IN THE SUPREME COURT OF FLORIDA

ERNEST WHITFIELD,

Appellant,

vs.

Case No. 86,775

STATE OF FLORIDA,

Appellee.

:



APPEAL FROM THE CIRCUIT COURT
IN AND FOR SARASOTA COUNTY
STATE OF FLORIDA

# INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE

Ernest Whitfield, Appellant, was indicted by a Sarasota County grand jury on July 7, 1995, for first degree murder in the stabbing death of Claretha Y. Reynolds (R1829-30). He was later charged by information on July 25, 1995 with Armed Burglary of the dwelling belonging to Claretha Reynolds (R1844-5). Subsequently, amended two-count informations were filed August 16, 1995 and September 1. 1995 adding a count of sexual battery with a deadly weapon to the burglary count (R1876-8, 1893-5). The State's motion for consolidation of the related offenses for trial was granted over Appellant's objection (R87-101, 1889-90).

At a hearing held August 4, 1995, Appellant's handwritten note requesting a speedy trial was considered (R10-1, 1856). Defense counsel acknowledged that there was conflict between himself and his client over whether a demand for speedy trial should be filed (Rll-4). Appellant personally spoke to the trial judge and requested that his desire for a speedy trial be honored (R14-7). Defense counsel stated that he would file a demand for speedy trial if the State would permit him to take depositions during the running of the sixty day period (R17-8). The State agreed to allow depositions and the court stated that all requests for discovery would be accommodated (R18). The written demand for speedy trial was filed the same day (R1861).

At the next hearing, August 11, 1995, defense counsel told the court that it might be impossible for him to prepare for trial within the sixty day period and he might ask to withdraw

the demand for speedy trial (R29-30). The judge replied that counsel did not have this option; since his client wanted a speedy trial, counsel would have to "get into high speed" (R30-1). The judge set the trial date for September 18, thirty-seven days from the date of the hearing (R32-3).

Subsequently, at a hearing held September 7, 1995, defense counsel moved for a continuance and asserted that he would waive speedy trial (R50-1, 1900-01). The court admonished counsel that Appellant had demanded a speedy trial, which counsel could not waive without his client's consent (R51-2). He suggested that counsel wanted the court to continue the case against Appellant's wishes; so that Appellant could later move for discharge when the speedy trial time period ran (R53). Counsel replied that he simply needed to point out that he was not prepared the way he should be to try a capital case because of the time limitations (R53). The court inquired of Appellant personally if he was waiving adequate representation at trial in order to have a speedy trial (R54). Appellant repeated his desire for a speedy trial (R54-5). The judge ruled:

> It's his day in court, it's his trial, it's his right to a speedy trial, if he wants it he's going to get it.

(R55). It was also put on the record that the State offered a plea bargain of two consecutive life sentences which Appellant rejected (R57-9).

At a pretrial hearing held September 15, 1995, Appellant's motion to suppress statements was heard (R69-85). After hearing

testimony, the prosecutor and defense counsel agreed as to which statements should be suppressed (R84). The court granted the motion per the stipulation of the counsel (R85).

The prosecutor next asked that Appellant be arraigned on the Second Amended Information charging him with sexual battery and armed burglary (R85). A plea of not guilty was entered (R87). The prosecutor then moved to consolidate the charges in the information with the Indictment for trial (R87-8, 1889-90). Defense counsel objected to consolidation and pointed out that Appellant had demanded a speedy trial only on the first-degree murder charged by the indictment (R88-90, 100). Accordingly, counsel had expended all of his efforts in preparing both guilt and penalty phase for the capital offense (R90-1). Moreover, no co-counsel had been appointed to assist with preparation (R91). While counsel was "arguably prepared" to try the murder charge, he **was** totally unprepared to try the sexual battery count (R92-7). He conceded that under ordinary circumstances judicial economy would be sufficient reason to consolidate the charges (R97). However, Appellant would be severely prejudiced if he were forced to go to trial on all charges with unprepared counsel, so judicial economy should yield to fairness (R97).

The prosecutor replied that he would be prejudiced if he could not use a sexual battery conviction as an aggravating circumstance in the penalty phase (R98-9). The State further offered to agree to a continuance if the demand for speedy trial

was withdrawn (R99). The court granted the motion to consolidate (R101).

Trial commenced on September 18, 1995 before Circuit Judge Harry Rapkin (R150). At the start of the second day of jury selection proceedings, Appellant informed the court that he was having a conflict with his attorneys (R470-5). They were telling him that they were not adequately prepared for trial and that he was going to get a death sentence (R471-2). He further complained that they had not done some tests which he felt were important to his defense (R473-4). He asked the court to discharge them (R474, 482, 486, 489-90).

After inquiry of counsel, the court ruled that he would not appoint new counsel (~486, 493-4). Appellant would have to either accept his counsel or represent himself (R486, 496, 584). When jury selection proceedings resumed, Whitfield turned his back to the jury panel and did not communicate with counsel (R521-3). During the lunch recess, Appellant was examined for competency to proceed and found competent (R582-3, 589-91, 623-5).

Upon further inquiry by the court, Appellant reiterated his complaints about counsel and counsel responded (R594-603). The court again ruled that other counsel would not be appointed (R604, 611). Appellant said that he would represent himself (R612). The court admonished him of the dangers of self-representation and conducted a Faretta inquiry (R612-9). The court ruled that Whitfield was not competent to represent himself although he was competent to communicate with counsel (R619).

Appellant then asked to be taken back to his cell and have the trial proceed without his presence (R619-21). The judge initially ruled that Whitfield should remain and allowed him to turn his back to the proceedings (R622). However, upon defense counsel's request that Appellant be removed because "the jurors looking at Mr. Whitfield in this position is more prejudicial than him not being here at all", the judge ordered Appellant taken back to the jail (~627). The jury was instructed that his absence was voluntary (R629).

Soon thereafter, defense counsel exercised five peremptory strikes (~652-3). Later in the afternoon, four more defense peremptories were exercised (R706, 709-12). The jury was sworn (R714).

The next morning, Judge Rapkin went to the jail and personally requested Whitfield to attend his trial (R736). Saying "there is nothing good going to come out of it", Whitfield chose to remain at the jail (R737) . The court advised him that he could change his mind and be brought to the courtroom at any time (R737). After opening statements, the State presented two witnesses before the lunch break (R747-798, 809). Appellant was present in the courtroom when the afternoon proceedings began (R817).

The State proffered testimony about a confrontation between Appellant and the victims which took place at Claretha Reynolds' house about two weeks prior to the rape and stabbing (R801-6) . Whitfield had come asking for money from Claretha Reynolds, Mae

Brooks and Estella Pierre on the day that they received their welfare checks (R802-4). None of them would give him any so Appellant tried to snatch Pierre's purse (R804). The incident ended with Reynolds grabbing Whitfield in a headlock and forcibly ejecting him from her residence (R805). Whitfield said as he left, "I'm going to kill all three of you all, make sure you all don't have no more fun" (R805-6). Over defense counsel's objection, the court ruled that testimony about this prior event was admissible because it **was** relevant to premeditation (R807).

At the close of the state's case, Appellant's motion for judgment of acquittal was denied (R1127). The renewed motion for judgment of acquittal after the defense case was also denied (R1267).

At the jury instruction conference, Appellant again complained about his counsel (R1270-5). Appellant stated that he would prepare a list of the grounds why he believed counsel's performance was deficient and present it to the court following the weekend recess (R1271-2). The court replied that Appellant could "bring up whatever list you want on Monday morning" and stated that closing arguments would take place at that time (R1274-5).

On Monday morning, Whitfield refused to come to court (R1291). The judge went to the jail and admonished Appellant that closing arguments would take place in his absence if he chose not to attend court (R1294-6). Appellant stood mute during this jail hearing (R1296-7). The jury was told that Whitfield

had chosen not to be present and that no inference should be drawn from his absence (R1305-6). After closing arguments, the judge told defense counsel that Whitfield was planning to give a press conference at the jail (R1410). The judge ordered press access to Appellant restricted until after the jury had been instructed and defense counsel given a chance to dissuade Appellant (R1412).

The jury returned verdicts of guilty as charged on all counts (R1447, 2033-4). The jury was permitted to separate for two days before the penalty proceedings would commence (R1448, 1450-1).

The next day, Appellant was present in court for the penalty phase charge conference (R1454-1507). Defense counsel noted that Whitfield had conducted a press conference the previous day and expressed dissatisfaction with his counsel (R1454-5). Appellant complained that the jury had been selected in his absence and that ten women were chosen for the jury panel (R1455). Appellant argued with the judge as to whether his request for self-representation was unequivocal (R1456-7). The judge told Appellant that the Supreme Court of Florida would be reviewing his case (R1457-8). He asked Appellant whether he wanted his current counsel to represent him at the penalty phase (R1458-60). When Appellant remained mute, the court said, "I want the Supreme Court to hear what he has to say" (R1460). The court ruled that defense counsel would represent Appellant during the penalty phase (R1461).

Defense counsel's request that the sentences be deleted from the documents proving Appellant's prior violent felony convictions was denied by the court (R1505). During his penalty phase opening statement, the prosecutor said that Appellant had told the victims in his prior aggravated battery convictions that he would kill them if the incidents were reported to the police (R1529). Defense counsel moved for a mistrial because the threats were unrelated to the crimes for which Appellant was convicted (R1529). The court ruled that the threats were "part of the res gestae" (R1529-30).

During the prosecutor's closing argument, defense counsel objected when the prosecutor asked the jury to "consider" themselves in the role of the victim (Rl662). The court overruled the objection (R1662).

After the jury had retired for deliberations, a question was returned signed by six of the jurors (R1701-2, 2041). It asked, "Does life in prison without parole really mean 'no parole' under any circumstances. He will never be allowed back into society again?" (R2041). The judge declined Appellant's request to answer the question "yes" because "the legislature may change the law next week" (R1703, 1705). He agreed to reread the portion of the standard jury instructions dealing with penalty to the jury (R1708-9). The jury recommended a death sentence by a vote of seven-to-five (R1709, 2042).

