IN THE SUPREME COURT OF FLORIDA

CHADWICK WILLACY,	)	
	)	
Defendant/Appellant,	)	
	)	
vs.	)	CASE NUMBER 86,994
	)	
STATE OF FLORIDA,	)	
	)	
Plaintiff/Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

OTHER AUTHORITIES:

IN THE SUPREME COURT OF FLORIDA

CHADWICK WILLACY, Defendant/Appellant, vs. STATE OF FLORIDA, Plaintiff/Appellee.	)	CASE NO. 86,994

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

In 1991, following a jury trial in the Circuit Court for Brevard County, the Honorable Theron Yawn, Jr. presiding, Chadwick Willacy was found guilty of first-degree murder, arson, robbery and burglary with assault. After a jury recommendation 9-3 for death, Willacy was sentenced to death on the first-degree murder conviction and thirty years to each underlying felony, consecutive. On direct appeal, this Court affirmed the convictions, reversed the death sentence and remanded for a new penalty hearing because of a faulty jury selection process. Willacy v. State, 640 So.2d 1079 (Fla. 1994) This is the direct appeal of a death sentence imposed after the subsequent penalty phase.

In imposing this death sentence, the trial court found

five statutory aggravating factors: the murder was committed while the defendant was engaged in the commission of a robbery/arson/burglary; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; the murder was committed for pecuniary gain; the murder was cold, calculated and premeditated murder without pretense of moral or legal justification, (CCP); and an especially heinous, atrocious or cruel murder (HAC). (R615, 618) The defense presented for consideration thirty-seven mitigating circumstances; the trial court rejected six, and gave the remaining thirty-one little weight. (R619, 624)

Motions and Objections Denied by the Trial Court.

The following pre-trial and jury selection motions made by the defense were denied by the trial court: Motion to Disqualify and Motion to Recuse Judge; (R5,13) Motion in Limine to Exclude Burning of the Victim's Body; (R233) Motion in Limine to Suppress and Exclude Evidence of Aggravating Factors; (R246) Motion to Vacate the Death Penalty; (R263) Motion for Determination of Admissibility of Physical Evidence; (R270) Motion to Continue to determine whether black jurors have been systematically excluded from the jury venire (R333) Motion for Mistrial based upon statements by the state to the jury venire; (R359) Motion for Mistrial based upon the jury taint from questioning jurors about pre-trial publicity in front of the

remaining jury venire; (R1310) and Motion for Additional Peremptory Challenges. (R1397)

The following defense motions were denied after the jury was seated: Motion for Mistrial based upon comments by the State during opening statement; renewed; (R1657, 1773) Motion for Mistrial based upon trial courts order that defense not ask leading questions on cross-examination; (R2269) Motion for Mistrial based upon the inflammatory nature of the victim impact evidence; (R2918) Motion for Recess to permit trial court to consider evidence presented at sentencing. (R104)

The following objections and cause challenges were made by the defense before the jury was seated: Court denied cause challenges against Juror Aker, Juror Hemple and Juror Smith; (R320) Court denied cause challenge against Juror Stanton; (R582) Court denied cause challenges against Juror Harrell and Juror Cioffi; (R1115) Court denied cause challenge against Juror Warrensford; (R1303) If additional peremptories were given the defense would have struck Juror Williams, Juror Wittfeldt and Juror Gordon; (R1397, 1415) Defense renews all objections to the jury panel. (R1527)

The following objections were made by the defense after the jury was seated: Objection to photo of gas can; (R1718) Objection to photos of victim be excluded as gruesome, and not relevant to aggravating factors; (R1864) Objection to testimony

of the fire damage to the body of the victim; (R1893) Standing objection to the testimony of the medical examiner; (R1984) Objection to photo of crime scene, photo of victim's wrist, photo of victim's ankle being bound; (R1897, 1898 and 1899) Objection to photos of the victim. (R1914, 1920) Objection to video of crime scene; (R2131) Objection to trial court orders to defense to refrain from asking leading questions on cross-examination; (R2243, 2253) Objection to introduction of victim's dress and watch based upon relevancy; (R2358) Objection to photo of fan as cumulative; (R2384) Objection to photo of burnt matches in victim's house; (R2462) Objection to jury instructions on the following aggravating circumstances: avoiding or preventing lawful arrest (R2931); financial gain (R2933); HAC (R2933); and CCP. (R2945)

FACTS CONCERNING THE MURDER

In early September, 1990, Pastor Russell Sasscer met with the victim, Marlys Sather, at a homeowners' association meeting. (R1675) At the meeting, Pastor Sasscer informed Sather that a member of his congregation was interested in buying a used car. (R1676) They then arranged to meet at Sather's house the next day at noon. (R1676) The following morning, on September 5, 1990, Sather appeared at work at 7:00 a.m. (R1666) Sather left work between 11:00 and 11:30 a.m. to make her appointment with Pastor Sasscer. (R1667) On the way home, Sather stopped at a

Winn-Dixie and bought some groceries. (R1816)

