitution, rejecting Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)).

As explained generally in Strickland, an accused is denied effective assistance when either the government's or counsel's acts or omissions cause a breakdown in the adversarial process. Certain situations constitute denial of the rights to due process and counsel, and require a rigid per se reversible error rule whereby prejudice is absolutely presumed, making irrelevant any inquiry into prejudice.

For example, prejudice is presumed when the defendant was made to suffer actual or constructive denial of assistance of counsel altogether. E.g., Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932) (conviction reversed where all members of local bar appointed six days before high profile capital case, and Tennessee lawyer appointed to represent defendants on day of trial with local bar members' assistance). Presumed prejudice also requires reversal when law or a judicial ruling had the effect of interfering with counsel's assistance. E.g., Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330, 47 L.

Ed. 2d 592 (1976) (conviction reversed because court barred attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975) (conviction reversed because court barred defense right to summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1961) (conviction reversed because state required defendant be first witness); Ferguson v. Georgia, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961) (conviction reversed because court could not prevent defense counsel's guidance of defendant in conducting direct examination); cf. Jackson v. State, 464 So. 2d 1181 (Fla. 1985) (reversing murder conviction and death sentence on direct appeal because court erroneously refused continuance and compelled counsel to proceed despite counsel's claims prior to and during trial that he was unable to provide effective assistance due to his physical condition.)

Some other types of situations require a showing of prejudice to successfully challenge a conviction. For example, Strickland itself held that a collateral attack on a conviction alleging specific acts or omissions of counsel constituting ineffectiveness requires a demonstration of both unreasonable conduct by counsel and prejudice to the client. 466 U.S. at 668 (alleged acts and omissions of counsel did not prejudice client in penalty phase). Similarly, a general attack on the ineffectiveness of counsel requires a showing of prejudice. United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed.

2d 657 (1984) (counsel's lack of preparation and competence not shown to affect reliability of proceedings).

### C. In conflict of interest cases, the Florida and United States Constitutions impose on counsel a duty of loyalty, and impose on judges duties to protect an accused's right to effective assistance.

In discussing what constitutes "ineffective assistance," the United States Supreme Court has made clear that "[p]erhaps the most basic of counsel's duties" is the "duty of loyalty." Strickland, 466 U.S. at 692. See also R. Reg. Fla. Bar 4-1.7 (ethical duty to avoid conflicts of interest); Id. R. 4-1.7 (comment) ("Loyalty is an essential element in the lawyer's relationship to a client."); Id. R. 4-1.16(a) (lawyer's mandatory duty to withdraw if representation will violate rules of professional conduct or law, or if mental condition impairs ability to represent client). The lawyer's duty of loyalty to his client is constitutionally compelled in a criminal trial. "Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." Strickland, 466 U.S. at 688. The constitutions also impose certain concomitant duties on the trial court to protect the accused's right to zealous, loyal advocacy, one of which is "it's duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even by suggesting that counsel undertake to concurrently" represent conflicting interests. Glasser, 315 U.S. at 76; Holloway, 435 U.S. at 485. Another duty of the judge is to conduct an adequate inquiry into

a timely allegation that a possible conflict of interest existed. Holloway.

When these duties are breached despite the trial court's opportunity to cure the problem, courts follow the rigid per se reversible error rule whereby prejudice is absolutely presumed.[12] Prejudice is presumed and reversal is required when the trial court refuses to appoint conflict-free counsel after being shown counsel has conflicting interests that would adversely affect his representation. E.g., Glasser, 315 U.S. at 60 (actual conflict of interest affecting representation in joint trial of codefendants represented by single lawyer denied effective assistance of counsel). Likewise, prejudice is presumed and reversal is required when the trial court fails to conduct an adequate inquiry into a timely allegation that a possible conflict of interest existed. E.g., Holloway 435 U.S. at 475 (court's failure to inquire into timely allegation of potential conflict of interest denied effective assistance of counsel).

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[12] When conflict claims are raised for the first time in a collateral attack of a conviction questioning the counsel's conduct, prejudice is not presumed. Instead, the accused must demonstrate that counsel's conflict adversely affected the representation and prejudiced the client. E.g., Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) (federal habeas relief denied because multiple representation was not shown to present an actual conflict of interest that adversely affected lawyer's performance); Burden v. Zant, 24 F.3d 1298 (11th Cir. 1994) (habeas granted because Burden's pre-trial counsel had informally negotiated immunity agreement for State's principle witness before Burden's trial). That, however, is not the case here because the judge was presented with the issue immediately when the violent conflict erupted, and counsel and the defendant personally gave the judge every opportunity to remedy the conflict.

These per se reversible errors due to conflict generally involve claims of judicial error made on direct review. Because facts on the record establish the conflict, this claim is reviewable on direct appeal. Foster v. State, 387 So. 2d 344 (Fla. 1980) (reversing murder conviction and death sentence on direct appeal due to counsel's conflict of interest); see also Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984) (presumed prejudice found in conflict of appellate lawyer, thus requiring habeas relief and new direct appeal).

Although the usual case is one of divided loyalties between jointly represented clients, courts have long recognized that many other conflicts reversibly taint a client's constitutional right to loyal, zealous representation. Depending on the nature of the claim and the context in which it is raised, some personal conflicts give rise to presumed prejudice, while others require a showing of prejudice. As explained below, the conflict issue presented here is in the nature of an actual conflict for which prejudice must be presumed.

### D. The right to effective assistance is violated when actual serious personal conflicts arise.

Cases from all over the United States make clear that the constitutional duty of providing loyal, zealous representation is at issue whenever an actual personal conflict arises affecting the representation of a client. Some conflicts are more closely associated with counsel's conduct than with the client's conduct. For example, a defense lawyer may have developed a personal interest or personal involvement in a case causing his loyalties

to be torn between the client's interests and his own. See, e.g., Government of Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984) (reversing conviction on direct appeal based on presumed prejudice in conflict where defense counsel had independent personal information regarding the facts underlying his client's charges and made a self-exculpatory stipulation); Commonwealth v. Fontana, 415 A.2d 4 (Pa. 1980) (presuming prejudice and reversing conviction on direct appeal because court was placed on notice counsel was potential witness, creating appearance of impropriety that required counsel's withdrawal); cf. Buenoano v. Dugger, 559 So. 2d 1116, 1119-20 (Fla. 1990) (collateral attack arising from counsel's penalty-phase contract with client for interest in book and movie proceeds arising from case did not demonstrate sufficient prejudice in acts or omissions of counsel in penalty phase to overcome overwhelming evidence against client).

Defense counsel's personal or professional relationship with the State, the victim, or a witness, also may create a reversible conflict of interest. See, e.g., People v. Lewis, 430 N.E. 2d 994 (Ill. 1981) (presumed prejudice in conflict required reversing conviction on direct appeal where counsel's six-year acquaintance with client's murder victim may have involved substantial emotional ties), cert. denied, 460 U.S. 1053, 103 S. Ct. 1501, 75 L. Ed. 2d 932 (1983); cf. Harich v. State, 573 So.2d 303 (Fla. 1990) (in collateral review, finding counsel's honorary status as special deputy did not create per se conflict or actual conflict of interest adversely affecting representation), cert. denied, 499 U.S. 985, 111 S. Ct. 1645, 113 L. Ed. 2d 740 (1991);

Roberts v. State, 345 So. 2d 837 (Fla. 3d DCA 1977) (certiorari granted to permit assistant public defender to withdraw when fellow assistant public defender subpoenaed as state witness in sentencing hearing).

Other serious personal conflicts requiring reversal arise when a court compels representation despite serious personal conflicts known to exist between counsel and client. This kind of serious conflict arises when a client openly commits a crime upon counsel or has a substantial charge against counsel pending during representation. These cases go way beyond mere dissatisfaction or the desire for a meaningful lawyer-client relationship, because the severity of the conflict erodes loyalty and causes an irreconcilable breakdown in confidence and communication. Courts timely apprised of such conflicts follow the general rule that "an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant," requires a trial judge upon good cause shown to allow counsel to withdraw and to appoint substitute counsel even in the middle of a trial. Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991); United States v. Calabro, 467 F.2d 973, 986 (2d Cir. 1972), cert. denied, 410 U.S. 926, 93 S. Ct. 1357, 35 L. Ed. 2d 587 (1973). Numerous convictions have been reversed under this rule.

In Gray v. Estelle, 616 F.2d 801 (5th Cir. 1980) (Gray II), appeal from remand of Gray v. Estelle, 574 F.2d 209 (5th Cir. 1978) (Gray I), the federal court on habeas review of a murder conviction found an actual conflict requiring a new trial where

Gray had victimized his trial lawyer prior to trial by committing a felony theft against him. Gray, charged with murder and already represented by appointed counsel, was approached by attorney Proctor, who advised he believed he could win the murder case. Proctor informed Gray that he had filed a felony theft complaint against Gray for having stolen merchandise from Proctor's typewriter rental business. Gray agreed to Proctor's representation after Proctor agreed to drop the felony theft charge, and the judge appointed Proctor despite knowing of the conflict. In the first habeas proceedings, the district court found "as a matter of law that 'an actual and significant conflict of interest existed.'" Gray I, 574 F.2d at 213. The Circuit Court remanded on procedural grounds for an evidentiary hearing on conflict and waiver issues. On remand, everybody agreed that Proctor had an actual conflict of interest, and the circuit court affirmed that ruling, holding that Gray had not waived the actual conflict and was entitled to a new trial. Gray II, 616 F.2d at 804-05.

In United States v. Hurt, 543 F.2d 162 (D.C. Cir. 1976), Hurt's appellate lawyer alleged ineffective assistance of trial counsel, and the Circuit Court remanded for a full evidentiary hearing in which appellate counsel continued his representation. Meanwhile, the allegedly ineffective trial lawyer sued the appellate lawyer for $2 million in a libel action stemming from the appellate lawyer's charge that the trial lawyer had been ineffective. When advised that appellate counsel felt hampered by the conflict in the evidentiary hearing, the trial judge at

the evidentiary hearing refused to substitute counsel and denied relief. Back on appeal, the Circuit Court reversed upon finding presumed prejudice in the existence of an actual conflict, concluding that the judge's failure to allow appellate counsel to withdraw deprived Hurt of his right to counsel.

In Smith v. Lockhart, 923 F.2d at 1314, the court granted habeas relief to reverse a conviction due to the judge's refusal to substitute counsel in a pretrial omnibus hearing when the client alleged dissatisfaction and conflict stemming in part from the client's pending lawsuit against counsel and others in which he had alleged serious constitutional deprivations. The court found prejudice even though different counsel handled the trial because the opportunity to raise some defenses pretrial had been irretrievably lost.

In Witherspoon v. United States, 557 A.2d 587 (D.C. App. 1989), the client apparently wanted counsel to present perjured testimony, which counsel said he could not do ethically under Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) (no right to present perjured testimony). Nonetheless, the court reversed the conviction on direct appeal based on presumed prejudice because the judge failed to adequately inquire as to whether counsel's ethical conflict with the defendant may have impaired counsel's ability to effectively represent the defendant in other aspects of the case.

A couple of cases along this line did not reverse convictions but are nonetheless instructive. In Maddox v. State, 715 S.W.2d 10 (Mo. Ct. App. 1986), Maddox collaterally attacked

his burglary and firearm convictions by asserting that his counsel had a conflict arising from counsel's suspicion during trial that Maddox had earlier burglarized counsel's home. The court denied collateral relief because counsel had merely suspected Maddox of the crime, with no proof and without making any accusation against him. The Court found that counsel's mere suspicion that he had been victimized by his client, without more, was insufficient to show an actual conflict of interest adverse to the client's interest.