The court heard sentencing arguments at a hearing held October 13, 1995 (R1723-97). The prosecutor urged the judge to

reject Appellant's proposed statutory mitigating circumstances because they "really were not even proved beyond clear and convincing evidence" (R1747, 1749-50, 1756). On October 20, 1995, sentence was imposed (R1799-1803). On the armed burglary and sexual battery with a deadly weapon convictions, concurrent sentences of life were imposed (R1801, 2106-8, 2121-4). With regard to the first degree murder count, the court found three aggravating factors: a) prior violent felony, b) committed in the course of an enumerated felony, and c) especially heinous, atrocious or cruel (R1802, 2109-11, see Appendix). The court found that none of the statutory mitigating circumstances were applicable (R1802, 2111-2, see Appendix). The court did find and weigh some nonstatutory mitigating factors, including impoverished background, crack cocaine addiction, and a childhood scarred by a rejecting father and an alcoholic mother (R1802, 2112-3, see Appendix). The sentencing judge concluded that the aggravating factors outweighed the mitigation and imposed a sentence of death (R1802, 2113-4, 2118-20).

Appellant's notice of appeal was timely filed on October 24, 1995 (R2140). The Public Defenders of the 12th and 10th Judicial Circuits were appointed to represent Appellant on appeal (R2142). Jurisdiction lies in this Court pursuant to Article V, section 3 (b) (1) of the Florida Constitution and Fla. R. App. P. 9.030 (a) (1) (A) (i) .

## STATEMENT OF THE FACTS

**A) STATE'S EVIDENCE.**

On June 19, 1995, shortly after 6:30 a.m., City of Sarasota police responded to a call at 2116 Dixie Avenue (R765-6). Inside the residence, patrol officer Steven Shoemaker found a heavyset black woman who had been stabbed (R770-1). She was lying face-up on the floor (R770-1). Although the officer noted some shallow breathing, the stabbing victim was not able to carry on a conversation (R771). The officer performed CPR on the victim until paramedics arrived three or four minutes later (R772-3). Their efforts were unsuccessful; and the victim expired at the scene (R774, 793).

Willie Mae Brooks testified at trial that she and her one-year-old child had been residing with the stabbing victim, Claretha Reynolds, and her children for about a month before the incident (R819-20). Appellant, Ernest Whitfield, was known to both women (R820-6). Whitfield had been living with the witness's sister, Estella Brooks Pierre, but the relationship had broken up (R820-1).

Around four o'clock in the morning on June 19, Brooks was awakened by Whitfield speaking to her from outside her bedroom window at the Dixie Avenue residence (R827-8). Whitfield was looking for Estella and wanted to talk to Brooks (R831, 850-1). He asked her to let him in, but she refused (R830). She went to Claretha Reynolds bedroom, woke her up, and told her that Whit-

field was outside (R831). Reynolds said to ignore him and go back to sleep (831-2).

Brooks fell back asleep; but awoke to find Ernest Whitfield on top of her, holding a knife to her neck (R832-3). He told her to pull off her clothes and threatened to stab her and her infant child if she screamed (R833). Brooks noted that Whitfield's eyes were unusually big, and that he was talking faster than normal (R862). She lay motionless, while Whitfield vaginally raped her (R834-5). Then, Whitfield left her room and went into Reynolds' bedroom (R835-6).

About ten minutes later, the witness heard Claretha Reynolds screaming as she ran into Brooks' bedroom (R836-8). She said that Whitfield had stabbed her; and asked Brooks to call the police (R837). Brooks climbed out the window and ran to a neighbor's house (R839-40). The police arrived about five minutes later (R840).

Peggy LaRue testified that she, Mae Brooks and Estella Pierre are sisters (R920-1). She also knew Ernest Whitfield because of his relationship with Estella Pierre (R921). Around seven o'clock in the morning on June 19, Whitfield banged on the door of her house (R921-2). She opened the door and hesitated to let him in because "he just looked weird" (R923). Once inside, Whitfield sat down and said, "I just killed big girl"[1] (R923). The witness didn't believe him, but Whitfield repeated that he

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[1]Claretha Reynolds' nickname was "big girl" (R840). According to the medical examiner, she was 5'10" and weighed 284 pounds (R1109).

stabbed her eighteen times[2] and demonstrated how he did it (R924-5).

Whitfield further explained that he **was** upset because Estella had not brought her children to see him the previous day, which was Father's Day (R925). Whitfield told the witness that when he started talking to Claretha Reynolds about Estella, Reynolds responded, "I don't want to hear it", and pushed him (R926, 939). At that point, Whitfield began stabbing Reynolds (R926, 939).

LaRue testified that Whitfield appeared to be high on drugs (R937-8, 947). His eyes were big and his speech was "real hyper" (R937). The witness had previously seen Whitfield when he had been using drugs and observed similar changes in his appearance and speech (R938).

Whitfield then asked LaRue to drive him to several locations (R927-9). After she dropped him off, she drove toward Reynolds' residence (R931). When she saw the police, she led them back to where she had left Whitfield (R931-2, 944).

Police officer Dale Waugh testified that he went to the duplex pointed out by LaRue (R900). Police officers surrounded the duplex around 9:00 a.m. (R900). He was behind the building when he saw Appellant come up to him (R900-1). Whitfield said, "Here I am. I give up" (R901).

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[2]The medical examiner found twenty-one cuts and stab wounds on the body (R1112).

All officers at the scene agreed that Whitfield was cooperative (R889, 903-5, 917). After receiving Miranda warnings, Whitfield admitted stabbing Reynolds but did not acknowledge any sexual battery (R891-3, 908). He agreed to show the officers where he had thrown the knife he used in the stabbing (R879-80, 902, 913). He directed the officers to a house and said that he had thrown the knife on its roof (R880, 902). Officer Lyons climbed on the roof and located the knife (R881, 913-4). At trial, Mae Brooks identified the knife as one that had been in the victim's residence (844-5).

Whitfield also told the officers some of the circumstances leading up to the stabbing. He said that he was depressed because someone wouldn't let him see his stepchildren on Father's Day (R903, 906, 918). He said that he had smoked $500 worth of crack cocaine during the previous night (R893-5, 903, 907). However, the arresting officers testified that Whitfield didn't appear to be under the influence of cocaine when they encountered him (R896, 903).

To support the burglary charge, the State adduced evidence that a bathroom window was the likely point of entry to the Dixie Avenue residence (R1010). A large garbage can was found directly below the window and the screen had been unlocked (R1010). A latent fingerprint was lifted from the bathtub located directly inside the window (R952-3). An expert in fingerprint comparison testified that she compared the known prints of Whitfield to the

submitted latent (R962-3). She gave her opinion that the print on the bathtub was made by Appellant's left palm.

Shoeprints were collected from outside the residence and the bathtub as well (R951, 966-72, 1002-3, 1010-1) . Whitfield's sandals were also seized (R1008-9). An expert in shoeprint comparisons testified that he could not make a positive identification between the prints and Whitfield's shoes (1064, 1066). However, there were similar characteristics between Whitfield's shoes and the prints such as size and tread design (R1064-5, 1068). The witness did not detect any dissimilarities between the prints and the submitted shoes (R1069).

To corroborate the testimony of Mae Brooks about the sexual battery accusation, the State called Carrie Weeks as a witness (R866-70). When Brooks fled from the Dixie Avenue residence on the morning of June 19, she knocked on her neighbor, Weeks', door (R839-40, 868). In addition to reporting the stabbing of Reynolds, Brooks told Weeks that Whitfield had raped her (R868). Weeks called the police to report the incident (R869).

Brooks was examined at the Emergency Room of Sarasota Memorial Hospital shortly afterwards (R1013, 1027, 1040-1). Dr. Kruglick performed a pelvic exam and found erythema, which could indicate recent sexual intercourse (R1033). He didn't observe any physical trauma, only emotional trauma (R1035-6).

Further tests were performed on the clothing Brooks was wearing (R1016, 1086-7). A "rape kit" was collected (R1032-3, 1042-5). At trial, a serologist testified that Brooks was

determined to be blood type B, while Appellant and Reynolds were blood type A (R1088-9). She detected the presence of semen on the vaginal swabs contained in the rape kit (R1091-2). She also found semen on the shorts collected from Brooks (R1096-7). The semen on the shorts must have come from an individual with type A blood, such as Appellant (R1097).

**B)** DEFENSE EVIDENCE.

Appellant's defense was based upon voluntary intoxication by cocaine. Estella Brooks Pierre testified that she met Whitfield in September 1994 and that he moved in with her and her six children soon afterwards (R1136-8). The relationship lasted until May 18, 1995 (R1137). Early on in the relationship, Estella Pierre became concerned that Appellant was using drugs (R1138-9). She had previously been around people who used cocaine and was familiar with the physical effects of the drug (R1140-1). She noticed the same wide-eyed appearance and inability to be still in Whitfield (R1141). He would ask her for money to give to his mother; she would give it to him, but would later find out that his mother hadn't received it (R1141-2).

Eventually, Whitfield admitted to her that he used crack cocaine (R1143). He promised to get help for his drug problem, but never followed through (R1142-3). In April 1995, Appellant was involved in an incident where he got shot (R1143-4). After that time, his drug use increased (R1144). Between the time that she broke up with Whitfield and the homicide of Claretha Reynold-

s, the witness only saw him once, the June 1st incident at Claretha's house (R1146-9).

A clinical psychologist, Dr. Eddy Regnier, testified that he met with Appellant eight times prior to trial for a total of about ten hours (R1189-90). Whitfield said that he had a substance abuse problem, particularly with crack cocaine (R1190, 1193). Whitfield told the doctor that on the day of the homicide, he used crack cocaine continuously up until a few minutes before entering the victim's house (R1218).

Dr. Regnier found that Appellant's statements about drug abuse were supported by medical records, an interview with his sister Dinah, and depositions from witnesses in this case (R1192-5). In September 1991, Whitfield was brought to the Coastal Recovery Unit because of crack cocaine usage and involuntarily hospitalized under the Baker Act (R1192-3). The reports of Whitfield's behavior from his sister and the witness depositions fit the classic cocaine pattern of a person who walks a lot, talks fast, and has enlarged pupils (R1193-5, 1200-1, 1218). Crack cocaine also causes a depressive state when the effect of the drug wears off (R1201). This is characterized by paranoia and hypervigilance (R1201-2, 1219). In his jail visits with Appellant, Dr. Regnier observed similar paranoid, guarded and hypervigilant behavior (R1220).