In King v. Rowland, 977 F.2d 1354 (9th Cir. 1992), Assistant Public Defender Gomez was appointed to represent King on numerous charges. King was then permitted to represent himself, but some time later Gomez was reappointed. King physically attacked Gomez in open court, after which King was ordered to be physically restrained in all future court proceedings. Private counsel was appointed as substitute counsel, but that representation ended after one month. King briefly represented himself, a third lawyer was appointed and removed, and finally Assistant Public Defender Wisot was appointed. After becoming upset with Wisot, King physically attacked Wisot in front of the jury. King was removed from the courtroom and the trial proceeded, ending in King's conviction. In his habeas petition, King claimed, among other things, that Wisot's dislike and fear of King severely impaired his ability to represent him. The Circuit Court denied collateral relief, finding the trial court had done an adequate inquiry into the conflict, that the lack of communication was most likely attributable to King, there was no evidence of

prejudice in Wisot's presentation of the case, and King had a general plan to delay and disrupt the trial and prevent it from proceeding.

These cases demonstrate that when a trial court is timely made aware that a direct, serious personal conflict exists between client and counsel, failure to permit counsel to withdraw and substitute counsel constitutes denial of effective assistance and due process. Only when the client has been given affirmative relief from conflict-free counsel but persists on disruptive behavior planned and intended to delay the proceedings and impair the administration of justice does the court have discretion to deny counsel's timely motion to withdraw and to appoint substitute counsel.

The trial court in the present case did not even attempt to give Mr. Wike relief from the conflict. The court's brief inquiry effectively confirmed the existence of an actual conflict rather than dispelling the allegation. There was absolutely no disagreement expressed as to the fact that an actual, serious, personal conflict existed. Mr. Wike personally stated and restated that point. Assistant Public Defender Boles, fully supported by Assistant Public Defender Barksdale, said a conflict existed and the public defender's office could not ethically or effectively proceed to represent Mr. Wike after that violent physical attack on defense counsel in open court. A defense attorney "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." Holloway, 435 U.S. at 485.

The prosecutor never even challenged the fact that a serious personal conflict existed, and the judge never found to the contrary, either.

Even if there had been a debate, the fact that Mr. Wike openly committed a crime of violence, for which he was adjudicated and sentenced to a term of imprisonment, surely established proof of an actual conflict as a matter of law. The conflict here is far more serious than Gray v. Estelle, 616 F.2d at 801, where the court found an actual conflict in the commission of a relatively minor property crime of which the jury presumably was unaware. The conflict is also more personal and clear-cut than those found in other cases cited above where actual conflict was found and prejudice presumed. In People v. Lewis, 430 N.E. 2d at 994, for example, counsel's substantial emotional ties with the victim was disqualifying. Surely the emotions at issue here were more magnified. This Court should also note that in King v. Rowland, 977 F.2d at 1354, the trial judge did in fact allow counsel to be substituted when the client attacked attorney Gomez, no doubt having found an actual conflict. Cf. Livingston v. State, 441 So. 2d 1083 (Fla. 1983) (hostility between judge and defense counsel required disqualification of judge and reversal of client's murder conviction and death sentence).

The fact that the trial judge's inquiry in Mr. Wike's case did not even expressly address whether an actual conflict existed despite clear evidence of its existence rendered its subsequent

rulings erroneous. It also demonstrates the inadequacy of his inquiry.

The judge's inquiry did nothing to dispel the fact that the conflict would affect counsel's representation of Mr. Wike. That too is error, for clearly there was an affect in this case. But for the conflict, Mr. Wike may not have testified. It is apparent that a significant reason he testified was to explain the conflict and his courtroom behavior in an attempt to dispel the negative impression the violent conflict created. T881-84. Furthermore, despite the defense team's division of labor that made only counselor Boles prepared to handle all the defense witness, counselor Barksdale examined Mr. Wike. Mr. Wike had a constitutional right to be guided by a prepared, zealous, uncompromisingly loyal, effective advocate in direct examination, see Ferguson v. Georgia, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961), but the court's rulings created a situation where an unprepared lawyer was compelled to assume that weighty responsibility after only ten or fifteen minutes of consultation during the lunch break.

Representation also was affected, as counsel asserted, in that nothing counsel could do would be credible in the jury's eyes. Yet Boles, who was attacked by Mr. Wike, not only examined most of the remaining defense witness, he also presented the closing argument. No reasonable person could expect counsel's presentation and argument to be unaffected by the embarrassment he had suffered, the fact that he was shaken up by the incident, his total loss of credibility, and whatever hostility he

naturally would have felt. The jury could not have believed in his sincerity in closing argument, especially after having presented Professor Radelet's testimony about future dangerousness, nor could counsel be reasonably expected to have made the kind of zealous argument Mr. Wike was entitled to have made on his behalf. The judge had a duty to prevent this kind of embarrassment and ineffectiveness in the face of the jury. Glasser, 315 U.S. at 76; Holloway, 435 U.S. at 485.

These problems underlie the very reason prejudice must be presumed under the circumstances. It is impossible to intelligently determine how counsel altered his performance or what counsel refrained from doing in the conduct of the defense. A harmless error inquiry into prejudice would necessarily require "unguided speculation." Holloway, 435 U.S. at 490. That is precisely why Glasser and its progeny establish a rule requiring the presumption of prejudice and automatic reversal in conflict cases of this nature. See United States v. Hurt, 543 F.2d at 162; Witherspoon v. United States, 557 A.2d at 587; Government of Virgin Islands v. Zepp, 748 F.2d at 125; Commonwealth v. Fontana, 415 A.2d at 4; People v. Lewis, 430 N.E. 2d at 994.

The issue presented here does not directly concern the court's discretion to deal with a disruptive defendant. Appellant recognizes that courts have discretion to physically restrain or remove disruptive clients under extreme circumstances where less restrictive alternatives cannot reasonably solve the problem. Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The trial court in King v. Rowland, 977 F.2d

at 1354, properly followed that rule, restraining King after he attacked counsel Gomez, and finally removing him from the court after he later committed a second attack on one of Gomez's successors.

However, unlike the facts in King, there was no evidence in this case that Mr. Wike planned or intended the attack for the purpose of delaying the proceedings and impairing the administration of justice. The trial court had legitimate concerns that such delay might result, but there is no evidence that Mr. Wike did it for that purpose -- especially given that he complained about counsel before the proceedings even began -- nor is a necessary delay a valid reason to deny one effective assistance of counsel. There is also no evidence in this record that Mr. Wike previously had been or threatened to be disruptive, despite the trial judge's statement that he had some concern. The judge considered restraints after Mr. Wike's attack, finding none were called for.[13]

The prosecutor and the trial judge both erroneously focused on whether Mr. Wike should benefit from his own misconduct. That too is not dispositive. Certainly a client has no right to manipulate proceedings to intentionally disrupt the administration of justice. Waterhouse v. State, 596 So. 2d 1008, 1014 (Fla.), cert. denied, 506 U.S. 957, 113 S. Ct. 418, 121 L. Ed. 2d 341 (1992). But the focus here is on the client's constitutional right to receive -- and counsel's constitutional

[13] Such restraining measures might be appropriate on remand if required for the proper administration of justice.

duty to provide -- loyal, zealous, conflict-free advocacy, and the court's duty to ensure that counsel fulfill that responsibility without embarrassing counsel by compelling them to represent a client despite the presence of a serious actual conflict.

The trial court also erred by relying on Florida Rule of Professional Responsibility 4-1.16(b) to make a finding that withdrawal of counsel "at this point in time would materially adverse or have an adverse material affect on the rights of the defendant when we are this late in the proceeding." T827-28. First, rule 4-1.16(b) says withdrawal is permitted under circumstances not even at issue here. Second, the judge's conclusion with respect to rule 4-1.16(b) is simply wrong: Mr. Wike would have benefitted, rather than suffered, had he been allowed to substitute conflict free-counsel for a counsel with whom he had a violent personal conflict.

Rule 4-1.16(a) is the rule to which the judge should have referred. Rule 4-1.16(a) imposes on counsel a mandatory duty to withdraw if representation will violate the rules of professional conduct or law, or if counsel's mental condition impairs his ability to represent his client. That is precisely the situation presented here.

If prejudice is not presumed under the circumstances, at the very least the trial court should have granted counsel's motion to individually voir dire the jurors to ascertain on the record whether any of them had been adversely affected by the violent conflict. Cf. Boggs v. State, 21 Fla. L. Weekly 64 (Feb. 8,

1996) (trial court abused discretion by refusing to individually voir dire jurors to determine affects of pretrial publicity with regard to peremptory challenges). Moreover, the judge should have closely monitored defense counsels' behavior, making express inquiries and findings as to whether their actions comported in every respect with their legal, ethical, and constitutional duties, and as to whether Mr. Wike had observed any further acts or omissions of counsel that were prejudicial to him. The judge also should have ordered a continuance in the interests of justice rather than just recess for lunch to give counsel and Mr. Wike time to fully discuss the situation, attempt to resolve the conflict, and to allow counsel a realistic opportunity to gather their thoughts and calm their emotions, as the prosecutor recognized they needed to do.[14]

Moreover, the record contains evidence of certain actions or omissions of counsel that arose after Mr. Wike's attack and that demonstrate prejudice to the defense. Most obvious is the repeated failure to timely raise or renew a number of objections to erroneous, vague, and overbroad aggravating circumstance jury instructions at the charge conference and during the actual presentation of the instruction to the jury, all of which are set forth in detail in Issue III, pp.45-68, infra. For the sake of

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[14] If this Court finds that prejudice cannot be presumed and has not been demonstrated on the face of the record, Mr. Wike should be permitted, if and when appropriate, to demonstrate in collateral proceedings that the conflict created actual prejudice affecting representation.

brevity, appellant asks this Court to refer to that issue for the particular instances and record cites.

At bottom, the judge should have permitted counsel to withdraw, appointing substitute counsel. Failure to do so, and to take other measures necessary to protect Mr. Wike's constitutional rights, required the judge to grant the motion for a mistrial. The Court should reverse the sentence and remand for a new sentencing proceeding.

ISSUE II: WHETHER THE TRIAL COURT ERRONEOUSLY PERMITTED THE STATE TO MAKE UNDULY PREJUDICIAL DETAILS OF CRIMES COMMITTED UPON A DIFFERENT VICTIM THE FEATURE OF THE PENALTY PHASE IN RE-PRESENTING VIRTUALLY THE ENTIRE GUILT PHASE OF THE TRIAL, THEREBY DEPRIVING MR. WIKE OF A FAIR HEARING IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

Aggravating circumstances for the capital murder of Sara Rivazfar were the State's only legitimate concerns for the prosecution in its case-in-chief. However, the State called witness after witness to testify about the crimes of kidnapping, sexual battery, and attempted murder committed upon the murder victim's sister, Sayeh Rivazfar, including the testimony of Sayeh herself, in virtually re-presenting the guilt phase of the trial. Sayeh's victimization -- not Sara's -- became a feature of the State's case, and the prejudicial weight of this evidence under the present circumstances far outweighed its probative value. Defense counsel repeatedly objected to the State's tactics, each time being overruled. The judge's rulings effectively allowed the jury's attention to be shifted away from what should have been its only lawful focus, rendering the jury's ultimate judgment unreliable. These errors violated Mr. Wike's state and

federal constitutional rights to due process, a fair sentencing proceeding, and his protection against cruel and/or unusual punishment. U.S. Const. amends VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

**A. Constitutional law sets forth clear rules limiting the introduction of unduly prejudicial evidence of crimes on other victims in a penalty phase.**

Constitutional law permits the State to introduce relevant collateral crimes evidence to prove an aggravating circumstance, but with some very important limitations: The evidence must not violate the defendant's confrontation or other rights; its prejudicial effect must not outweigh its probative value; and the details of the collateral offense must not be emphasized to the point where that offense becomes a feature of the penalty phase. The accused's rights are most seriously endangered when the victim of a collateral crime testifies for the State to prove an aggravating circumstance. Finney v. State, 660 So. 2d 674, 683 (Fla. 1995), cert. denied, 116 S. Ct. 823, 133 L. Ed. 2d 766 (1996); see Hitchcock v. State, 21 Fla. L. Weekly S139 (Fla. March 21, 1996) (reversible error to make feature of penalty phase sexual crimes committed upon the juvenile sister of the murder victim for whose killing he was being sentenced, and other alleged similar acts of pedophilia); Wuornos v. State, 20 Fla. L. Weekly S481, 483 (Fla. Sept. 21, 1995) (error to prove CCP aggravator relying entirely on collateral crime evidence because evidence proved only bad character or propensity); Duncan v. State, 619 So. 2d 279, 282 (Fla.) (error to introduce photo of collateral murder victim when collateral crime had been proved

through judgment and officer's testimony), cert. denied, 114 S. Ct. 453, 126 L. Ed. 2d 385 (1993); Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1989) (error to introduce statement of collateral crimes victim when collateral crimes had been proved through judgment and officer's testimony); cf. Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990) (spouse of collateral crime victim should not have been permitted to testify in penalty phase where testimony was not essential to proof of prior felony conviction), cert. denied, 501 U.S. 1259, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1991).

Finney made a special point to limit the State's use of victims of collateral crimes to prove aggravating circumstances:

> [W]e take this opportunity to point out that victims of prior violent felonies should be used to place the facts of prior convictions before the jury with caution. Cf. Rhodes, 547 So. 2d at 1204-05 (error to present taped statement of victim of prior violent felony to jury, where introduction of tape violated defendant's confrontation rights and the testimony was highly prejudicial). This is particularly true when there is a less prejudicial way to present the circumstances to the jury. Cf. Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990) (surviving spouse of victim of prior violent felony should not have been permitted to testify concerning facts of prior offense during penalty phase of capital trial where testimony was not essential to proof of prior felony conviction), cert. denied, 501 U.S. 1259, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1991). Caution must be used because of the potential that the jury will unduly focus on the prior conviction if the underlying facts are presented by the victim of that offense.
>
> Testimony concerning the circumstances that resulted in a prior conviction is allowed to assist the jury in evaluating the defendant's character and the weight to be given the prior conviction so that the jury can make an informed decision as to the appropriate sentence. Rhodes,

> 547 So. 2d at 1204. However, the collateral offense need not be "retried" before the capital jury, in order to accomplish that goal. Evidence that may have been properly admitted during the trial of the violent felony may be unduly prejudicial if admitted to prove the prior conviction aggravating factor during a capital trial. This is particularly true where highly prejudicial evidence is unnecessary, or where the evidence is likely to cause the jury to feel overly sympathetic towards the prior victim. See, e.g., Duncan, 619 So. 2d 279 (error to admit gruesome photograph of victim of prior unrelated murder for which defendant had been convicted where photograph was unnecessary to support aggravating factor); Freeman, 563 So. 2d 75 (error to allow surviving spouse of victim of prior violent felony to testify concerning facts of prior offense where testimony was not essential to proof of prior felony conviction).

Finney, 660 So. 2d at 683-84.

The purpose of the rules discussed in Finney is to prevent jurors and the trial judge from placing undue weight on crimes other than those for which the defendant is being sentenced. Yet crimes committed upon another person who was not murdered became a feature of this penalty trial.

**B. Mr. Wike repeatedly objected to the introduction of unnecessary details of crimes committed on Sayeh for which he had already been convicted and sentenced, and which were not the subject of the penalty proceedings.**

In a pretrial motion in limine, defense counsel moved to prevent the State from introducing evidence concerning the extensive injuries suffered by Sayeh in support of aggravation, arguing it was irrelevant to certain aggravators and its prejudice unduly outweighed its probative value. R197-201, 615-22. "What we are asking this Court to do is to prevent the State from making it a feature of the trial." R616. The State argued the evidence was relevant, R618-19, and the judge took the motion

under advisement. R623, 667. The State wasted no time in making its point when, over objection, the prosecutor began the trial by describing aggravating circumstances as they related to Sayeh. T392-93. The State then presented witness after witness to testify about what happened to Sayeh.

Sayeh herself delivered the coup de grâce with extensively detailed testimony about the criminal episode. At the time she testified, she was a 15-year old 10th-grader. At the time of Sara's murder, she was eight and Sara was six. T686-87. On the night this happened, they went to bed dressed, Sayeh dressed in a T-shirt, jeans, and shoes, and Sara dressed in a skirt with a shirt. They were dressed so they would not be delayed in rushing to school the next day. T688-89. Sometime that night, they were carried out to the car by Ray, a friend of her mom's whom she had seen several times before. Sayeh was carried to Ray's car, a very large green car with a dent in the front. T689-90. She asked where her mom was and Ray said "She's coming." T691.

They drove off and turned onto a dirt road. When they stopped, Sara got out and used the bathroom in the woods. Sayeh went behind the car. Sara went back into the car. Ray tied up Sara's hands and legs. Sayeh was scared. Sara asked "Where's mom?" T692-93. He took Sayeh out back on top of the trunk and he took off her pants and underwear. He wore jeans and a shirt, and shoes with velcro. T694-95.

When she was up on the car, he pushed his penis into her vagina. T695. It hurt her, and she cried. T696. He put her clothes back on and put his clothes on. He put her in the front

seat of the car along with Sara who was crying. Ray changed into white shorts. T696-97.

They made contact with another vehicle, an "electrical-type truck" with some pipe on the top of it. T697. Ray walked over, talked to the guy, then came back in the car and drove off. T698. They drove along a dirt road. He stopped, took them out of the car, and walked them way back into the woods. It was beginning to get light. It was still dark, but not as dark as before. Both girls were crying. He stopped and put Sara beside a tree. T698-99. He came over to Sayeh with the knife in his hand and "He told me to say my prayers." T700. "Then he cut my throat." T700. Sayeh dropped to the ground. When he cut Sayeh's throat, Sara "started screaming." T700. Ray then went to her sister and "he cut her throat." T700. Then he ran off. T701. Sayeh got up, walked over to her sister and saw that she was dead, then went out to the dirt road and waved down people in a blue truck. On that day she was shown photographs by the police, and identified photograph number five as Ray. T701-02. She then identified the man in the courtroom as that man. T703. She did not actually see him cut Sara's throat, but she did hear it. T704-05.

Surgeon Dr. Robert Althar was permitted, over objection, to testify in extensive detail about the injuries Sayeh had sustained. T550-58. Dr. Althar found Sayeh had been severely traumatized with a laceration to the anterior neck and a stab wound below that to the anterior neck. The stab wound was the more serious of the injuries, stopped by the bone itself. It

came within one millimeter of the carotid artery and within a millimeter of the jugular vein. Again over objection, he testified that Sayeh could have survived this trauma only by "The grace of God." T558. He gave no evidence about Sara.

Over objection, pediatrician Dr. Leila Montes detailed the injuries she examined to Sayeh's neck and vaginal area, describing the vaginal injuries as the worst she had seen, how Sayeh's dress was being filled with blood, how upset Sayeh had been, and as to what Sayeh had told her about acts committed upon her. She said "Ray put his thing in mine," and "Ray cut her throat." T589-98. She, too, gave no evidence about Sara.

Teresa Ann Wright testified about her dramatic encounter with Sayeh after the crimes took place, describing Sayeh's injuries, what Sayeh told her, what she did in response, and even describing a "hysterical" telephone conversation she had with Sayeh's mother after taking Sayeh to the hospital. T470-76. Defense counsel objected to Wright's testimony and moved for a mistrial because the testimony did not pertain to the murder victim, it was irrelevant to aggravating circumstances, and the evidence was unduly prejudicial far beyond its probative value. Defense counsel said even though some evidence of the prior violent felony is relevant, "they are going far beyond and they are trying this case on the basis of the injuries and the treatment that Sayeh encountered in this case. And that has become the focal point of the trial. And now it looks like that is going to be the focal point of this trial and I submit to the Court it is prejudicial against the defendant." T477-78. The

court denied the motion because it was relevant to describing the underlying circumstances and was untimely. T479.

Other witnesses also testified about what happened with respect to Sayeh. Janice Johnson, a crime laboratory analyst with the Florida Department of Law Enforcement, testified about physical evidence she recovered from the crime scene, and she was permitted, over objection, to introduce and testify about various items of evidence relating to Sayeh, including her socks and jogging pants; a bathing suit; a police sexual assault kit used to examine Sayeh; and blood, bloody fingerprints, and photographs that related to Sayeh's sexual assault and the injuries she suffered. T516-25. DNA analyst Kevin Noppinger testified, over objection, about Sayeh's blood found on various items of physical evidence including articles of clothing and the vehicle. T606-625. FBI DNA analyst Dwight Adams testified about his examination of Sayeh's blood samples taken from various pieces of physical evidence. T667-76. FDLE expert Paul Norkus testified about Sayeh's bloody palm prints, in addition to other facts associating Wike with the crimes. T559-85. Moes Bauldree said, among other things, he saw Sayeh's blood on Wike's cut-off pants when he encountered Mr. Wike on the road after the sexual battery on Sayeh but before Sara's murder. T460. Hair analyst Linda Hensley testified as to hair comparisons she did, concluding in part that some hairs found in a blue blanket in Wike's possession were consistent with Sayeh's hair. T647-48.

In all, the State presented fourteen witnesses over the course of two days, most of whom gave testimony about the details

of Sayeh's injuries and what had happened to her. Some of those witnesses testified exclusively and in stark detail about Sayeh and the injuries she suffered -- especially Dr. Althar, Dr. Montes, and Teresa Ann Wright -- while others gave evidence that dealt directly with Sayeh and her injuries in addition to other facts. This evidence about Sayeh was a very substantial portion of the State's case.

The State proved the prior violent felonies by introducing judgments of conviction imposed against Mr. Wike in his initial trial for the kidnapping of Sayeh, the sexual battery of Sayeh, and the attempted murder of Sayeh, T705, as well as a judgment from a Pennsylvania conviction for robbery, T437, 444-45. Given that guilt was not in issue and that each of the prior violent felonies was proved with documentary evidence of the judgments of conviction, the State's evidence about the details of those crimes could have been, and should have been, severely limited. See Finney.

Appellant recognizes that some evidence about the criminal episode was admissible to prove aggravating circumstances other than the prior violent felony. However, the judge permitted the State to go way beyond the bounds of propriety. Gory details about the severity of Sayeh's injuries were grossly inflammatory and did not prove any legitimate aggravating circumstance at issue. Yet jurors were needlessly and prejudicially exposed to the details of what happened to Sayeh, especially through the testimony of Dr. Althar, Dr. Montes, Teresa Ann Wright, and Sayeh herself. Even though these offenses against Sayeh do not fit the

traditional mold of collateral offenses factually at issue in Finney, the principles discussed in Finney, Hitchcock, Wuornos, Duncan, Rhodes, and Freeman, are applicable here and should have been applied, as counsel requested, to limit the introduction of evidence in the penalty phase. Otherwise, the State will have been permitted to seek the death penalty for Sara's murder by unlawfully imputing another's injuries to her murder. One cannot be convicted of an aggravating circumstance by vicarious imputation, Archer v. State, 613 So. 2d 446 (Fla. 1993) (improper to vicariously impute HAC to one who did not actually commit the murder); Omelus v. State, 584 So. 2d 563 (Fla. 1991) (same), or by proof of injuries that were factually irrelevant and inadmissible for that purpose, e.g., Halliwell v. State, 323 So. 2d 557 (Fla. 1975) (post-death trauma of murder victim inadmissible to support HAC). The trial court erred by giving the State a free hand, and that error unduly prejudiced Mr. Wike and denied him his right to a fair penalty determination.

ISSUE III: WHETHER THE COURT FUNDAMENTALLY ERRED BY GIVING AGGRAVATING CIRCUMSTANCE INSTRUCTIONS SO VAGUE, OVERBROAD, AND RIFE WITH ERROR THAT INDIVIDUALLY AND COLLECTIVELY THOSE INSTRUCTIONS DENIED MR. WIKE A FAIR PENALTY PHASE IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS IRRESPECTIVE OF WHETHER PARTICULAR INSTRUCTIONS HAD BEEN OBJECTED TO AT TRIAL.