When asked for his opinion on whether Whitfield had the capacity to premeditate the homicide of Reynolds, Dr. Regnier said that he really couldn't determine this because he had not

been able to do enough testing of Whitfield (R1221-2, 1230-2, 1240). He testified that there was no reason to believe that Whitfield was not under the influence of cocaine during the incident and there was reasonable doubt about premeditation (R1221-2, 1241).

**C) STATE'S REBUTTAL**

Daniel Sprehe, a psychiatrist, testified as **a** rebuttal witness (R1247-66). He gave his opinion that Whitfield was able to form a specific intent to commit murder (R1251). He pointed to the fact that the police arrested Appellant within two hours of the incident and did not consider him to be intoxicated (R1252). The doctor also noted that Whitfield apparently entered the residence through **a** window, located a knife, held the knife to Brooks throat while threatening to use it if she made noise, fled the house after the homicide, disposed of the knife, and attempted to evade the police (R1253-4). All of these actions showed some planning ability (R1252-4). Also significant was Whitfield's ability to lead the police to where he had thrown the knife away as it shows **a** good memory and capacity to cooperate with the police (R1254).

Dr. Sprehe also ruled out cocaine psychosis resulting from long-term use of cocaine as a diagnosis (R1255) . The witness testified that once this type of cocaine psychosis starts, it doesn't go away in a matter of hours (R1255). He observed that Whitfield "talked about getting his attorney" and was "aware of

his legal rights within an hour or two after this killing" (R1255).

The doctor also ruled out cocaine psychosis resulting from ingesting a very large dose of cocaine (R1255-6). He said that he would expect to see hyperactive and loud behavior under those circumstances rather than "subterfuge and planning" (R1256). In conclusion, Dr. Sprehe said that "whether or not" Whitfield had used cocaine before the incident, there was "no doubt" that he was able to form specific intent (R1262).

**D) PENALTY PHASE EVIDENCE**

STATE PENALTY EVIDENCE

The State offered certified copies of Whitfield's prior convictions for three violent felonies into evidence (R1547-8). Various law enforcement officers then testified to the underlying circumstances of these prior offenses, throwing a deadly missile and two aggravated batteries (R1548-59).

Sarasota police officer Connie Colton testified that on December 1, 1990, she was dispatched to the Capricorn Bar (R1548-9). She encountered Barbara Hale, who was Whitfield's girlfriend at the time (R1549). Hale reported that Whitfield was insistent about talking to her and she wanted to get away from him (R1549). She got into the back seat of a vehicle that her sister was driving (R1550). As they attempted to leave, Whitfield threw a bottle through the rear windshield (R1550). The occupants of the vehicle received some scratches from the broken glass (R1550).

On January 11, 1991, Sergeant Paul Sutton investigated a complaint made by Harriet Whitfield, Appellant's ex-wife (R1553). She alleged that around 4:00 a.m., Appellant tapped on her window and asked to come in (R1554). He said that he was suicidal and needed to talk to her (R1555). She let him in and they talked for a while (R1555). However, when she asked him to leave, Whitfield grabbed her around the throat and started choking her (R1555). He threatened to kill her if she screamed or told the police about the incident (R1555).

The other aggravated battery occurred during the night of September 30 to October 1, 1992 (R1556). Sarasota police detective George Connor testified that Tonya Kirce reported that Whitfield was visiting his sister who shared an apartment with her (R1557-8). When Kirce went into the bedroom to tuck in her two children, Appellant followed her and choked her into unconsciousness (R1558). When she came to, Appellant threatened to kill her and her children if she called the police (R1559).

Sadie Hester Morrison, the mother of Claretha Reynolds, testified without objection (R1560-4). She said that her daughter was 26 years old when she was killed and that she had five children (R1560-2). Claretha had grown up in Homestead, Florida, but moved to Sarasota in the previous year (R1561-2). The witness said that she was going to raise the five children herself (R1563).

DEFENSE PENALTY EVIDENCE

Stephen Watson, an assistant public defender, testified that he had recently represented Eddie Curry, charged with attempted second degree murder in an incident where Whitfield got shot and severely wounded (R1567-8). At a pretrial meeting between the two, Appellant told Curry that he forgave him for the shooting and requested that the charges be dropped (R1569).

Sarasota Police Detective R.G. Hinesley testified that he escorted Whitfield to the county jail after his arrest on these charges (R1578-9). A reporter informed Appellant that Claretha Reynolds was dead (R1579). When they got to the jail, Whitfield said that he didn't know that Reynolds had died; said that he didn't mean to kill her; and started crying (R1580-2). On crossexamination, over defense objection, Detective Hinesley was allowed to give his opinion that Whitfield's remorse was "more for himself" than because he felt sorry for the victim (R1581).

Dr. Eddy Regnier testified that Whitfield suffered from several conditions relevant to the extreme mental or emotional disturbance mitigating circumstance (R1589-90). First, Whitfield had been chronically dependent on drugs for the past nine years (R1590, 1610, 1632). He also suffered from post-traumatic stress which originated when he was shot in February 1995 and almost bled to death (R1590, 1605, 1632). As a result of that incident, Whitfield has flashbacks and chronic headaches (R1606). Moreover, he has become paranoid and imagines that an attacker will return to shoot him again (R1606-7).

A third diagnosis made by Dr. Regnier was major depression (R1590, 1632). This condition had existed for a long time and was manifested by a serious suicide attempt (R1590). In 1991, after bingeing on cocaine for three days, Whitfield went to his sister's house and put a loaded gun to his head, saying "I can't take it anymore" (R1602-3). For this, he was involuntarily committed to the Coastal Recovery Crisis Center under the Baker Act (1603-4).

On crossexamination, Dr. Regnier was asked if he was aware that Appellant had been released from jail and placed on community control about a week prior to the Baker Act proceeding (R1627-). Over defense objection, the prosecutor was allowed to assert that Appellant had violated his community control and was returned to jail immediately subsequent to the Baker Act (R1627-8). The prosecutor further asked if the return to jail might explain Appellant's depression at the time (R1628).

Dr. Regnier also recounted the circumstances of Whitfield's childhood (R1593-1602). Appellant's first memory was of his father holding a gun to his mother's head and threatening to shoot her (R1595). His mother abused alcohol (R1594, 1599). His father was a violent drunk who regularly beat Appellant and his mother (R1595). Despite this abuse, Appellant adored his father (R1598). The father, on the other hand, never believed that Ernest was his biological son and never accepted him (R1595, 1599).

When Appellant's parents separated, his sisters went with the mother while Ernest remained with the father (R1599). However, Ernest's father abandoned him and he was shuffled through a series of relatives (R1599-1600). His father died and Ernest rejoined the mother in Sarasota (R1598-1600). Three stepfathers with whom Appellant tried to form attachments also died (R1599).

Appellant's background was also impaired by poverty (R1600-2). Several children had to sleep on a single mattress (R1601). He often was hungry because there was little food (R1601). At one point in his childhood, he was hospitalized with an infection caused by worms (R1602).

Dr. Regnier noted that there had been **two times** in Whitfield's life where he had been able to function more or less normally. When he was married to his first wife Harriet, Appellant held a job (R1607). However, the marriage didn't last because of Whitfield's drug use (R1615). A similar pattern took place with Estella. When the relationship began, Appellant worked as a roofer (R1607). But after the incident where he was shot, Whitfield's drug use increased to the point that Estella broke off the relationship (R1607-8). Dr. Regnier testified that he believed that the break-up with Estella "pushed him [Whitfield] over the edge" (R1608-9).

The doctor concluded with the opinion that Whitfield was suffering from mental illness and was under the influence of crack cocaine when he entered Reynolds' residence (R1617). He

was not "in complete control of his emotions" because of the break-up with Estella (R1617). Dr. Regnier observed that there was "a thread of humanity" in Whitfield which manifested itself in remorse for the murder and acceptance of his guilt (R1615-6, 1638).

## SUMMARY OF THE ARGUMENT

This Court has held that a capital defendant can waive his presence at trial. This Court has also held that when a defendant does not participate in the exercise of juror challenges, the trial judge must inquire to make certain that the defendant has properly waived his right to be present when juror challenges are exercised. At bar, there is initially a question of whether the defendant made a valid waiver of presence when the judge had him removed on defense counsel's request. Even if this Court could hold that the waiver of presence was valid, the trial judge did not advise Appellant of his right to participate in the jury selection. Therefore, it cannot be found that Whitfield made a knowing, intelligent, and voluntary waiver of this right as defined in Coney v. State, 653 So. 2d 1009 (Fla.), cert. den., _ U.S. _, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995).

Over objection, the trial court allowed the State to present evidence about an incident which took place at the victim's house over two weeks before the homicide. In this incident, Appellant asked the three women who were at the house for money and attempted to snatch one of their purses. Claretha Reynolds, the victim of the later homicide, grabbed Appellant and pushed him out of her house. When Appellant left the premises, he yelled that he would kill all three of the women. Any possible relevance of this incident to premeditation was greatly outweighed by the prejudice to Appellant with regard to the jury's penalty recommendation. The prosecutor's penalty argument focused on

Appellant's propensity to commit "crimes against women". The prior incident supplied another example of **a** crime committed against women even though Appellant was never charged in connection with it. Because the jury's death recommendation was by a seven-to-five vote, harmless error cannot be found.

A number of errors in the penalty phase of the trial tainted the jury's death recommendation. First, over objection, the prosecutor was allowed to inform the jury of the sentences imposed on Whitfield's prior violent felonies so that he could portray Appellant as someone who committed violent "crimes against women" whenever he was not locked up. Next, the State was allowed to elicit **hearsay** testimony from police officers (which could not be fairly rebutted) that Appellant threatened to kill the victims of his prior violent felonies. The prosecutor engaged in improper crossexamination with two defense witnesses, Doctor Regnier and Detective Hinesley. Finally, the prosecutor's penalty argument contained an improper "Golden Rule" appeal (asking the jurors to place themselves in the shoes of the victim) and an improper appeal to the gender of the majority of the jury. Individually and cumulatively, these errors were prejudicial enough to deny Whitfield **a** fair penalty trial.