The trial court's jury instructions as to the aggravating circumstances considered in this case contain a variety of errors that make them vague, overbroad, and otherwise deficient. These errors necessarily went to the heart of the most critical issues being considered in the penalty phase. The defects in these

instructions prevented jurors as co-sentencers from adequately channeling their sentencing discretion.[15] The cumulative effect of these erroneous instructions violated Mr. Wike's rights under the United States and Florida Constitutions to a fair penalty phase trial, due process, and his protection against cruel and/or unusual punishment. U.S. Const. amends VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const. His protections under the Florida Constitution are greater than those minimal protections afforded by the federal constitution. See, e.g., Allen v. State, 636 So. 2d 494 (Fla. 1994) (Florida's cruel or unusual punishment protection more protective than federal counterpart); Traylor v. State, 596 So. 2d 957 (Fla. 1992) (primacy of Florida Constitution).

**A. 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 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

[15] A copy of the written instructions is attached in the Appendix to this brief at pp. A55-69.

> REFLECTION. "CALCULATED" MEANS THE DEFENDANT HAD A CAREFUL PLAN OR PREARRANGED DESIGN TO COMMIT THE MURDER. "PREMEDITATED" MEANS 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 REBUTS THE OTHERWISE COLD AND CALCULATING NATURE OF THE HOMICIDE.

R477 (underscoring supplied). This instruction was unconstitutionally vague and overbroad, particularly with respect to the premeditation element, because the definition of premeditation was meaningless and gave the jury in this resentencing hearing no guidance whatsoever.

The premeditation element of the CCP aggravating circumstance is a heightened form of premeditation required for proof of guilt of first-degree murder. This Court adopted the phrase "heightened premeditation" specifically to distinguish the premeditation element of CCP from guilt phase premeditation. Jackson, 648 So. 2d at 88-89; Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 106 (1991); Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). As Jackson recognized, the definitions of "premeditation" and "heightened premeditation" are, by necessity, inextricably intertwined: "Heightened premeditation" is defined by what "premeditation" is and is not. This Court said:

> Where a defendant is convicted of premeditated first-degree murder, the jury has already been instructed that:

> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and 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.
>
> Fla. Std. Jury Instr. (Crim.) 63. Without the benefit of an explanation that some "heightened" form of premeditation is required to find CCP, a jury may automatically characterize every premeditated murder as involving the CCP aggravator.

Jackson, 648 So. 2d at 89 (emphasis supplied).

In the present resentencing trial, the jury was never told the definition of premeditation to commit first-degree murder. Thus, as Jackson held, without the benefit of explanation, the jury was left free to automatically characterize this murder as one of "heightened premeditation." This is precisely what the Supreme Court prohibited in Maynard v. Cartwright, 486 U.S. 356, 361-62, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), where it struck down an instruction finding that it failed "adequately to inform jurors what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)."

The failure to instruct a jury as to the definition of premeditation is not just error: It is fundamental error. This Court has long held that the omission of a definition of premeditation in a first-degree murder case is fundamental error. Anderson v. State, 276 So. 2d 17, 19 (Fla. 1973) ("Failure to

define 'premeditation' in a first degree murder charge is reversible error, even where no objection was made by the defendant."). Certainly the same fundamental error existed here where the definition of premeditation, absolutely essential to the CCP instruction, was wholly omitted. Rojas v. State, 552 So. 2d 914 (Fla. 1989), also supports this position. Rojas held that fundamental error occurs in the absence of an objection when a judge fails to give jurors the definitions of justifiable and excusable homicide as part of the manslaughter instruction because justifiable and excusable homicide are required as part of a complete definition of manslaughter. See State v. Smith, 573 So. 2d 306, 310 (Fla. 1990) (Rojas "held that a conviction of second-degree murder, when the trial court initially instructed on manslaughter without making any reference whatsoever to justifiable and excusable homicide, must be reversed even though the defendant's lawyer did not object to the instruction"). The error here is even worse than in Rojas because the omission in that case was a separate but necessarily related defense definition, whereas the omission here was part of the very core of the CCP definition.[16]

This Court could not have intended its Jackson instruction to be used in a resentencing proceeding in the total absence of a

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[16] Interestingly, Rojas noted that when a reinstruction takes place, the standard instructions inform the judge to again include the definitions of excusable and justifiable homicide in the manslaughter definition. Rojas, 552 So. 2d at 916 n.2. Here, however, state law provided no guidance to the parties or the judge as to including the full definition of premeditation in defining CCP in the resentencing proceeding.

definition of guilt-phase premeditation. It is apparent that when this Court promulgated the proposed standard CCP instruction in Jackson, it did so based on the assumption that the jury listening to the heightened premeditation instruction already would have heard the definition of premeditation in the guilt phase. That, of course, is not the case here.

A related problem also incurably infected the vague and overbroad premeditation definition in this instruction. 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 clear, separate, and 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, overbroad, 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).[17] But the attempted cure, which may not be adequate

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

> [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 law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and 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

anyway, was not in place at Mr. Wike's trial. The instruction given was inadequate both as a matter of statutory construction and pursuant to constitutional requirements of due process and cruel and/or unusual punishment.

CCP was a contested issue at trial, T1109, T710, R522-24, R485-88, R672, rendering the erroneous instruction of great significance. Defense counsel pre-trial contested the standard instruction, R104-22, R648-49, and at the charge conference followed Florida the law by asking for what was then the brand new Jackson CCP instruction. T1022-24. Apparently nobody realized that the CCP instruction, at a minimum, must be given in association with the guilt-phase premeditation instruction in a resentencing proceeding. The instruction error constitutes fundamental error. Anderson. Moreover, Mr. Wike should not be made to suffer a procedural bar where this Court's own decisions had failed to consider the fundamental inadequacy of its own instructions and failed to address the special need for a complete instruction in a capital resentencing jury trial.

**B. The jury instruction on HAC was vague and imprecise, and the judge here made a critical error in misreading the standard definition to the jury, thereby allowing jurors to eliminate the need for proof an essential part of this aggravating circumstance.**

The trial court set out to give the standard jury instruction for heinous, atrocious, or cruel under section 921.141(5)(h), Florida Statutes (1987). That instruction was vague and overbroad in that it failed to adequately and narrowly

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period of reflection, is required.

define the elements of this circumstance to the jury. The instruction error was compounded in this case when the judge misread the instruction to the jury, inviting them to overlook one of the essential elements jurors were obligated to find proved beyond a reasonable doubt if this circumstance applied.

1. The jury instruction on HAC was vague and imprecise, thus failing to channel the co-sentencer's discretion

The written instruction in this case said:

> THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL. "HEINOUS" MEANS EXTREMELY WICKED OR SHOCKINGLY EVIL. "ATROCIOUS" MEANS OUTRAGEOUSLY WICKED AND VILE. "CRUEL" MEANS DESIGNED TO INFLICT A HIGH DEGREE OF PAIN WITH UTTER INDIFFERENCE TO, OR EVEN ENJOYMENT OF, THE SUFFERING OF OTHERS. THE KIND OF CRIME INTENDED TO BE INCLUDED AS HEINOUS, ATROCIOUS, OR CRUEL IS ONE ACCOMPANIED BY ADDITIONAL ACTS THAT SHOW THAT THE CRIME WAS CONSCIENCELESS OR PITILESS AND WAS UNNECESSARILY TORTUROUS TO THE VICTIM.

R476-77. See also See Fla. Std. Jury Instr. (Crim.) 77.[18] This instruction was unconstitutionally vague because it failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Espinosa v.

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[18] Florida Standard Jury Instruction (Criminal) 77 reads:

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

Florida, 505 U.S. 112, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990); Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1980).

The United States Supreme Court held Florida's previous heinous, atrocious, or cruel standard penalty phase instruction unconstitutional in Espinosa. Prior to Espinosa, this Court consistently held that Maynard, which struck down HAC instructions similar to Florida's, did not apply in Florida because the jury is not the sentencing authority in Florida. Smalley v. State, 546 So. 2d 720 (Fla. 1989). But the United States Supreme Court rejected this reasoning in Espinosa, which recognized that Florida's jury recommendation is an integral part of the sentencing process and neither of the two co-sentencing authorities -- judge and jury -- are constitutionally permitted to give weight to invalid aggravating circumstances. Although the instruction in this case was slightly more elaborate than the one in Espinosa, the instruction nevertheless suffered the same constitutional flaw: The jury was not given adequate guidance on the legal standard to be applied when evaluating whether this aggravating factor exists. See also Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990) (definition limiting HAC factor identical to definitions in Florida were unconstitutionally vague); Atwater v. State, 626 So. 2d 1325, 1328-29 (Fla. 1993) (recognizing vagueness of HAC definition), cert. denied, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994).

The addition of the last sentence in the written instruction fails to cure the constitutional infirmities. First, this language was taken from State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), which purported to construe the statute -- not the instruction -- in a manner later approved by Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). But Proffitt did not approve this limiting language as providing constitutionally sufficient guidance in a jury instruction. Sochor v. Florida, 504 U.S. 967, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992). Inclusion of the Dixon language does not cure the vagueness of the whole instruction because the instruction still focuses on the meaningless definitions condemned in Espinosa, Shell, and Maynard. The Dixon language merely applies those vague definitions to give jurors an example of the type of crime HAC is intended to cover. Instructing the jury with this language as only an example still gives the jury the discretion to follow the definitions repudiated in Espinosa.

Second, the terms "conscienceless," "pitiless," and "unnecessarily torturous" are subject to overbroad interpretation. A jury could easily conclude that any homicide that was not instantaneous would qualify for the HAC circumstance. Furthermore, as this Court said in Pope v. State, 441 So. 2d 1073, 1077-78 (Fla. 1983), an instruction inviting the jury to consider if the crime was "conscienceless" or "pitiless" allows the jury to consider lack of remorse, which is strictly forbidden by Florida law.

Appellant recognizes that the standard instruction was approved in the face of a vagueness challenge in Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993), but he urges this Court to reconsider the issue because, as demonstrated here, Hall and the cases relying on it were erroneously decided.

Counsel pretrial moved unsuccessfully to declare the statute and the instruction unconstitutional on vagueness and other grounds. R123-41, R650-52. A motion for a revised instruction as to post-death trauma also was denied. R461, 461; T1021-22. At the charge conference, counsel requested the standard instruction because "that's the law." T1021-24. Nonetheless, this Court should address the merits of this claim in the interests of justice. This circumstance was a contested issue at trial, T1108, T710; R485-88; R520-22, so giving the erroneous instruction had great significance.

2. The judge changed a word in the standard instruction, thereby erroneously permitting jurors to eliminate one of the essential elements of HAC from required consideration.

The last paragraph of the standard instruction says:

> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

Fla. Std. Jury Instr. (Crim.) 77 (emphasis supplied). That is the instruction the judge had prepared and apparently had intended to read aloud to jurors. R476-77. But the instruction

the judge actually read aloud to the jury materially and reversibly varied from the standard instruction:

> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was consciousless [sic] or pitiless or unnecessarily torturous to the victim.

T1135-36 (emphasis supplied). This portion of the aggravating circumstance instruction makes clear that HAC requires proof that the murder was both (1) conscienceless or pitiless and (2) was unnecessarily torturous to the victim. Finding both, not just one, is what this Court expressly intended in Dixon, where the Court said HAC must apply to a "conscienceless or pitiless crime which is unnecessarily torturous." Dixon, 283 So. 2d at 9 (emphasis supplied). Incorporating the dual requirement of Dixon is precisely what this Court intended, In re Standard Jury Instructions in Criminal Cases (90-1), 579 So. 2d 75 (Fla. 1990); see Atwater, 626 So. 2d at 1328 n.3, because the limitation is required for the statute to meet constitutional requirements, see Proffitt. By orally changing the word "and" to "or," the judge allowed jurors to eliminate one of those essential requirements while still finding the circumstance proved beyond a reasonable doubt. This was reversible, fundamental error.

Mr. Wike acknowledges that the record indicates the judge intended to provide each juror an individual copy of written instructions to bring into the jury room. T1140. However, that does not cure the problem. First, the record does not indicate that jurors actually had the written instructions with them during deliberations; and even if they did, the written standard

instruction was vague, as explained above. Second, the fact that jurors were exposed to two directly contradictory instructions on essential elements of this aggravating circumstance necessarily renders their judgment suspect and unreliable, for there is no way to tell whether jurors followed the oral, incorrect instruction, or the written, standard instruction. Third, no written instruction can be expected to have the same weight as an oral directive issued personally by the judge in open court. Ours is a system based on hundreds of years of tradition in which jury instructions always have been orally given. Reasonable jurors cannot be presumed to have casually dismissed the judge's oral instructions, for such a presumption would strike at the very heart of the jury system and would violate due process and the protection against cruel and/or unusual punishment.

**C. The instruction as to the prior violent felony aggravating circumstance was so vague and overbroad that it invited the jury to unlawfully quadruple the weight to this single factor; and it unconstitutionally invaded the province of the jury by relieving jurors of their responsibility to find the elements proved.**

In instructing the jury as to the existence of a prior capital or violent felony conviction under section 921.141(5)(b), Florida Statutes (1987), the judge said:

> THE AGGRAVATING CIRCUMSTANCES THAT YOU MAY CONSIDER ARE LIMITED TO ANY OF THE FOLLOWING THAT ARE ESTABLISHED BY THE EVIDENCE:
>
> 1. THE DEFENDANT HAS BEEN PREVIOUSLY CONVICTED OF ANOTHER CAPITAL OFFENSE OR A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO SOME PERSON;
>
> A. THE CRIME OF SEXUAL BATTERY UPON A CHILD UNDER THE AGE OF 12 YEARS IS A CAPITAL FELONY.

B. THE CRIME OF ROBBERY COMMITTED IN THE STATE OF PENNSYLVANIA IS A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO ANOTHER PERSON.

C. THE CRIME OF KIDNAPPING OF SAYEH RIVAZFAR IS A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO ANOTHER PERSON.

D. THE CRIME OF ATTEMPTED FIRST DEGREE MURDER OF SAYEH RIVAZFAR IS A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO ANOTHER PERSON.

R475-76; see T1134-35. The instruction was erroneous on two grounds.

1. The instruction permitted the jury to quadruple its finding and weighing of this single aggravating circumstance.

The trial court's instruction invited the jury to find the existence of four specific prior violent felonies in aggravation, yet nothing in the instruction clearly limited the jury's discretion as to separately finding and weighing each of the four crimes as four heavy aggravating circumstances. Mr. Wike objected to the instruction on this ground and proposed an alternative instruction that would at least require jurors to merge the contemporaneous felonies as one because they were based on the same aspect of the crime -- Sayeh's victimization. The State recognized the problem and even suggested some limiting language to that effect. Nonetheless, the Court overruled the objection, did not incorporate the limiting language suggested by either party, and rejected the defense's proposed instruction. The court instead believed that eliminating the aggravating circumstance of murder committed while engaged in an enumerated

felony, section 921.141(5)(d), Florida Statutes (1987),[19] would resolve the defense's concern about doubling. Defense counsel explained that while the Court's decision not to instruct on the (5)(d) aggravator was correct -- and the State did not disagree -- the doubling problem still existed by listing four separate felonies in the prior violent felony instruction without limiting language to restrain the jury's discretion to find and weigh the aggravator four times. Defense counsel again objected, but the court overruled that objection and gave the unbridled instruction quoted above. T1005-17, 1020, 1057-59; R460.

Just as two aggravating circumstances cannot be based on the same aspect of the crime, e.g., Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2929, 53 L. Ed. 2d 1065 (1977), a single aggravating circumstance cannot be found and weighed four times. The jury is free to attribute less or more weight to a single factor based on the facts of a case, but the jury cannot be given free reign to find each and give great weight to each, then add them to the other aggravators to make the cumulative number of aggravators and the cumulative weight of the aggravators far greater than what the law permits.

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[19] Section 921.141(5)(d) provides:

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

See also Fla. Std. Jury Instr. (Crim.) 76.

That would thoroughly distort the weighing process. Yet the instruction here gave the jury the kind of open-ended discretion condemned under the eighth amendment, Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1980), and under article I, section 17, of the Florida Constitution. Mr. Wike asked for and was entitled to get a limiting instruction to prevent the jury from doubling these prior convictions. See Castro v. State, 597 So. 2d 259, 261 (Fla. 1992) ("A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, and thus the instruction should have been given.").

2. The instruction erroneously commented on the evidence, invaded the province of the jury, and relieved the State of its burden by directing jurors to the elements of this aggravating circumstance proved.

The state and federal constitutions require that "[i]n a jury trial it is the sole province of the jury to determine whether the state has proved each essential element beyond a reasonable doubt." Wright v. State, 586 So. 2d 1024, 1030 (Fla. 1991). An instruction unconstitutionally comments on the evidence and invades the fact-finding province of the jury when it has the effect of telling jurors an element has been proved. Id. at 1030-31. For example, in Wright, the issue concerned battery on a law enforcement officer, and the jury had to determine whether the State had proved beyond a reasonable doubt the essential element that the victims in that case were in fact law enforcement officers.

> [T]he trial court instructed the jury that Peggy Gahn and Gary Farless, the respective victims, were law enforcement officers. We conclude that the trial court erred. The instruction in effect directed the jury to find as a matter of law that an essential element was proved. Whether these particular persons were law enforcement officers at the time the offense occurred was a matter of fact, and that fact constituted an essential element of the offense.

Id. at 1030. The court in Sarduy v. State, 540 So. 2d 203 (Fla. 3d DCA 1989) applied a similar analysis to reverse a second-degree murder conviction:

> [T]he trial court also instructed the jury that "[e]ven though a defendant had no intent to hit or kill anyone, firing a gun into a crowd of people constitutes second degree murder when a person is killed as a result."
>
> The instruction on shooting into a crowd was tantamount to a directed verdict of guilty and requires a reversal of the conviction for second degree murder. Directing a verdict against a criminal defendant is clear error.
>
> > A trial court ... has no power to direct a verdict of guilty. An instruction deciding a material fact issue as a matter of law adversely to the accused is regarded as a partial instructed verdict of guilty prohibited by the rule just stated.
>
> Mims v. United States, 375 F.2d 135, 148 (5th Cir. 1967) (footnote omitted), citing United Bhd. of Carpenters & Joiners of America v. United States, 330 U.S. 395, 408, 67 S. Ct. 775, 782, 91 L. Ed. 973, 985 (1946) ("For a judge may not direct a verdict of guilty no matter how conclusive the evidence."). The instruction given here violated Sarduy's due process rights protected by the Florida and United States constitutions by excusing the state from its burden of proving beyond a reasonable doubt each element of the charged offense. The trial court, in giving the instruction, also usurped the jury's fact-finding function and eliminated any possibility that the jury would find Sarduy guilty of either manslaughter or excusable homicide. See Bowes v. State, 500 So. 2d 290 (Fla. 3d DCA 1986), rev. denied, 506 So. 2d 1043 (Fla. 1987) (murder conviction reversed where instructions implied

excusable homicide defense unavailable if dangerous weapons involved).

Sarduy, 540 So. 2d at 204.

The same errors occurred here as to three of the four prior violent felony instructions because the judge clearly directed the jury to find as a matter of law that essential elements of the aggravating circumstance had been proved. Paragraphs C & D most clearly violated the law in telling jurors that Sayeh's kidnapping and Sayeh's attempted murder were felonies "involving the use or threat of violence to another person." The same is true as to paragraph B because the instruction was directed to the one and only Pennsylvania robbery conviction at issue, leaving the jury no fact to find. Because of the way in which this instruction was worded, three of the prior violent felonies had been deemed proved as a matter of law before the jury ever had the opportunity to consider the facts.

Appellant acknowledges that no objection was made to this erroneous instruction on this ground. Nonetheless, Wright left open the issue of whether this error could be fundamental, 586 So. 2d at 1031 n.9. In this case, the error was fundamental, expecially when considered in conjunction with the other instruction errors, particularly the doubling permitted by the judge over the defense's objection, see Issue III(C)(1), pp.59-61, supra.

**D. The jury instruction as to the avoid lawful arrest aggravator failed to give jurors any guidance as to what the State was required to prove.**

Section 921.141(5)(e), Florida Statutes (1987), provides:

> The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

When the victim is not a law enforcement officer, this statute requires proof beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of the witness. E.g. Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994); Livingston v. State, 565 So. 2d 1288 (Fla. 1988). Evidence of the requisite intent "must be very strong." Hannon v. State, 638 So. 2d 39, 44 (Fla. 1994), cert. denied, 115 S. Ct. 1118, 130 L. Ed. 2d 1081 (1995); Riley v. State, 366 So. 2d 19, 22 (Fla. 1978). The sole or dominant motive must be proved by positive evidence; speculation is insufficient. Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1937, 104 L. Ed. 2d 408 (1989). If circumstantial evidence is relied upon, the State's evidence must be inconsistent with every other reasonable hypothesis. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). The motive to eliminate witnesses cannot be inferred solely from a plan to commit, or the actual commission of, another felony, as with CCP. Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995), cert. denied, 116 S. Ct. 823, 133 L. Ed. 2d 766 (1996).

In the present case the judge instructed as follows:

> THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR AFFECTING AN ESCAPE FROM CUSTODY.

R476; see T1135. This was the standard jury instruction, which merely tracks the statutory language. See Fla. Std. Jury Instr.

(Crim.) 76-77. However, the instruction fails to tell jurors that the aggravating circumstance can be applied only where the sole or dominant motive for the murder was elimination of the witness; that strong proof beyond a reasonable doubt also must be inconsistent with any other reasonable hypothesis; and that it cannot be inferred from speculation, proof of a plan to commit, or the actual commission of, another felony. The instruction tracking the statute is especially confusing in that it seems on its face to be directed toward situations directly involving law enforcement, yet case law says it can be applied when a law enforcement officer is not directly involved. "Purpose" is undefined both in the statute and in the instruction, so even if this Court's narrowing construction might clarify the statute in a case-by-case application, it does not provide jurors the guidance they require.

A standard instruction that merely mirrors the statute and provides no guidance is unconstitutional under the eighth amendment, e.g., Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1980), and article I, section 17 of the Florida Constitution. This Court, in Jackson v. State, 648 So. 2d 85 (Fla. 1994), applied that principle by holding that its prior case law approving the CCP instruction was no longer applicable in light of Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992) (striking down HAC instruction that did little more than track statute), and Hodges v. Florida, 506 U.S. 803, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1992). Thus, Jackson revisited and struck down the CCP instruction. Just as

Espinosa and Jackson struck down penalty instructions that tracked the statute without sufficient guidance, the Court should do the same here with respect to the "avoid lawful arrest" aggravator. Cf. State v. Smith, 573 So. 2d 306, 310 (Fla. 1990) (standard instruction on excusable homicide required clarification even though it tracks statutory language because the language, though narrowed by judicial construction, is unclear).

This Court in Whitton v. State, 649 So. 2d 861, 864 n.10 (Fla. 1994), cert. denied, 116 S. Ct. 106, 133 L. Ed. 2d 59 (1995), rejected a vagueness claim as to this aggravating circumstance instruction under Espinosa. However, the argument here is more compelling. Furthermore, Jackson was decided after Whitton and properly explicates the requirements of law applicable to this claim. This Court should revisit the issue under Jackson.