The penalty jury's question about the possibility that Whitfield would ever be released on parole was not given a satisfactory answer by the trial judge. The Eighth and Fourteenth Amendments, United States Constitution require that a capital sentencing jury receives clear and unambiguous informa-

tion regarding the possibility of parole. The trial judge erroneously speculated that the legislature might change the law as a reason to deny the jury a clear answer to their question.

In his sentencing order, the judge misapprehended the evidence and the law when he refused to find or give any weight to the mental mitigating factors. By giving "great weight" to the death recommendation of a jury split seven-to-five, the judge imposed a death sentence which is vulnerable to constitutional attack.

## ARGUMENT

### ISSUE I

APPELLANT DID NOT MAKE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF HIS CONSTITUTIONAL RIGHT TO BE PRESENT DURING JURY SELECTION AND TO PARTICIPATE IN CHALLENGING THE JURORS.

In Francis v. State, 413 So. 2d 1175 (Fla. 1982), this Court held that it was reversible error for defense counsel to waive his client's presence when exercising peremptory challenges and selecting a jury. More recently, in Coney v. State, 653 So. 2d 1009 (Fla.), cert. den., _ U.S. _, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), this Court clarified the need for the defendant's presence when juror challenges are being exercised. The Coney court wrote:

> The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. See Francis. Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. (e.s.)

653 So. 2d at 1013. Although the Coney holding was made prospective only, it is fully applicable to the case at bar.[3]

At bar, when the judge refused to discharge court-appointed counsel and denied Whitfield's request to represent himself,

---

[3]The Coney decision was final when rehearing was denied April 27, 1995. Appellant's trial commenced September 18, 1995.

Appellant asked to be taken back to his cell (R619-20). The court initially ruled:

> THE COURT: Okay. Well, as long as you behave, you're going to sit there; and if you don't behave, there will be other measures taken. And if it finally is such that you choose to go back to your cell and you choose not to have any communication, maybe that's what will happen, but in the meantime, I'm going to take the lesser step. I want you to stay there for awhile. I want you to see what goes on.
>
> THE DEFENDANT: I'm not going to look. I'm not going to look.
>
> THE COURT: If you want to turn your chair around, you can do that.

(R622).

After Dr. Regnier testified about his evaluation of Whitfield's competency, defense counsel's suggestion of incompetency was withdrawn (R623-6). Defense counsel then asked the judge to revisit his ruling:

> MR. WILLIAMS: Judge, since the Court has not relieved us of our representation of Mr. Whitfield, it would be our request that Mr. Whitfield be allowed to return to his cell and the Court instruct the jurors that Mr. Whitfield has voluntarily absented himself from the jury selection. That is what our request would be.
>
> We feel that the jurors looking at Mr. Whitfield in this position is more prejudicial than him not being here at all.
>
> THE COURT: What do you propose that we tell the jurors?
>
> MR. WILLIAMS: Judge, I would suggest the jurors be instructed that Mr. Whitfield has a right to be present, that he has elected not to be present for jury selection, and that would be the end of the instructions.

> THE COURT: Okay. Again, Mr. Whitfield, I'll give you the opportunity to stay here or go back to your cell. Which do you choose?
>
> Take him back to his cell. Make sure that at the jail that there's somebody available to him, that should he choose to come over here at any time and exercise any of his rights that I will immediately be informed, and we will immediately bring him back.
>
> And from time to time, I'll have Mr. Whitfield brought back here and attempt to interrogate him with regard to --
>
> THE DEFENDANT: I'm not coming back.
>
> THE COURT: You're going to come back if I ask you to come back, sir. We're going to discuss it on the record. And try thinking about this, because at any time you can change your mind and agree to participate.
>
> Bring the jurors back in.

(~626-7).

While this Court may sympathize with the plight of a trial judge who was often unable to get any response from Appellant to his inquiries, a defendant should never be removed from the courtroom in a capital trial. Illinois v. Allen, 397 U.S. 337 (1970) authorizes a trial judge to remove an unruly and disruptive defendant from his trial. However, Allen is not applicable here because the trial judge specifically found that Appellant had behaved himself (R622, 626).

Moreover, Allen was not a capital case. As the Eleventh Circuit noted in Proffitt v. Wainwright, 685 F. 2d 1227 (11th Cir. 1982), as modified on rehearing, 706 F. 2d 311 (11th Cir.), cert. den., 464 U.S. 1002 (1983), early U.S. Supreme Court cases, which have never been overruled, hold that the defendant's right to presence in a capital trial is so fundamental that even the

defendant cannot waive it. The Eleventh Circuit continues to adhere to the view that presence is non-waiveable at critical stages of a capital prosecution. Hall v. Wainwright, 733 F. 2d 766 (11th Cir. 1984), cert. den., 471 U.S. 1107, 1111 (1985).

Appellant recognizes that this Court has held that a defendant may waive his presence in a capital proceeding. Peede v. State, 474 so. 2d 808 (Fla. 1985), cert. den., 477 U.S. 909 (1986). Appellant also recognizes that the circumstances at bar are similar to those in Ferry v. State, 507 So. 2d 1373 (Fla. 1987), where this Court found no reversible error in defense counsel's waiver of the defendant's presence during the exercise of peremptory challenges. However, the Ferry opinion contains this advisement to trial judges:

> We strongly recommend that the trial court judge personally inquire of the defendant when a waiver is required.

507 so. 2d at 1375-6. As Appellant reads the Coney decision, this personal inquiry of the defendant by the court is now mandatory. After all, how else can the trial court "certify through proper inquiry that the waiver is knowing, intelligent and voluntary"? 653 So. 2d at 1013.

No doubt the State will argue that the trial judge attempted to make a proper inquiry, but Whitfield refused to respond. The problem with this argument is that waiver of an important constitutional right cannot be presumed on silence alone. Johnson v. Zerbst, 304 U.S. 458 (1938); Carnlev v. Cochran, 369 U.S. 506 (1962). It was incumbent on the trial judge to let Appellant sit

in the courtroom until such time as he clarified whether his absence from jury selection would be voluntary.

The second problem with the trial judge's procedure is that he didn't explain to Whitfield that he had a right to participate in the exercise of peremptory strikes. In fact, defense counsel exercised five peremptory strikes within a short time after Appellant was taken from the courtroom (R652-3). While the court did advise Appellant that he could "choose to come over here at any time and exercise any of his rights" (R627), this general advisement was insufficient to inform Appellant of the specific constitutional rights that he was waiving. Cf., Boykin v. Alabama, 395 U.S. 238 (1969). Accordingly, even if this Court could find that Whitfield's waiver of presence was voluntary, it cannot be found to be knowing and intelligent.

Coney allows the defendant's acquiescence to serve as an alternative procedure to waiver when the defendant is not present at the exercise of peremptory strikes. However, the court "must certify the defendant's approval of the strikes through proper inquiry". 653 So. 2d at 1013. At bar, there was no such inquiry; in fact Appellant later complained about being absent when the jurors were chosen and the number of women selected for his jury (R1455).

Finally, the case at bar should be distinguished from the recent decision of Kilgore v. State, Case No. 83,684 (Fla. August 29, 1996) [21 Fla. L. Weekly S345]. First of all, Kilgore was tried before the procedure established by this Court in Coney was

effective. Secondly, the trial judge in Kilgore personally informed the defendant about his right to participate in selecting the jury and found that his waiver "satisfied all constitutional standards". 21 Fla. L. Weekly at S347. Finally, Kilgore never complained at trial about the peremptory strikes exercised in his absence. By contrast, Whitfield specifically complained about his counsel's selection of jurors, saying "I thought it was my constitutional right to have . . . the last say so in that jury selection" (R1455).

Accordingly, this Court should hold that the trial court failed to comply with Fla. R. Crim. P. 3.180 as interpreted in Coney. This Court should further recognize that Appellant's purported waiver of presence did not satisfy the due process provisions of the federal and Florida constitutions. Whitfield's convictions and sentences should be vacated and a new trial held on all counts.

## ISSUE II

THE TRIAL JUDGE ERRED BY ALLOWING THE PRIOR INCIDENT AT THE VICTIM'S HOUSE TO COME INTO EVIDENCE BECAUSE ANY PROBATIVE VALUE WAS GREATLY OUTWEIGHED BY PREJUDICE TO APPELLANT WITH REGARD TO THE JURY'S PENALTY RECOMMENDATION.

Prior to trial, Appellant filed a motion in limine to bar testimony about an incident which took place at Claretha Reynolds' house about two weeks prior to the homicide (R1920-1). In particular, Appellant wanted to keep out testimony that after asking the three women present for money, he grabbed Estella Pierre's purse (R120-1, 123). At the pretrial hearing, he argued that this testimony established a collateral crime of attempted robbery as well as being irrelevant to the charged offenses (R121). The judge who heard the pretrial motions reserved ruling until the testimony could be placed within the context of the entire case (R124).

At trial, prior to allowing state witness Willie Mae Brooks to testify, the court heard a proffer of her testimony regarding this incident (R801-6). The judge ruled that testimony about the incident would be admissible because "a threat within two weeks of occurrence would certainly go to show that there was premeditation which is an essential element" (R807).

In accord with this ruling, Willie Mae Brooks was allowed to testify that the first weekend in June, she, her sister Estella Pierre, and Claretha Reynolds had gone shopping after receiving their welfare checks (R822-3). They returned to Reynolds house

and Whitfield walked in, asking to speak to Claretha (R822-3). After speaking with Claretha, Whitfield asked the witness whether she had any money (R823-4). Brooks refused to give him any, so Whitfield asked Estella Pierre for money (R824-5). When he didn't get any from her, he tried to snatch her purse (R825). Claretha intervened and grabbed Whitfield in a headlock (R825). She pushed Appellant out on the porch and told Brooks to lock the door (R825-6). The witness heard Reynolds and Whitfield talking on the porch (R826). Before Whitfield left running, he said, "I'm going to kill all three of you all bitches" (R826).