Appellant pretrial unsuccessfully challenged the statute and the instruction on vagueness and other grounds, R177-187, R652, but did not challenge it at the charge conference, T1018. Nonetheless, this argument should not be deemed waived in the interests of justice. The "avoid lawful arrest" aggravator was a contested issue, T1107, 710-11, R488, R518-20, so the erroneous instruction had great import in the jury's ultimate determination. Moreover, as demonstrated in Issue IV(A), pp.69-75, infra, the evidence was insufficient to prove this factor, so the judge erred by instructing on it over Mr. Wike's objection. T710-11. Cf. Mungin v. State, 21 Fla. L. Weekly S66 (Fla. Feb.

8, 1996) (on rehearing denied) (error to instruct as to premeditated murder when court should have granted judgment of acquittal as to premeditation).

**E. The jury should have been instructed not to find both the CCP and avoid lawful arrest aggravators if both were based on the same aspect of the crime.**

As demonstrated in Issue IV(B), pp.75-77, infra, the judge should not have given double consideration to the avoid lawful arrest and cold, calculated, and premeditated aggravating circumstances because essentially the same facts necessarily underpinned both. Just as the judge made that mistake, jurors were left free to do the same because they were given no instruction to limit their discretion in the very manner prohibited by Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1980). See Castro v. State, 597 So. 2d 259, 261 (Fla. 1992). Despite the omission of counsel to seek a limiting instruction on this point, the error on these facts, when added to the other errors in this case, constitutes fundamental error.

**F. Even if not individually preserved or harmful, the cumulative affect of all instruction errors constitutes fundamental error infecting the very heart of the penalty phase trial.**

Jury instruction errors going to the heart of a case constitute fundamental error compelling reversal. E.g., Rojas v. State, 552 So. 2d 914 (Fla. 1989) (omitting justifiable and excusable homicide definitions in manslaughter instruction); Anderson v. State, 276 So. 2d 17 (Fla. 1973) (omitting premeditation definition in first-degree murder); Jones v. State,

656 So. 2d 489 (Fla. 4th DCA) (erroneous reasonable doubt instruction), review denied, 663 So. 2d 632 (Fla. 1995), cert. denied, 116 S. Ct. 1451, 134 L. Ed. 2d 570 (1996). If one critical or fundamental error requires reversal, certainly multiple errors require reversal.

Even if any or all of these instruction errors are not fundamental when viewed in isolation, the collective impact of whatever multiple instruction errors occurred here goes right to the core of the most critical issue this jury faced: finding and weighing aggravating circumstances. Viewed in the context of the overall instructions, the vague and erroneous instructions and instruction omissions prevented jurors from adequately channeling their sentencing discretion and left them instead with the open discretion prohibited by the United States and Florida Constitutions. See Kearse v. State, 662 So. 2d 677, 684 (Fla. 1995) (erroneous penalty instructions and doubling of aggravators collectively required reversal for new penalty phase before jury). The flawed instructions here, in combination, constitute fundamental error. The jury's determination was unreliable under the circumstances, so this cause should be remanded for a new sentencing proceeding.

ISSUE IV: WHETHER THE COURT ERRONEOUSLY FOUND MURDER COMMITTED TO AVOID LAWFUL ARREST, ERRONEOUSLY DOUBLED THE CCP AND AVOID LAWFUL ARREST AGGRAVATING CIRCUMSTANCES, AND ERRONEOUSLY MADE AMBIGUOUS FINDINGS AS TO THREE MITIGATING CIRCUMSTANCES, THEREBY VIOLATING MR. WIKE'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

The judge's findings and attribution of weight include a number of errors. The judge found the avoid lawful arrest

aggravating circumstance despite the absence of evidence of motive. The judge compounded that error by doubling the circumstance with CCP where he relied on the same aspects of the crime. The judge also was ambiguous about his finding and weighing three aggravating circumstances, thus making unclear whether he gave them appropriate consideration. These errors violated Mr. Wike's rights under the United States and Florida Constitutions to fair penalty phase trial, due process, and his protection against cruel and/or unusual punishment. U.S. Const. amends VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const. His protections under the Florida Constitution are greater than those minimal protections afforded by the federal constitution. See, e.g., Allen v. State, 636 So. 2d 494 (Fla. 1994) (Florida's cruel or unusual punishment protection more protective than federal counterpart); Traylor v. State, 596 So. 2d 957 (Fla. 1992) (primacy of Florida Constitution).

**A. The trial judge erroneously found the murder was committed to avoid arrest in the absence of clear and positive proof of motive.**

Section 921.141(5)(e), Florida Statutes (1987), establishes aggravation for a murder committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. As stated above in Issue III(D), pp.63-67, supra, the circumstances of this case required the State to have very strong evidence to prove beyond a reasonable doubt, and with positive evidence inconsistent with every other reasonable hypothesis -- not speculation -- that the sole or dominant motive for the murder was the elimination of the witness. The motive to

eliminate witnesses cannot be inferred solely from a plan to commit, or the actual commission of, another felony, the same rule applied to CCP. E.g. Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1937, 104 L. Ed. 2d 408 (1989). This factor concerns one thing -- motive, which must be distinguished from the method of killing embraced within other factors, such as CCP and HAC. See, e.g., Stein v. State, 632 So. 2d 1361, 1366 (Fla.), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994). The judge here both invoked an erroneous standard of law and misapplied the facts to the law.

First, the judge said he was guided by the rule of law that

> Evidence that a victim knew the Defendant and could later identify him is sufficient to prove this aggravating circumstance. Correll v. State, 523 So. 2d 562 (Fla.[), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152] 1988); Welty v. State, 402 So. 2d 1159 (Fla. 1981).

R504. This is wrong. While evidence that a victim knew the defendant may be considered by the judge as one factor in the totality of circumstances, it is not sufficient to prove the aggravating circumstance beyond all reasonable doubt, especially when other hypotheses exist. Case law does not support the judge's standard.

Second, the judge misapplied the law because even if evidence suggested witness elimination as a possible motive, or even a likely motive, the evidence was insufficient to establish witness elimination as the sole or dominant motive. As this Court has said many times, the State's evidence of "sole" or "dominant" motive must be "very strong," Hannon v. State, 638 So.

2d 39, 44 (Fla. 1994), cert. denied, 115 S. Ct. 1118, 130 L. Ed. 2d 1081 (1995); Scull, 533 So. 2d at 1141, and it cannot be based on "mere speculation," even if that speculation is reasonable, Scull, 533 So. 2d at 1142. The judge here found:

> In the instant case, the evidence presented to the jury was that the victims knew the Defendant as a friend of their mother, could identify him and knew him by his name, Ray. The evidence clearly established that the Defendant kidnapped both girls from their home, transported them to a remote, rural area of Santa Rosa County, sexually battered Sayeh Rivazfar, attempted to kill her and that Sara Rivazfar while bound by tape witnesses the Defendant's attempt to kill her sister. The Defendant slashed both of the girls throats several times in an attempt to eliminate Sayeh Rivazfar as a witness to the kidnapping and sexual battery and Sara Rivazfar as a witness to the kidnapping, sexual battery and attempted murder of her sister. The girls throats were not slashed in the same location where the sexual battery took place, but they were walked into a thick pine forrest [sic] where the murder and attempted murder took place and where the Defendant left them for dead. All of these circumstances taken together establish that the motive of the Defendant was witness elimination for the purpose of avoiding or preventing his lawful arrest. Preston v. State, 607 So. 2d 404, 409 (Fla. 1992)[, cert. denied, 507 U.S. 999, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993)].

R504-05; T719-21. The court's ultimate findings are both conclusory and speculative. The judge here merely concluded that he killed Sara to eliminate a witness. This is pure guess work. The judge also wrongly gave weight to the appellant's possible motivation for the attempted murder of Sayeh Rivazfar, who was not even the murder victim in this case.

Mr. Wike's motive for each of the crimes committed in this case are a mystery. Although there is evidence as to what his actions were, there is no evidence as to his motivation. Most

cases in which this circumstance is found include statements by the defendants made at the scene of crimes or afterward bearing directly on motive. E.g., Hannon, 638 So. 2d at 44 (statements made by killers after the murders); Harvey v. State, 529 So. 2d 1083 (Fla. 1988) (killers discussed need to eliminate witnesses in front of victims at time of killing), cert. denied, 489 U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989). Here, however, Mr. Wike made no statements either during or after the crimes to give any indication of motive, and he has consistently maintained his innocence. It is also important to note that the fact that appellant took Sara and Sayeh into the woods proves nothing about motive in this case. It may be some proof of his intent to kill, but it does not show why he wanted to kill. Additionally, he was not an escaped fugitive, and there is no evidence he had any reason to believe law enforcement was after him at the time of the killing.

The judge also did not consider other hypotheses, none of which are pleasant or mitigating but still constitute reasonable hypotheses consistent with other motives for the killing. For example, due to Mr. Wike's prior relationship with Patricia Rivazfar, the mother of both girls, he could have sought to kill Sara to hurt Patricia as a means of seeking vengeance. See Arbelaez v. State, 626 So. 2d 169 (Fla. 1993) (killed child because he wanted revenge against the child's mother), cert. denied, 114 S. Ct. 2123, 128 L. Ed. 2d 678 (1994); Klokoc v. State, 589 So. 2d 219 (Fla. 1991) (killed daughter to retaliate against wife). Or Sara's murder could have been motivated by

sheer cruelty, which already is covered by the HAC aggravating circumstance. Or he could have had some other unexplained reason. Knowles v. State, 632 So. 2d 62, 66 (Fla. 1993) (rejecting witness elimination as sole or dominant motive because "Knowles could have shot his father for the same unexplained reason that he shot Carrie Woods, or for some other undisclosed reason").

A number of analogous cases support Mr. Wike's position. For example, in Jackson v. State, 599 So. 2d 103 (Fla.), cert. denied, 506 U.S. 1004, 113 S. Ct. 612, 121 L. Ed. 2d 546 (1992), Jackson and co-defendant Livingston went to a residence to find Jackson's estranged wife, Karen Jackson. She was there with the Jackson children, her lover Larry Finney, and four people with whom she and her kids were living: Walter Washington, Edna Manuel Washington, and Edna's children Terrance Manual and Reginald Manual. They transported Karen and the Jackson children into the cab of Jackson's truck, and transported the five decedents -- Finney, the Washingtons, and the Manuel children -- into the camper of the truck. After driving around for a while, Jackson and Livingston found an abandoned car. They transported the five victims from the truck into the abandoned car, shot the Washingtons and Finney and set the car afire, killing the Manuel children by smoke inhalation. Jackson denied any involvement in the crimes and made no statements indicating his motive. Jackson got the death sentence for the deaths of the Manuel children partly supported by the witness elimination aggravator. In reversing the sentence, this Court reversed the trial court's

finding as to the avoid lawful arrest aggravating circumstance by holding

> There is no direct evidence of Jackson's motive for killing the two children, and the circumstantial evidence was insufficient to prove that Jackson killed the children to eliminate them as witnesses.

599 So. 2d at 109. Similarly, in Dailey v. State, 594 So. 2d 254 (Fla. 1991), Dailey and co-defendant Pearcy picked up some women including the victim, Shelly Boggio. After drinking together at some bars and later at Pearcy's house, Dailey and Pearcy took Shelly into a car and drove off. Shelly's nude body was discovered the next day. She had been stabbed, strangled, and drowned, and may have been sexually battered. No statements were introduced revealing motive for the murder in that case, and this Court reversed the finding that the murder had been committed to eliminate a witness because the evidence failed to prove it beyond a reasonable doubt.

The relevant facts in Mr. Wike's case are indistinguishable from these cases. Even though the victims had been transported, there was insufficient evidence to establish, beyond a reasonable doubt, that the motive for the killing in any of these cases was witness elimination. See also, e.g., Knowles, 632 So. 2d at 62 (killer murdered ten-year-old girl, walked outside and killed his own father, taking his father's truck to leave the scene, but witness elimination in father's murder not proved to be dominant or sole motive when other possible reasons, or no rational reason, could have existed); Scull, 533 So. 2d at 1142 (two women had been savagely beaten to death and their bodies burned, but

because there was no evidence to establish Scull's motive to the murders, the avoid lawful arrest aggravator did not apply).

Hannon, 638 So. 2d at 39, presents a good case in contrast. Hannon and co-defendant Acker went to the home of Brandon Snider to avenge what Snider had done to Acker's sister. They killed Snider, and in the process they were seen by Snider's roommate, Carter, so they pursued and killed Carter, too, shooting him six times. While in jail, Hannon told a cellmate that one of the victims was a "real jerk" but the other victim was a "pretty nice guy" who was just in the wrong place at the wrong time. Hannon also advised another cellmate that the cellmate should have left no witnesses in the cellmate's crime. Id. at 44. This evidence established that in Hannon's mind, Carter was a witness who had to be eliminated. No such compelling evidence exists in Mr. Wike's case. The court erred by instructing on this factor and by finding it proved.

**B. The error finding murder to avoid arrest was compounded by the court's erroneous doubling of this aggravator with the CCP aggravator.**

To find the murder had been cold, calculated, and premeditated, the judge found as follows:

> If the Defendant's intent was merely to kidnap the minor victims, or even to sexually batter both of said victims, he could have done so and then left the children in an area where they would have easily been found. Instead, the Defendant kidnapped the children from their home, drove across a county line into a rural and heavily wooded area. He sexually battered Sayeh after binding the decedent's hands with tape and even then did not allow the children to go free but continued into even a deeper pine thicket area where he had the children exit the car and march

into the woods where the murder of the victim took place.

R506-07; T721-23. To find the murder was committed to avoid a lawful arrest, the judge relied on precisely the same facts, adding only that Sara Rivazfar had known Mr. Wike and could identify him. R504-05; T719-21.

Courts are prohibited from finding and weighing two aggravating circumstances that are based on the same aspect of the crime because doing so skews the weighing process, undermining confidence in the decision and rendering the sentence unreliable. e.g., Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2929, 53 L. Ed. 2d 1065 (1977). Yet the record demonstrates that the judge relied primarily on the same facts to find both circumstances, just as the prosecutor did in his closing argument. T1084-85, 1089-92. Only one additional fact was added in finding witness elimination, but the addition of that single fact is not enough to overcome the constitutional prohibition discussed in Provence and its progeny, especially in light of the fact that the judge erred by finding witness elimination in the first place.

The present facts are distinguishable from Stein v. State, 632 So. 2d 1361, 1366 (Fla.), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994), and Hodges v. State, 595 So. 2d 929, 934 (Fla. 1992), vacated on other grounds, 506 U.S. 803, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1992), where doubling arguments also were made. In Stein, the Court focused on distinct facts that distinguished motive (avoid lawful arrest) from method (CCP).

Evidence showed that well in advance, the killers had openly discussed the need to eliminate witnesses as part of their plan to rob the Pizza Hut where one of the killers previously had worked. Then, when the murders took place, one victim suffered five gunshot wounds -- four to the head and one to the chest, and the other victim suffered four gunshot wounds -- one through the neck, one in the right shoulder, one in the chest, and one in the right thigh (CCP). Likewise, in Hodges, the Court found that Hodges' sole purpose in killing the victim was to prevent his being prosecuted for indecent exposure, and distinct facts showed he planned her execution in a cold, calculated, and premeditated manner.

The erroneous doubling thereby violated Mr. Wike's rights to a fair resentencing trial, due process, and protection against cruel and/or unusual punishment. U.S. Const. amends VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

**C. The trial judge made numerous ambiguous findings as to mitigation.**

The judge may or may not have found age mitigation, giving Mr. Wike's age of 32 "little if any weight." R508-09, 727-28. The judge also gave "little, if any weight" to Mr. Wike's mental and/or emotional disturbance developed as the result of his father's death and continuing through the date of the crime, or that he has led a troubled and emotionally unstable life in recent years. R511, 731. Finally, the judge gave "little or no weight" to the fact that Mr. Wike has adapted well to prison life and can most likely continue to make a satisfactory adjustment to

that life. R512, 732-33. These findings are unclear and do not demonstrate that the judge appropriately considered, found, and weighed the mitigating circumstances.

In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this Court stressed the significance of the need for trial courts to express with the utmost clarity their findings of mitigation, the facts on which they relied to find or reject every possible mitigating circumstance, and the weight they gave to each. The findings quoted above fall well short of the mark. It is impossible to tell whether the Court found any of these three circumstances, and if it did, what weight it attributed to them. The sentencing order thereby deprives the reviewing court of a full understanding of the trial court's decision, so resentencing is required.

## CONCLUSION

For the reasons stated above, this Court should reverse the sentence and remand for sentencing before a jury.

**CERTIFICATE OF SERVICE**

I certify that a copy of this initial brief of appellant has been furnished by delivery to Ms. Gypsy Bailey, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301, and a copy has furnished by mail to appellant Warfield Raymond Wike, Jr., on this 1st day of July, 1996.

Respectfully submitted,

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**IN THE SUPREME COURT OF FLORIDA**

WARFIELD RAYMOND WIKE, JR.,

Appellant,

vs. CASE NO 86,537

STATE OF FLORIDA,

Appellee.

_____/

# A P P E N D I X

**TO**

**INITIAL BRIEF OF APPELLANT**


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IN THE CIRCUIT COURT IN AND FOR SANTA ROSA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. 88-547-CF

WARFIELD RAYMOND WIKE, JR.,

Defendant.



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## ORDER OF SENTENCE AND FINDINGS OF FACT SUPPORTING THE IMPOSITION OF DEATH SENTENCE

This matter is before the Court for resentencing of the Defendant, Warfield Raymond Wike, Jr., for the offense of first degree premeditated murder. On June 19, 1989, the Defendant was found guilty of first degree premeditated murder and felony murder of Sara Rivazfar, the kidnapping of Sara and her sister, Sayeh, the sexual battery of Sayeh Rivazfar and the attempted first degree murder of Sayeh Rivazfar. On July 19, 1989, the Court sentenced the Defendant to a term of imprisonment for a period of 22 years for the kidnapping and attempted first degree premeditated murder charges and to a term of life imprisonment without possibility of parole for 25 years for the sexual battery of Sayeh Rivazfar. Those sentences were to run concurrent with each other. The Court further imposed the sentence of death by electrocution upon the Defendant for the offense of first degree premeditated murder of Sara Rivazfar.

## STATEMENT OF THE CASE

On appeal, the Supreme Court of Florida affirmed the Defendant's convictions and sentences for all offenses except the sentence of death for first degree premeditated murder and remanded the case to the trial court for a second penalty phase proceeding before a newly

impanelled jury. Pursuant to the Mandate of the Supreme Court of Florida, a new jury was impanelled on November 30, 1992, and following the second penalty phase proceedings, the jury, on December 3, 1992, returned its advisory sentence recommending to the Court by a majority vote of twelve (12) to zero (0) that the Defendant be sentenced to death by electrocution. On January 11, 1993, the Court imposed the sentence of death by electrocution upon the Defendant for the offense of first degree, premeditated murder of Sara Rivazfar. That sentence was also reversed and the case was again remanded for a new penalty phase proceeding.

In accordance with the Mandate of the Supreme Court of Florida, a new jury was impaneled on August 15, 1995, and following the new penalty phase proceedings, the jury, on August 18, 1995, returned its advisory sentence recommending to the Court by a majority vote of twelve (12) to zero (0) that the Defendant be sentenced to death by electrocution.

A sentencing hearing was conducted by this Court on September 8, 1995. At that hearing, the Defendant objected to the "update to presentence investigation" report as it related to the jail disciplinary actions. He disputed many of the factual allegations contained in the report and for the purposes of this resentencing, the Court is not considering the criminal contempt charge of August 17, 1995, or the prior prison or jail disciplinary actions set forth in said report. Also, attached to the update to the Presentence Investigation was a letter from the decedent's father, Ahmad Rivazfar which was submitted as a victim impact statement. The Court did not consider said statement as an aggravating circumstance or in any other way adversely to the Defendant.

The Court after carefully considering the evidence presented during this new penalty

phase proceeding, the advisory sentence of the jury, the Sentencing Memorandum of the State and of the Defendant, the citations of authority presented by counsel and the evidence and argument presented during the sentencing hearing finds as follows:

## SYNOPSIS OF FACTS AND EVIDENCE

In the early morning hours of September 22, 1988, the Defendant drove to the home of Patricia Rivazfar in Escambia County, Florida, entered her home and kidnapped her daughters Sara and Sayeh Rivazfar while they were asleep. At the time this offense was committed Sayeh Rivazfar was eight years of age and her sister Sara was six years of age. The Defendant carried each of the young girls from their home and placed them in his car. The Defendant then drove across the Escambia County line into a remote area in the northern portion of Santa Rosa County. He proceeded to drive onto a dirt road into a wooded and secluded area of the county. The Defendant then bound Sara's hands behind her back with tape, removed Sayeh from the car and sexually battered her on the trunk of his car.

After sexually battering Sayeh, the Defendant returned Sayeh to the car, drove further along the dirt road until such time as he stopped his vehicle and walked the children deeper into the woods and told Sayeh to "say a prayer" at which time he slit the throat of Sayeh with a knife several times, stabbed her in the throat one time and allowed her to fall to the ground. During this time, Sara's hands were still bound behind her and she was heard crying and screaming by her sister. The Defendant then proceeded to slit the throat of Sara multiple times resulting in her death. The Defendant departed the area leaving both girls to die and returned to the home of his mother and stepfather. His mother saw him later that same morning and testified that he did not appear to be drunk.

Sayeh was somehow able to walk out of the woods where she was found by a passing couple who sought assistance for her. As a result of information given to law enforcement officials by Sayeh, the Defendant was subsequently arrested, indicted and convicted for these offenses.

## CONSIDERATION OF AGGRAVATING CIRCUMSTANCES

The evidence supports the finding of the following aggravating circumstances beyond a reasonable doubt based upon the evidence presented during the new penalty phase proceeding:

1. The Defendant was previously convicted of another felony involving the use or threat of violence to the person. - Section 921.141(5)(b). The Defendant was convicted for the offense of robbery in 1974 in the State of Pennsylvania as evidenced by the certified copy of the Defendant's Judgment of Conviction for that offense. Even though said offense was committed in 1974, said conviction may be properly considered as an aggravating circumstance in that the death penalty statute is silent as to the time or place of previous convictions. Kelley v. Dugger, 597 So.2d 262 (Fla. 1992). Additionally, the Defendant was convicted of attempted first degree premeditated murder, sexual battery and kidnapping of Sayeh Rivazfar as evidenced by the introduction of certified copies of the Defendant's Judgment of Conviction in this case. Although these convictions were entered contemporaneously with the Defendant's conviction for first degree murder, they were entered previous to sentencing and may be considered as an aggravating circumstance. Lucas v. State, 376 So.2d 1149 (Fla. 1979).

2. The capital felony was committed for the purpose of avoiding or preventing a

lawful arrest. - Section 921.141(5)(e). This Court is well aware that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses. Menendez v. State, 368 So.2d 1278 (Fla. 1979). However, this aggravating circumstance has been applied in cases where the victim is not a law enforcement officer where it was clearly shown that the dominant or only motive for the murder was the elimination of witnesses. Riley v. State, 366 So.2d 19 (Fla. 1978). This factor may be proved by circumstantial evidence from which the motive for the murder may be inferred without direct evidence of the offender's thought processes. Preston v. State, 607 So.2d 404 (Fla. 1992); Swafford v. State, 533 So.2d 270 (Fla. 1988), *cert. denied*, 489 US 1100 (1989). Evidence that a victim knew the Defendant and could later identify him is sufficient to prove this aggravating circumstance. Correll v. State, 523 So.2d 562 (Fla. 1988); Welty v. State, 402 So.2d 1159 (Fla. 1981).