Although the court ruled that this threat showed premeditation, it is clear that the participants in the incident did not view it seriously. Brooks testified that Claretha Reynolds was never afraid of Whitfield (R861). She also said that Whitfield was upset when he made the alleged threat; he seemed to need some money right away (R861-2). The primary reason for offering this evidence was simply to show prior bad acts by Whitfield.

This is not a case like Hunter v. State, 660 So. 2d 244 (Fla. 1995) where the collateral robbery took place only hours earlier. Rather, the attempted purse snatching incident at Reynolds' house took place over two weeks prior to the homicide. The facts at bar are most like those in Pope v. State, Case No. 81,797 (Fla. June 13, 1996) [21 Fla. L. Weekly S257], as modified on rehearing, 21 Fla. L. Weekly S362-3. In Pope, the defendant had committed a battery on the victim several months before he murdered her. This Court found that the prior battery was

basically irrelevant to the murder. Similarly, this Court should find that Whitfield's frustration at being unable to get any money from the three women two weeks prior to the homicide was equally irrelevant to the stabbing of Claretha Reynolds.

The remaining question is whether Whitfield was truly prejudiced by admission of testimony about this incident. This Court has often said that admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged". E.g., Peek v. State, 488 So. 2d 52 at 56 (Fla. 1986). Even if there is overwhelming evidence against the defendant, the error is harmless only if it can be found beyond a reasonable doubt that it could not have contributed to the verdict. See, Castro v. State, 547 so. 2d 111 at 115 (Fla. 1989).

Appellant concedes that in light of his numerous confessions and the eyewitness testimony of Brooks, the evidence of the prior incident at Reynolds house could not have affected the jury's verdict in the guilt or innocence phase of this trial. However, the uncharged collateral crime evidence could have contributed to the jury's death recommendation. It was another example of prior "crimes against women" which characterized the prosecutor's argument to the jury asking for a death recommendation (R1653-8, 1669, see Issue III-F, infra). This Court has recognized that "hearing about other alleged crimes could damn a defendant in the

jury's eyes and be excessively prejudicial". Robinson v. State, 487 So. 2d 1040 at 1042 (Fla. 1986).

Moreover, the penalty recommendation was by the narrowest of margins, 7 to 5. In several decisions, this Court has observed that errors with respect to the penalty phase are not harmless when the jury splits 7 to 5. See, Rhodes v. State, 547 So. 2d 1201 at 1206 (Fla. 1989) (communication between trial judge and jury); Way v. Dugger, 568 So. 2d 1263 at 1266 (Fla. 1990) (failure to instruct jury that they could consider nonstatutory mitigating factors); Morgan v. State, 515 So. 2d 975 at 976 (Fla. 1987) (same).

Where the jury has heard evidence and argument unrelated to any proper aggravating circumstance, this Court has found that the jury's death recommendation was tainted. Trawick v. State, 473 so. 2d 1235 (Fla. 1985), cert. den., 476 U.S. 1143 (1986). Sometimes, as at bar, the improper evidence has been introduced in the guilt or innocence phase but taints the subsequent penalty trial. E.g., Burns v. State, 609 So. 2d 600 (Fla. 1992) (evidence about the victim's background and character); Castro v. State, 547 so. 2d 111 (Fla. 1989) (collateral crime evidence). As in these cases, this Court should now vacate Whitfield's death sentence and remand for a new penalty trial before a new jury.

## ISSUE III

THE JURY'S PENALTY RECOMMENDATION WAS TAINTED BECAUSE THE TRIAL COURT ALLOWED THE STATE TO INTRODUCE IRRELEVANT EVIDENCE AND TO ENGAGE IN IMPROPER ARGUMENT DURING THE PENALTY TRIAL.

Appellant contends that each of the following errors was sufficiently prejudicial in itself to warrant a new penalty trial. However, even if none of them is sufficient in itself, this Court must consider the cumulative effect of the improper evidence and argument. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Garron v. State, 528 So. 2d 353 (Fla. 1988).

A) Allowing Introduction of the Sentences Received on the Prior Convictions.

Before the penalty proceeding commenced, defense counsel asked that various irrelevant references be deleted from the judgments to be introduced in evidence as proof of the prior violent felony aggravating factor (R1504-5). He specifically requested that the sentences imposed on these offenses not be admitted (R1505). The trial judge denied this request (R1505).

In accord with this ruling, the prosecutor crossexamined the public defender who had represented Eddie Curry about Whitfield's prison sentence for the aggravated battery on Tonya Kirce (R1576-). However, the truly prejudicial effect of the court's ruling did not become evident until the prosecutor's argument. After reviewing the facts of Appellant's prior violent felony convic-

tions, the prosecutor asked the jury to "look at the sentences that were imposed" (R1655). He then read off the sentences of six months in jail for throwing a deadly missile, community control for the first aggravated battery, and eighteen months in prison for the second aggravated battery (R1655-6). Then the prosecutor made his point:

> The only period of any significant time that stopped the defendant from committing any violent crimes against women, ladies and gentlemen, was the time he spent in prison...

(R1656).

§921.141 (5) (b), Fla. Stat. (1995) provides as an aggravating circumstance:

> The defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person.

This Court has held that the State may go beyond presenting a certified copy of the judgment of conviction to the jury. Waterhouse v. State, 596 So. 2d 1008 (Fla.), cert. den., _ U.S. _, 113 S. Ct. 418, 121 L. Ed. 2d 341 (1992). However, the State may not introduce irrelevant material or evidence whose prejudicial value outweighs its probative value as proof of this aggravating circumstance. Rhodes v. State, 547 So. 2d 1201 at 1205 (Fla. 1989).

To Appellant's knowledge, this Court has never specifically held whether the State may introduce the sentence imposed in addition to the judgment showing the prior violent felony for which the capital defendant was convicted. There are good

reasons why the sentence imposed for the prior offense is irrelevant to the aggravating circumstance and could be prejudicial to the defendant. Sentence length is often dependent upon such factors as the personal philosophy of the sentencing judge or whether the defendant can strike a favorable plea bargain with the prosecutor. Such factors are completely irrelevant to the weight which a capital jury should give to the aggravating circumstance in their penalty recommendation.

It is also possible that a penalty jury might decide that a long sentence imposed for a prior violent felony would indicate that the defendant already had a bad record of nonviolent offenses. While this fact might or might not be true, if considered by the jury, it would amount to a nonstatutory aggravating circumstance. On the other hand, evidence of a prior lenient sentence might cause the jury to feel that the defendant was already given an undeserved break.

In short, the probative value of a capital defendant's prior sentence is nil while the possibility for prejudice due to jury speculation about the sentence is great. This Court should hold that only the judgment of conviction and not the sentence is admissible to prove the prior violent felony aggravating circumstance. Since Appellant made a timely objection in the trial court, he has preserved this point for appeal.

The prosecutor's utilization of Appellant's sentences in his argument should also be disapproved. In Fitzgerald v. State, 227 so. 2d 45 at 46 (Fla. 3d DCA 1969), the court reversed a convic-

tion where the prosecutor told the jury that the defendant had "spent the better part of his life in jail". This Court, in Sherman v. State, 255 So. 2d 263 (Fla. 1971) found fundamental error in a prosecutor's argument which used a prior conviction as a basis for telling the jury:

> He just violates the law, and it has got to come to a stop sometime...

255 So. 2d at 265. As in these examples, the prosecutor's argument at bar was prejudicial error because it invited the jury to recommend death for Whitfield because he would commit more violent "crimes against women" if ever given an opportunity. Cf., Teffeteller v. State, 439 So. 2d 840 (Fla. 1983).

B) Admission of Hearsay Testimony that Whitfield Threatened to Kill the Victims in the Prior Violent Felonies if They Reported the Crimes.

The prosecutor's opening statement in the penalty phase featured the following remarks:

> he told the first victim as he was leaving, if you call the police, I'll kill you, he told the second victim, Ms. Kirce, if you call the police I'll kill you and your children.

(R1529). Defense counsel objected and moved for a mistrial (R1529). The trial judge ruled that the threats to kill were "part of the res gestae" and overruled the objection (R1529). In accord with this ruling, Sergeant Paul Sutton was permitted to testify that during the incident with his ex-wife, Harriet Whitfield, Appellant told her that he would kill her if she

screamed (R1555). The state witness further testified that as Appellant was leaving, he threatened to kill the victim if she reported the incident to the police (R1555).

The next witness, Detective George Connor, gave similar testimony regarding the incident with Tonya Kirce. He testified that Whitfield told the victim that "if she called the police he was going to kill her and her two children" (R1559).

Since neither Sergeant Sutton nor Detective Connor was actually present during the incidents that they testified about, their testimony was only hearsay from the victims of the offenses. While details of the circumstances surrounding a defendant's prior violent felony convictions may be admissible in the penalty phase, this Court has drawn the line "when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value". Rhodes v. State, 547 So. 2d 1201 at 1205 (Fla. 1989).

The testimony received at bar about Whitfield's alleged threats to kill the victims of his prior aggravated batteries crosses the line. It was not relevant to the offenses and was highly prejudicial because it portrayed Whitfield as someone who could kill other people. Most importantly, there was no way for Whitfield to rebut the officers hearsay statements other than taking the stand himself. Crossexamination would be futile because Sergeant Sutton and Detective Connor could only reply that the threats were written in their police report. Therefore, the error here is comparable to the one which caused this Court

to reverse for a new penalty proceeding in Rhodes (allowing tape recorded testimony from victim of prior violent felony to be played to the jury).

C) Improper Crossexamination of Defense Witness Dr. Resnier.