In the instant case, the evidence presented to the new jury was that the victims knew the Defendant as a friend of their mother, could identify him and knew him by his name, Ray. The evidence clearly established that the Defendant kidnapped both girls from their home, transported them to a remote, rural area of Santa Rosa County, sexually battered Sayeh Rivazfar, attempted to kill her and that Sara Rivazfar while bound by tape witnessed the Defendant's attempt to kill her sister. The Defendant slashed both of the girls throats several times in an attempt to eliminate Sayeh Rivazfar as a witness to the kidnapping and sexual battery and Sara Rivazfar as a witness to the kidnapping, sexual battery and attempted murder of her sister. The girls throats were not slashed in the same location where the sexual battery

took place, but they were walked into a thick pine forrest where the murder and attempted murder took place and where the Defendant left them for dead. All of these circumstances taken together clearly establish that the motive of the Defendant was witness elimination for the purpose of avoiding or preventing his lawful arrest. Preston v. State, 607 So.2d 404, 409 (Fla.1992).

3. The capital felony was especially heinous, atrocious or cruel. - Section 921.141(5)(h). The Supreme Court of Florida has held that fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous. Preston v. State, 607 So.2d 404, 410 (Fla. 1992); Hitchcock v. State, 578 So.2d 685, 693 (Fla. 1990). One can only imagine the absolute fear and terror experienced by Sara on the morning of her death. This horror did not occur instantaneously but manifested itself over a period of time commencing with Sara's abduction from her home. Sayeh described to the new jury the events of that morning. After being driven from their home into rural Santa Rosa county, the children awakened to find themselves in the Defendant's car on a dirt road in a secluded area. Sara's horrifying experience continued as the Defendant drove his vehicle onto a dirt road at which time he stopped the car and bound Sara's hands with tape while she was still in the rear seat of the vehicle. Sara then witnessed the Defendant sexually batter her sister, Sayeh, on the trunk of the car. Sayeh was bleeding profusely and the evidence of that blood was on Defendant's clothes as witnessed by Mose Bauldree who came upon the scene. After Defendant's brief contact with Mose Bauldree he calmly drove further into the woods along this dirt road and again stopped his vehicle. He removed the girls from the car and with Sara's hands still

bound behind her marched the girls into the woods positioning the girls a short distance apart from each other. Sara's ultimate fate no doubt became immediately obvious to her when she witnessed the Defendant touch Sayeh with the knife instructing her to "say a prayer", and immediately thereafter, slashed Sayeh's throat several times. Sara, terrified by what she had just seen, began screaming and continued to scream until the Defendant directed his attention toward Sara, similarly slashing her throat several times. Sayeh testified that the screaming did not stop right away. The death of Sara was not instantaneous, but took approximately two minutes to occur according to the testimony of the medical examiner. The medical examiner further testified that, in his opinion, the victim, Sara, would have experienced pain due to the sensitivity of the area where the wounds were inflicted by the defendant. Undoubtedly, Sara underwent tremendous fear, horror and terror as a result of the Defendant's actions culminating with her murder. Clearly these facts establish that Sara's murder was committed in a heinous, atrocious and cruel manner.

4. 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. - Section 921.141(5)(i). As defense counsel pointed out in his Sentencing Memorandum, the Court in its previous Sentencing Order was of the opinion that the evidence did not reach the heightened level of premeditation necessary to support this aggravating circumstance relying upon Power v. State, 605 So.2d 856 (Fla. 1992). After reconsidering the evidence in the instant case, the Court is of the opinion that the State has in fact proved this aggravating circumstance beyond a reasonable doubt. If the Defendant's intent was merely to kidnap the minor victims, or even to sexually batter both of said victims, he could have done so and then

left the children in an area where they would have easily been found. Instead, the Defendant kidnapped the children from their home, drove across a county line into a rural and heavily wooded area. He sexually battered Sayeh after binding the decedent's hands with tape and even then did not allow the children to go free but continued into even a deeper pine thicket area where he had the children exit the car and march into the woods where the murder of the victim took place. A totality of the circumstances can be sufficient to support this aggravating factor. Hall v. State, 614 So.2d 473, 478 (Fla. 1993). This Court finds that the totality of the circumstances surrounding the death of Sara Rivazfar show that her murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

CONSIDERATION OF STATUTORY MITIGATING CIRCUMSTANCES

The Court has also considered the evidence and circumstances presented during the new penalty phase proceedings and sentencing hearing conducted on September 8, 1995, with regard to the statutory mitigating circumstances as well as those statutory and nonstatutory mitigating circumstances argued in the Defendant's Memorandum. The statutory mitigating circumstances considered by this Court are as follows:

1. The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. - Section 921.141(6)(b), Florida Statutes. The Court is of the opinion that this statutory mitigating circumstance has not been reasonably established. Although the Defendant did have a difficult childhood and experienced the loss of his father at a very young age, there is no evidence that the Defendant was laboring under the influence of extreme mental or emotional disturbance. To the

contrary, the Defendant was able to maintain employment and carry on the other normal functions of day to day living. Additionally, there was no evidence establishing this statutory mitigatory at the time the murder was committed. The evidence was that when confronted by Mose Bauldree in the wooded area, the Defendant carried on a conversation with that witness to the point of attempting to solicit the witness's aide in assisting the Defendant with his allegedly "disabled" vehicle. Although there was testimony from the Defendant that he was under the influence of alcohol and or marijuana, this testimony was not corroborated by his mother, Alice Ober, when he returned home that morning. In fact, her testimony was that he "didn't look drunk".

2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. - Section 921.141(6)(f), Florida Statutes. On this count, the Court has previously noted that the Defendant testified that on the evening immediately preceding the murder, he had consumed a significant amount of alcohol and smoked marijuana. Again, this was not supported by his mother's testimony when she saw him immediately following the commission of the crime nor was it supported by the law enforcement officers who interviewed him that day. Mose Bauldree who observed the Defendant at the scene of the crime did not testify that the Defendant appeared to be under the influence of any type of intoxicant. There is no other evidence in the record that would support the proposition that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. The age of the Defendant at the time of the crime. Section 921.141 (6)(g),

Florida Statutes. The Defendant was approximately 32 years of age at the time he murdered Sara Rivazfar and accordingly, this mitigating circumstance is entitled to little if any weight.

NONSTATUTORY MITIGATING CIRCUMSTANCES

The Defendant has asked the Court to consider the following nonstatutory mitigating factors:

1. At a very early age Warfield Raymond Wike exhibited signs of mental and/or emotional disturbance that went untreated.

2. The Defendant's mental and/or emotional disturbances were caused in part by the emotional instability of his family members during his early developmental stages.

3. The Defendant never felt apart of his family and was deprived of the family nurturing necessary to properly develop.

4. The Defendant had a close, personal and family relationship with his father.

5. The sudden death of the Defendant's father in 1966 when the Defendant was ten years of age had an adverse emotional and mental impact on the Defendant.

6. The mental and emotional disturbance that developed when his father died continued through the date of his crime for which he is to be sentenced.

7. The Defendant has lead a troubled and emotionally unstable life.

8. The Defendant has a history of alcohol and drug abuse.

9. The Defendant's use and/or abuse of drugs and alcohol was a result of his mental and/or emotional disturbances.

10. The Defendant was under the influence of drugs and/or alcohol when the crime for which he is to be sentenced was committed.

11. The Defendant suffered a deprived and traumatic childhood.

12. Prior to his arrest the Defendant maintained gainful employment.

13. The Defendant is presently serving a life sentence without possibility of parole for twenty five (25) years for the sexual battery of Sayeh Rivazfar.

14. The Court has the authority to sentence the Defendant in this case for the murder of Sara Rivazfar to a consecutive sentence or another life sentence without possibility of parole for another twenty five (25) years.

15. The Defendant has adapted well to prison life.

16. The Defendant has received only one disciplinary report while in prison.

17. The Defendant can make a satisfactory adjustment to prison life.

18. The Defendant is not likely to be dangerous in the future.

19. The Defendant suffers from a serious and deteriorating physical condition.

20. The Defendant has steadfastly maintained his innocence.

1. 2. 3. 4. 5. and 11. The testimony of the defense witnesses clearly showed that the Defendant had a close, personal relationship with his father and was well bonded to him until the Defendant's father suddenly died when the Defendant was approximately ten (10) years of age. Thereafter, the Defendant's mother suffered mental problems which unfortunately resulted in the Defendant's separation from his mother. It is clear that while away at school, the Defendant on many occasions attempted to return to his mother's home. These unfortunate events of the Defendant's early years, however, do not appear to have followed the Defendant through his adult life. He apparently was able to adjust to these circumstances and there is no evidence of any long term affect of his traumatic childhood or that said events

contributed in any way to the murder of Sara Rivazfar. Thus, while the Court finds that the Defendant did in fact have a traumatic childhood for the reasons set forth in numbers 1 through 5 and 11 above, and that said reasons do support mitigating circumstances, the Court gave them little weight in the weighing process.

6. and 7. There is no evidence that any mental and/or emotional disturbance developed by the Defendant as a result of his father's death continued through the date of this crime for which Defendant is to be sentenced or that the Defendant has led a troubled and emotionally unstable life in recent years. Although the Court recognizes these issues to be mitigating circumstances when established, the Court does not believe that they have been established and places little, if any, weight on these mitigators.

8. 9. and 10. The Defendant does apparently have a history of alcohol and drug abuse but there is no evidence that said abuse is a result of his mental and/or emotional disturbance. Additionally, although the Defendant testified that he was under the influence of drugs and/or alcohol on the morning in question, this was not corroborated by any of the other witnesses who observed the Defendant and although the Court has given some weight to the Defendant's history of alcohol and drug abuse, it gives little weight to mitigators 9 and 10.

12. The Court recognizes the fact that the Defendant maintained gainful employment prior to the commission of these crimes. However, this factor was given only little weight in consideration to Defendant's sentence.

13. and 14. The Court has considered the fact that the Defendant is presently serving a life sentence without possibility of parole for 25 years and is aware of its authority to sentence the Defendant to a consecutive life sentence without possibility of parole for

another 25 years. Whenever human life is at stake these factors must carefully be considered and the Court has done so in this case and has placed some weight on these mitigators.

15. 16. 17. and 18. The Court does find that the Defendant has adapted well to prison life and that he can most likely continue to make a satisfactory adjustment to that life. However, whether or not he is likely to be dangerous in the future is speculative at best. The Defendant's actions in the Courtroom in striking out at his Public Defender, although certainly not considered by this Court to be an aggravating factor, seriously places at issue the Defendant's ability to satisfactory adjust to prison life as well as his potential for being dangerous in the future. In either case, the underlying rationale and opinion expressed by Professor Michael L. Radelet regarding these issues, is entitled to little or no weight since it is based upon statistical speculation.

19. Although there was some evidence of the Defendant having some health problems, the Court places only little weight on that factor.

20. Although this Court recognizes that the Defendant has steadfastly maintained his innocence this mitigating circumstance is entitled to only little weight in view of his conviction for this murder and the evidence presented at the new penalty phase proceedings.

## CONCLUSION

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in this balancing process. The Court finds, as did the jury, that the aggravating circumstances present in this case far outweigh the mitigating circumstances present. The evidence of mitigation although present is minor in comparison to the enormity and magnitude of the

crime committed.

Accordingly, it is

**ORDERED AND ADJUDGED AND IT IS THE SENTENCE** of this Court that the Defendant, Warfield Raymond Wike, Jr., is hereby sentenced to death for the first degree premeditated murder of Sara Rivazfar in accordance with the laws of the State of Florida. The defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence.

**DONE AND ORDERED** at the Santa Rosa County Courthouse, Milton, Santa Rosa County, Florida, on this 18th day of September, 1995.

CIRCUIT JUDGE