On direct examination, Dr. Regnier testified that Whitfield had been committed pursuant to the Baker Act in 1991 because he was suicidal (R1602-4). This was evidence of Appellant's long history of depression and relevant to the statutory mitigating circumstance of extreme mental or emotional disturbance. On crossexamination, the prosecutor inquired:

> **Q.** All right. Now this Baker Act that occurred back on September the 3rd -- is that when that occurred, Doctor?
>
> A. I believe so, 1991.
>
> Q. Were you aware that the defendant had just been released from jail August 26, 1991, a few days before that?
>
> A. No, I was not.
>
> Q. Okay. And that he had been placed on community control at that time which is a house arrest?
>
> A. I knew he was on community control, yes.
>
> Q. And do you know that he had violated that community control, that house arrest?
>
> A. I wasn't aware of that, no.
>
> Q. And that he was subsequently -- that a warrant was subsequently issued and he was put back --
>
> Ms. Scott: Objection, your Honor.
>
> BY MR. MORELAND:

Q. -- in jail September the 5th.

(R1627). Defense counsel's objection that the examination should have stopped when the witness said he wasn't aware of these facts was overruled by the trial judge (R1627). Consequently, the prosecutor was able to repeat that Whitfield was returned to jail (R1627-8).

The effect of the trial court's erroneous ruling was that the prosecutor was permitted, in effect, to testify to facts not in evidence. No witness at trial testified about Appellant's violation of community control and his return to jail. If a witness had testified on this subject, it would have been properly stricken as irrelevant evidence of a nonstatutory aggravating circumstance. Thus, the prosecutor was able to bring prejudicial material, otherwise inadmissible, in through his own testimony.

The error at bar is similar to what happened in the civil case of Bloch v. Addis, 493 So. 2d 539 (Fla. 3d DCA 1986). There, the plaintiff's attorney "took on the role of an impeaching witness" when he added his own version to the events testified to by the defendant's expert. 493 So. 2d at 541. In reversing for a new trial, the court wrote with regard to the attorney's conduct:

> he did not ask for permission to testify, did not take an oath, and did not subject himself to cross-examination.

493 So. 2d at 541. The same is true at bar. The prosecutor was allowed to give his own version of the events surrounding Appellant's Baker Act proceedings without being subject to impeachment.

Because Appellant was prejudiced by the jury's hearing of evidence which amounted to nonstatutory aggravation and because the jury's death recommendation was by a bare 7-5 majority (see Issue II, supra), a new penalty trial before a new jury should be granted.

D) Improper Crossexamination of Detective R. G. Hinesley.

On direct examination defense witness Detective R. G. Hinesley testified that when he was escorting Whitfield to jail after his arrest, a news reporter advised Whitfield that Claretha Reynolds had died (R1579). Once they were inside the jail, Whitfield told the detective that "he did not know that she was dead . . . he did not mean to kill her ... then he began to cry" (R1580).

This evidence of remorse was attacked on crossexamination when the prosecutor was allowed over objection to inquire:

> Do you know whether he was crying because he felt sorry for the victim or sorry for himself?

The detective replied:

> My impression was more for himself.

(R1581).

The judge erred in letting the detective give his opinion on a subject which could only be speculation. After all, only Whitfield knows what motivated his outburst. The error was prejudicial because the defense offered remorse as a nonstatutory mitigating circumstance to be considered. While the prosecution

may rebut evidence of remorse with relevant evidence [see Walton v. State, 547 so. 2d 622 at 625 (Fla. 1989), cert. den., 493 U.S. 1036 (1990)], it is not appropriate for a witness merely to comment that he didn't think the expression of remorse was genuine. The end result was that the judge wrote in his sentencing order:

> There is no evidence from which I draw the conclusion that the defendant was remorseful.

(R2113, see Appendix). Likewise, the jury may have failed to find and weigh this nonstatutory mitigating factor because of the improper crossexamination.

E) The Prosecutor's "Golden Rule" Argument.

In Bertolotti v. State, 476 So. 2d 130 at 133 (Fla. 1985), this Court stated that it was "deeply disturbed" by prosecutorial misconduct which included the prosecutor's remark to the penalty jury, "Can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life?" 476 So. 2d at 133, n.2. Later, in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), this Court condemned a closing argument which asked the jury "to try to place themselves in the hotel during the victim's murder." 547 so. 2d at 1205.

At bar, the prosecutor made the same type of improper argument when he asked the jury to:

> Consider being woken up at six A.M. in the morning, trying to defend off a stabbing Ernest Whitfield with an eight-inch kitchen knife, in front of your five kids, not knowing about --

(R1662). After defense counsel's objection to "Golden Rule" argument was overruled, the prosecutor continued:

> Consider Claretha Reynolds being attacked as she tried to defend herself. Consider her jugular vein being cut and her pulmonary artery, her pulmonary artery being severed, Claretha Reynolds trying to get up and fight, losing blood, becoming weaker, not being able to defend herself.

(R1662).

Arguments which appeal to the jurors to place themselves in the position of the victim of the crime have been "universally condemned". Jenkins v. State, 563 So. 2d 791 (Fla. 1st DCA 1990); Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979). As in those cases, this Court should find reversible error here.

F) Improper Appeal to Gender as a Reason to Return a Death Recommendation.

In Robinson v. State, 520 So. 2d 1 (Fla. 1988), this Court reversed a death sentence for a new penalty trial on a finding that the prosecutor made "a deliberate attempt to insinuate that appellant had a habit of preying on white women and thus constituted an impermissible appeal to bias and prejudice." 520 So. 2d at 6. At bar, there was no racial difference between Whitfield and the female victims of his prior offenses, but the prosecutor's appeal to bias based on gender was flagrant and repeated. The prosecutor started off by characterizing Whitfield's prior violent felony convictions as "all violent crimes against women" and Appellant as

> a violent, very violent man who takes his anger and violence out against women.

(R1653). After describing the prior offenses and Appellant's prison sentences (R1653-6), the prosecutor continued in this vein:

> The only period of any significant time that stopped the defendant from committing any violent crimes against women, ladies and gentlemen, was the time he spent in prison...

(R1656). The improper argument continued:

> What does all this history show you about the defendant's character? That he preys on women alone with children, that he attacks helpless women, women who he knows, women who he has relationships with, that he threatens them and their children and chokes and rapes them when he doesn't get his way.

(R1657).

As previously mentioned, the jury which tried Whitfield was composed of ten women and two men (R1455). The prosecutor unconstitutionally exploited this disparity of gender in his penalty phase argument in the same way that the prosecutor in Robinson exploited an all-white jury with a racial appeal.

It is Appellant's position that consideration of either race or gender in capital sentencing violates the Eighth Amendment's requirement of reliability as well as the Due Process Clause of the Fourteenth Amendment. An analogy should be drawn between the appeal to gender at bar and the United States Supreme Court's decision in J.E.B. v. Alabama ex rel. T.B., _ U.S. _, 114 S. Ct. 1419, 128 L. Ed 2d 89 (1994), which held that "gender, like race, is an unconstitutional proxy for juror competence and impartiali-

ty". 128 L. Ed 2d at 97. The J.E.B. Court went on to explain that discrimination on the basis of gender

> "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." Powers v. Ohio, 499 U.S. at 412, 113 L. Ed 2d 411, 111 S. Ct. 1364. The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity.

128 L. Ed 2d at 104.

In the case at bar, a rape was involved. It is **also** undisputed that the victims of Whitfield's prior violent felonies were women. The prosecutor's argument was clearly calculated to undermine jury neutrality and inflame the women on the jury so that they would recommend a death sentence for Whitfield. Accordingly, the rationale of J.E.B. is applicable to this case even though J.E.B. was decided under the Equal Protection Clause, Fourteenth Amendment and improper argument by the prosecutor implicates the Due Process Clause, Fourteenth Amendment and the Eighth Amendment's requirement of reliability in capital sentencing.

It must be acknowledged that defense counsel did not object to the prosecutor's argument on the basis of improper appeal to gender. However, this type of argument truly rises to the level of fundamental error. The prosecutor's remarks fit the category of those which are "so prejudicial that neither rebuke nor retraction will destroy their influence" and which require that a new trial be granted despite a lack of objection at the trial level. Pait v. State, 112 So. 2d 380 at 385 (Fla. 1959); Ryan v.

State, 457 so. 2d 1084 at 1091 (Fla. 4th DCA 1984). Accord, Dukes v. State, 356 So. 2d 873 (Fla. 4th DCA 1978) (if errors destroy the essential fairness of a trial, they must be considered regardless of the lack of objection). In Reynolds v. State, 580 So. 2d 254 (Fla. 1st DCA 1991), the First District held that the prosecutor's improper injection of racial issues into his argument required reversal despite the defendant's failure to object. The **same** result should be reached where the improper issue is gender. Whitfield's sentence of **death should be vacated** and a new penalty proceeding before a new jury ordered.

## ISSUE IV

THE TRIAL COURT'S INADEQUATE RESPONSE TO THE PENALTY JURY'S QUESTION RESULTED IN A DEATH RECOMMENDATION WHICH DOES NOT MEET CONSTITUTIONAL REQUISITES FOR DUE PROCESS AND EIGHTH AMENDMENT RELIABILITY.

After the jury had retired for penalty phase deliberations, the following written question was addressed to the court:

> Judge Rapkin:
> Does Life in Prison without parole really mean "No Parole" under any circumstances. He will never be allowed back into Society again?
>
> Respectfully,
> [signed by six jurors]

(R1701-2, 2041). The prosecutor suggested that the judge either reread the instruction or tell the jury to rely on the instructions already given to them (R1703). Defense counsel requested that an affirmative response be given to the question (R1703). However, the trial judge replied:

> I can't do that. The legislature may change the law next week.

(R1703). Defense counsel then requested that the court

> either instruct them that yes, it means life imprisonment without parole and he would not be released, or, at the very minimum, that you reread the pertinent portion of the jury instructions that says life without the possibility of parole.

(R1704). The judge eventually decided to reread from the beginning portion of the instructions, stating that the punishment is "either death or life imprisonment without the possibility of

parole" (R1707-8). He reiterated that he would not give any further explanation and acknowledged:

> It's really not answering their question. They want me to say that the legislature can't ever change this and the DOC can't ever do anything and I can't do that **and** I'm not going to say the opposite of it.

(R1707).

The jury should have been given a clear answer to their question. Because they weren't, it is likely that the jury's death recommendation represents an effort to prevent the possible release of a defendant who would likely commit more "crimes against women" rather than a determination that death was the proper penalty in this **case.**

The trial court's reasoning that he couldn't simply answer the jury question affirmatively because the legislature might change the law in the future is flawed. After all, some legislature in the future might decide to eliminate capital punishment altogether. Clearly, any suggestion to the jury that they could vote for **a** death sentence that might never be carried out would violate the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. **320 (1985).**

Another reason why the trial court's reasoning **was** flawed is the ex post facto provision of the Florida Constitution contained in Article X, section 9, which provides:

> **Repeal of criminal statutes.** -- Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

This constitutional provision means that a defendant sentenced to life without possibility of parole would not necessarily benefit by any subsequent legislation making convicted capital felons parole eligible. Cf., Ex parte Browne, 93 Fla. 332, 111 So. 518 (1927) (Hanging is proper means of execution for capital offender whose offense predated the statute providing for electrocution); Sins v. State, 115 So. 2d 773 (Fla. 1st DCA 1959) (Defendant must be sentenced in accord with law in effect at time the crime was committed).

In Simmons v. South Carolina, 512 U.S. _ , 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994), the Court held that the Eighth and Fourteenth Amendments require that a capital sentencing jury be informed of a defendant's ineligibility for parole under state law. Stated otherwise, a defendant cannot be sentenced to death because a jury wants to prevent other state authorities from acting. This is apparently what happened in the case at bar because six jurors (enough to return a life recommendation) were concerned enough about Whitfield's parole eligibility to sign the question to the judge.

Finally, the circumstances at bar should be distinguished from those present in some other decisions of this Court. In Mungin v. State, 667 So. 2d 751 (Fla. 1995), a witness testified that some inmates with life sentences are actually released from prison. This Court found no reversible error because a) there was no contemporaneous objection, and b) a defense witness gave this testimony, so any error was invited. In an earlier deci-

sion, Waterhouse v. State, 596 So. 2d 1008 (Fla.), cert. den., _ U.S. _, 113 S. Ct. 418, 121 L. Ed. 2d 341 (1992), the trial court refused to answer a jury question about parole possibilities. This Court found no error because the jury was properly informed of the then-mandatory 25 year sentence and because correct information on credit for time served could not possibly have made the jury more likely to recommend a life sentence.

By contrast, at bar, a simple response that Whitfield would never be released on parole under any circumstances would probably have induced at least six jurors to recommend a life sentence. Because the prosecutor's argument made Whitfield's future dangerousness to women a feature of the jury's deliberations, the Due Process Clause of the Fourteenth Amendment requires that the jury be clearly and unambiguously informed that he would never be released on parole. Simmons, 129 L. Ed. 2d at 147. The Eighth Amendment requires that a reviewing court find a death sentence unreliable when it cannot say that an error had no effect on the sentencing decision. Caldwell, 472 U.S. at 341. Since the trial judge's answer to the jury's question did not satisfy these constitutional criteria, Whitfield's sentence of death should be vacated and a new penalty proceeding held before a new jury.

## ISSUE v

THE SENTENCING JUDGE UNREASONABLY FAILED TO FIND AND WEIGH PROVEN MITIGATING CIRCUMSTANCES AND ERRED BY GIVING GREAT WEIGHT TO THE JURY-'S DEATH RECOMMENDATION BECAUSE THE VOTE WAS A BARE 7-5 MAJORITY.

In his sentencing order, the trial judge considered each of the mitigating circumstances proposed by the defense. However, he unreasonably failed to find factors established by the evidence and to weigh them. He also specifically stated, "I have given great weight to the recommendation of the jury" (R2113, see Appendix).

A) Statutory Mitigating Circumstance of Extreme Mental or Emotional Disturbance.

The sentencing order reflects that the judge considered only the testimony given during the penalty trial by Dr. Eddy Regnier in evaluating this mitigating factor. He made no mention of the testimony given by Peggy LaRue and Estella Pierre during the guilt or innocence phase of the trial. Thus, the court ignored important evidence relating to Whitfield's emotional disturbance about the breakup of his relationship with Estella Pierre.

After summarizing the testimony of Dr. Regnier, the judge concluded:

> Even if the above facts were proven, which they weren't, they were not of the magnitude to cause an extreme mental or emotional disturbance which would rise to the level of this mitigator.

(R2111, see Appendix). There are two errors here. First, the facts reported by Dr. Regnier were not controverted at all by the State. Therefore, the judge could not simply reject the factual evidence because it was not improbable, untrustworthy or contradictory. Brannen v. State, 94 Fla. 656, 114 So. 429 (1927); Hardwick v. State, 521 So. 2d 1071 at 1076 (Fla.), cert. den., 488 U.S. 871 (1988).

Secondly, even if the judge could correctly find that Whitfield's mental and emotional disturbances did not "rise to the level" of the statutory mitigating circumstance, he erred by failing to find and weigh the evidence as a nonstatutory mitigating factor. As this Court wrote in Cheshire v. State, 568 So. 2d 908 at 912 (Fla. 1990):

> any emotional disturbance relevant to the crime must be considered and weighed by the sentencer.

The sentencing judge's order reflects that no weight was given to the evidence of Whitfield's mental and emotional disturbance.

B) Impaired Capacity to Conform Conduct to the Requirements of Law.

There was a similar defect in the sentencing judge's treatment of the impaired capacity statutory mitigating circumstance. The judge relied on Dr. Regnier's testimony that a "crack cocaine high or euphoric feeling lasts about 15 minutes" to reach the conclusion that the mitigating factor would not apply unless the homicide was committed within fifteen minutes after the drug was smoked (R2112, see Appendix). This finding ignores the testimony

of Dr. Regnier from the guilt or innocence phase of the trial which described the aftermath of a crack cocaine high as "a deep depression, despair, uneasy feeling" (R1198). A person in this depressive state becomes "more irritable, more hyperactive" and "can even experience paranoid psychotic states" (R1201). Dr. Regnier gave his opinion that it was likely that Whitfield was in a paranoid and hypervigilant state when he committed the homicide (R1220).

Clearly, the sentencing judge should have looked to this part of Dr. Regnier's testimony when considering the substantial impairment statutory mitigating circumstance. The judge further erred when he relied upon the jury's rejection in the guilt or innocence phase of Whitfield's defense that he was unable to premeditate this homicide (R2112, see Appendix). The judge seems to have equated the level of proof required to establish the mitigating circumstance with that necessary for an affirmative defense to guilt. Cf., Mines v. State, 390 so. 2d 332 (Fla. 1980) (finding of sanity does not eliminate consideration of mental mitigating circumstances).

This Court said in Pardo v. State, 563 So. 2d 77 (Fla. 1990) that capital sentencing findings are unacceptable when "they are based on misconstruction of undisputed facts and a misapprehension of law". 563 So. 2d at 80. Accordingly, as in Larkins v. State, 655 So. 2d 95 (Fla. 1995), this Court should now vacate Whitfield's sentence of death and remand this case for the trial

court to reevaluate the mitigating evidence and resentence Appellant.

C) Giving "Great Weight" to the Jury's Penalty Recommendation.

In his order, the sentencing judge stated that he gave "great weight to the recommendation of the jury" (R2113, see Appendix). This is exactly what this Court has said that the judge should do. Grossman v. State, 525 So. 2d 833 at 839, n.1 (Fla. 1988), cert. den., 489 U.S. 1071-2 (1989); Smith v. State, 515 so. 2d 182 at 185 (Fla. 1987), cert. den., 485 U.S. 971 (1988). However, the jury returned a death recommendation for Whitfield by the barest possible vote, seven-to-five. When the vote of a single juror determines the outcome of a penalty trial, the recommendation does not deserve to be given "great weight" by the sentencing judge.

Appellant acknowledges that this Court rejected a similar argument in Brown v. State, 565 So. 2d 304 (Fla.), cert. den., 498 U.S. 992 (1990). However, this issue is ripe for re-examination because of intervening decisions such as Espinosa v. Florida, _ U.S. _, 112 S. Ct. 2114, 120 L. Ed. 2d 854 (1992) and Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993) which have redefined the jury's advisory role in capital sentencing. Because the jury is now recognized as a co-sentencer under the Florida capital sentencing scheme, any constitutional flaw in the jury's advisory recommendation invalidates the death sentence imposed.

The United States Supreme Court has allowed non-unanimous jury verdicts to pass constitutional muster. Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972). Both of these were plurality decisions involving verdicts in non-capital proceedings. In Johnson, the concurring opinion of Justice Blackmun stated that a verdict returned by a substantial majority of the jury (9 to 3 under the Louisiana statute) was acceptable but that a 7 to 5 standard "would afford me great difficulty". 406 U.S. at 366. Striking a similar chord, Justice Powell's concurring opinion in Apodaca emphasized that not all majority verdict alternatives would necessarily be approved. Indeed, the Court later held in Burch v. Louisiana, 441 U.S. 130 (1979) that conviction for a non-petty offense by a less than unanimous six person jury violated the Sixth and Fourteenth Amendments of the federal constitution.

The Eighth Amendment's requirement of heightened reliability in capital sentencing cannot be squared with allowing great (and usually determinative) weight to be given to a jury recommendation for death returned by less than a substantial majority of the jurors. In drawing a constitutional standard for unanimity with a six person jury, the Burch Court placed emphasis on actual practice in the various states. The Court wrote:

> It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two [Louisiana and Oklahoma} also allow nonunanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are

> constitutionally permissible and those that are not.

441 U.S. at 138. If this type of analysis were applied to jury practices in capital sentencing, it would show that only Florida and Delaware[4] permit a jury to return a death recommendation by a bare majority of the jury. One state, Alabama, allows a death recommendation to be made by a substantial (10 to 2) majority of the jury. The other states require jury unanimity for death.

Accordingly, this Court should hold that Florida's death penalty statute violates the Sixth, Eighth and Fourteenth Amendments, United States Constitution insofar as it permits a death recommendation to be returned by less than a substantial majority of the jury. Because Whitfield's death sentence was imposed by a judge who gave "great weight" to this defective jury recommendation, his death sentence should be vacated and resentencing ordered.

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[4]Delaware's current capital sentencing statute was expressly modeled on Florida's. See, State v. Cohen, 604 A. 2d 846 at 849 (Del 1992).

## CONCLUSION

Based upon the foregoing argument reasoning and authorities, Appellant, Ernest Whitfield, respectfully requests this Court to grant him relief as follows:

As to Issue I - Reversal of convictions and remand to the circuit court for a new trial.

As to Issues II, III, and IV - Vacation of death sentence and remand to the circuit court for a new penalty proceeding before a new jury.

As to Issue V - Vacation of death sentence and remand to the circuit court for resentencing before the judge only.

## APPENDIX

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR SARASOTA COUNTY**

**STATE OF FLORIDA,**

**-vs-** **CASE NO. 95-1588F**

**ERNEST WHITFIELD,**

**Defendant.**

## ORDER

The defendant, Ernest Whitfield, was tried by this court on September 18, 1995, thru September 25, 1995. The jury found the defendant guilty of first degree murder, as well as sexual battery and burglary while armed or with assault and battery.

The same jury re-convened on September 28, 1995, and heard evidence in support of aggravating and mitigating factors. On September 28, 1995, the jury returned a seven to five recommendation that the defendant be sentenced to death. On September 28, 1995, I requested memoranda from both counsel. On October 6, 1995, the memoranda were received. On October 13, 1995, I conducted a sentencing hearing in which both sides argued their position. I then set the final sentencing for this date, October 20, 1995.

Having heard the entire trial, both the guilt and sentencing phase, reviewing the memoranda submitted, as well as hearing further argument of counsel, I find as follows:

## AGGRAVATING FACTORS

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person.

The defendant was twice previously convicted of aggravated battery, once on June 3, 1991, and again on August 26, 1991, and the defendant was convicted ofthrowing a deadly missile into an occupied motor vehicle on June 3, 1991. The certified copies of conviction were received in evidence. During the penalty phase, the state attempted to show that both of the



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previous convictions for aggravated battery were in fact downgraded plea bargains from armed sexual battery and that the circumstances were similar to the present conviction for the sexual battery of Willie-Mae Brooks. I did not allow that evidence for the jury to consider. The state again argues that position in its memorandum, and I will not consider it. The defendant was convicted only of aggravated battery, and that is all I will consider regarding this aggravating factor.

Contemporaneously with this verdict of murder in the first degree, the defendant was found guilty of sexual battery with the use of a deadly weapon. The victim of this sexual battery was not the murder victim. The evidence shows that on June 19, 1995, the defendant entered the residence of Claretha Reynolds. While inside, he armed himself with a knife. He entered a bedroom in which Willie Mae Brooks was asleep on the bed with her one year old child. The defendant put the knife to the throat of Willie Mae Brooks and raped her. At that time, he also threatened to kill her baby.

This aggravating circumstance was proven beyond a reasonable doubt.

2. The murder was committed while the defendant was engaged in the commission of burglary.

The evidence shows that some time in the early morning hours, the defendant unlawfully entered the residence of Claretha Reynolds at 2116 Dixie Ave., Sarasota, Florida. While inside, the defendant, armed with a knife, first raped Willie Mae Brooks and then went into a different room and murdered Claretha Reynolds. Contemporaneous with the verdict of murder in the first degree, the defendant was found guilty of burglary while armed or with assault and battery.

I find that this was proved beyond a reasonable doubt.

3. The capital felony was especially heinous, atrocious and cruel.

The evidence shows that after raping Willie Mae Brooks, Ernest Whitfield, the defendant, while armed with a knife having an eight inch blade, went into the room where Claretha Reynolds was sleeping. According to the testimony of Willie Mae Brooks, he was there for about ten minutes when Claretha Reynolds stumbled into her room and asked Willie Mae to lock the door. She was bleeding profusely from her wounds, and she said, " I'm dying. Ernest has stabbed me."

The medical examiner testified that Reynolds was stabbed 21 times; seven of the wounds were potentially lethal. Her jugular vain was severed; her heart sac was perforated; her pleural cavity and right upper lobe of her lung was punctured; and her pulmonary artery was severed. She was fully conscious and aware that she was dying. Many 'of the wounds were seven inches deep. She was conscious for the ten minutes or so during the stabbing and for the additional time

it took to get to Willie Mae Brook's room and for a period of the time thereafter. The medical examiner indicated that some of the wounds were obviously the result of attempts to defend herself and ward-off her attacker. This murder occurred in the presence of the victim's five young children. This was a pitiless, conscienceless cruel murder. This factor was proven beyond a reasonable doubt.

## MITIGATING FACTORS

### Statutory Mitigating Factors

The jury was instructed on the following statutory mitigating circumstances.

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

The only professional called to testify regarding mitigating circumstances was Dr. Eddie Regnier, Ph.D., a psychologist who specializes in treating addiction disorders. He spent a total of approximately 14 hours with the defendant. The majority of his testimony came from hearsay documents and interviews. No witnesses with direct evidence were called to testify. Dr. Regnier indicated he was unable to get very much information from the defendant because the defendant was uncooperative and "a poor historian."

Dr. Regnier testified that the defendant suffered from long standing major depression as a result of childhood deprivation. He was neglected and abused as a child; he lacked stability in his life and as a result became a cocaine addict.

In 1991, the defendant was committed under the Baker Act and held for a few days. The records were never produced. Dr. Regnier indicated that this commitment was the result of a cocaine binge.

It was further disclosed that in 1995, the defendant was involved in a shooting and was injured. From this incident he suffers a post traumatic stress disorder.

Even if the above facts were proven, which they weren't, they were not of the magnitude to cause an extreme mental or emotional disturbance which would rise to the level of this mitigator. If Dr. Regnier's second hand recounting of the defendant's unpleasant and deprived childhood is believable, it still does not prove the existence of this statutory mitigator; however, I do find and apply that evidence to non-statutory mitigators.

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

Dr. Regnier testified both during the guilt and penalty phase regarding the defense of voluntary cocaine intoxication that the defendant was a crack cocaine addict and had been so for approximately nine years. It was alleged that the defendant used cocaine the evening of the murder.

I believe that the defendant is a cocaine addict, and that he probably did use cocaine some time shortly before the murder. Dr. Regnier testified that a crack cocaine high or euphoric feeling lasts about 15 minutes. There is no evidence that the defendant smoked rock cocaine within 15 minutes of the murder. The evidence shows that the defendant was committing the rape of Willie Mae Brooks for at least 10 minutes before entering the bedroom of the deceased where he then spent at least 10 minutes. During the guilt phase, the same evidence was presented to the jury to nullify the existence of the specific intent necessary for pre-meditation, and the jury found beyond a reasonable doubt that it did not exist. The law enforcement witnesses who saw the defendant shortly after the incident testified that he appeared normal. There is no satisfactory evidence from which I find the existence of this factor. This mitigating factor does not exist.

**3.** The defendant acted under extreme duress or under the substantial domination of another person. There was absolutely no evidence of this circumstance. The only argument that was made was again a general argument regarding his cocaine addiction. I find that this circumstance does not exist.

**Non-Statutory Mitigating Factors**

The defendant has asked the court to consider the following non-statutory mitigating factors.

1. The defendant co-operated with law enforcement.

The defendant did admit to the crimes when taken into custody. He further directed the police to the location of the murder weapon. His admission was of little significance. His identity was known, and there were other witnesses to the crime. There was virtually no way he could have avoided detection and apprehension. I find that this factor does exist, but I give it little or no weight.

2. The defendant came from an impoverished background.

The only evidence of this comes from the Dr. Regnier. He occasionally refers to getting some of this information from the defendant; however, no direct source of this information was presented. It was very difficult to glean from Dr. Regnier's testimony those things that actually pertain to the defendant's childhood and those that were just generally descriptive of a life of poverty and deprivation. I am satisfied that the defendant came from an impoverished background, and I give this factor considerable weight.

3. The defendant expressed remorse for his crime and a willingness to support the victims children.

There is no evidence from which I draw the conclusion that the defendant was remorseful. I do not consider this factor established. That the defendant expressed a willingness to help support the victim's children was established only through Dr. Regnier who also established that the defendant has fathered four children of his own and has never supported any of them This factor has not been established.

4. The defendant suffered from chronic crack cocaine addiction.

Although the evidence was not very definitive as to the nature and extent of the addiction, I find that this factor has been established. Had this been a crime to obtain money for drugs, this factor would be entitled to great weight. The commission of this murder had absolutely no relationship to the defendant's addiction; however, I do consider this an aspect of the defendant's background and character and in that regard, I give it substantial weight.

5. The defendant was abandoned by his father, and his mother was an alcoholic.

Again, although there was no direct evidence of this factor, the defendant, using Dr. Regnier as a conduit, was able to establish some basis for the existence of this factor. Unfortunately, this is a sociological reality, and I am sure that there can be shown a relationship between this circumstance and violent crime. I find this factor to exist, and I give it some weight.

6. The defendant was a victim of a near fatal shooting and subsequently demonstrated forgiveness to his assailant,

The evidence shows that the defendant was shot by one Eddie Curry. The shooting was brought about by the defendant allegedly having raped Tanya Kirce, Eddie Curry's girlfriend. It was only after the defendant was in custody for this murder that he expressed a desire to ask the state to drop the charges against Mr. Curry. I don't believe this factor was proven, but even if so, I would give it little or no weight.

I have carefully considered and independently weighed the aggravating and mitigating circumstances found to exist in this case. I have given great weight to the recommendation of the jury.

I find, as did the jury, that the aggravating circumstances far outweigh the mitigating circumstances.

Accordingly, it is

**ORDERED AND ADJUDGED** that the defendant, **ERNEST WHITFIELD,** is hereby sentenced to death for the murder of **CLARETELA** Y. **REYNOLDS.** The defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

**DONE** AND **ORDERED** in Sarasota, Sarasota County, Florida, this 20 day of October, 1995.

/HARRY M. RAPKIN

Harry M. Rapkin
Circuit Judge

Copies furnished to:

The Honorable Earl Moreland, State Attorney
Charles Williams and Charlie Ann Scott, Attorneys for the Defendant
Ernest Whitfield, Defendant

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 25th day of October, 1996.

Respectfully submitted,

Douglas S. Connor

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