Pastor Sasscer called Sather's home at 12:00 noon to inform her that he would be a few minutes late for their appointment, and there was no answer at the house. (R1677) Pastor Sasscer arrived at Sather's home minutes later and observed Sather's car in the driveway. (R1678) Sasscer rang the bell to the house and there was no answer. (R1678) Sather did not return to work that afternoon. (R1667)

The following day, Sather did not appear at work at her usual time, 7:00 a.m. (R1671) Employees were sent to Sather's home to check on her at 8:00 a.m., and they found nothing. (R1671) The two employees that went to the house rang the bell and there was no answer at the door. (R1692) One of the employees observed that Sather's garage door was ajar and unlocked and she looked under the garage door and saw a car in the garage she didn't recognize. (R1700) One of the employees then called Sather's relatives that live nearby to inform them that they did not know about Sather's whereabouts. (R1694)

After receiving a call that her mother-in-law's whereabouts were unknown, Denning Loveridge and his father went to the Sather home. (R1704) Loveridge gained entry to the Sather home through the back porch. (R1707) In the back porch he observed items out of place; the TV set, the VCR, a VCR tape rewinder, and a shotgun. (R1709) Upon entering the kitchen,

Loveridge observed things in disorder and the smell of gasoline. (R1711) Loveridge then found Sather lying on the floor of the front bedroom. (R1713) On the floor by Sather's feet was a fan that was still on. (R1713) Loveridge and his father then went outside and called the police. (R1715)

Officer John Masse of the Palm Bay Police was the first officer to respond to the Sather home. (R1726) Upon entering the home, Officer Masse smelled gasoline. (R1728) After observing the victim, Officer Masse notified his superiors of a possible homicide and asked for detectives to respond. (R1731) Officer Masse then secured the area. (R1732) While securing the area, Officer Masse noticed that the bathroom window of the house next door was broken. (R1734) Fearing that there was a burglary in this house, Masse entered through the window and nobody was home. (R1734) The house next door was also secured as a potential crime scene. (R1734)

Dr. Dennis J. Wickham, District Medical Examiner, performed an investigation into the death of Marlys Sather. (R1891) At the crime scene, Dr. Wickham observed that the victim had charring of the skin. (R1895) The doctor also observed that the victim's hands were bound behind the body with a black plastic cord and over that was duct tape. (R1895) The victim's legs were bound the same way. (R1896) The doctor also observed blood from the victim's head all the way to the doorway as well

as on the inside wall and back towards the door. (R1930) The victim also had "skin slip" which was due to gasoline and the combination of gasoline and heat on the skin. (R1933) There was also a ligature found around the neck of the victim which was made of a two wire electric cord and duct tape. (R1934)

A further examination of the victim's body by the doctor found that the victim had a number of bruises and lacerations. (R1935) The victim had bruises on the left side of the forehead, left upper eyelid, inside lower lip, and tip of the tongue. (R1936) The doctor also observed a laceration on the scalp behind the right ear and a chip of bone was chipped out of the skull. (R1936) There were also small bruises on the back of the left hand, the right forearm, and the left leg towards the knee. (R1936) The doctor testified that the injuries to the head were caused by something that is long and probably had some sort of angle on it. (R1943) The injuries to the lip and tongue occurred during a blow to the mouth or strangulation. (R1946)

Dr. Wickham made the following findings related to the victim's cause of death: lining of skull and brain had a thin layer of blood over the right back portion; the left temporal lobe of the brain had bruises and the back of the head had small bruises; neck tissues had blood (R1946); two cartilages in the neck were broken; trachea mucus had soot; black soot was found down into the lungs and into the medium sized bronchi. (R1947)

The doctor further testified that the strangulation to the victim was intermittent because of the amount of blood seepage in the eyes. (R1949) In the doctor's opinion, the victim was alive and breathing when the fire started because the victim inhaled soot. (R1951) In the doctor's opinion the victim's cause of death was a result of smoke inhalation following strangulation and blunt force injury to the head. (R1955)

Under cross-examination, the doctor admitted that the blows to the head could have been sufficient to cause unconsciousness. (R1958) Futhermore, once the victim was bound the victim showed no sign of struggle. (R1958) The strangulation caused by the ligature alone could have caused the death of the victim. (R1961) However, the doctor testified in 1991 that the ligature strangulation "would" cause death of the victim. (R1963) Also, the fire was not started over the face and mouth area of the victim (R1964); and, the blows to the skull were made from a left-handed blow. (R1965) Also, the victim was "agonal," meaning the victim was dying at the time the fire was started. (R1967)

The Murder Investigation

The Defendant's neighbors, Michael and Kathleen Delaney, saw a car towed away from the Defendant's house two weeks before the murder. (R2026,2043) The car being towed was a car rented by the Willacy which was being repossessed by the rental company.

Officer George Santiago was the lead investigator from the Palm Bay Police Department. (R2102) According to Santiago, the Willacy's house was next door to the house of the victim on Jarvis Street in Palm Bay. (R2075,2076) During an investigation of the victim's house, Santiago observed a green shirt on a chair in the living room that compared to clothes that were found in the Defendant's clothing hamper. (R2105) Also, there was food products and a Winn-Dixie receipt on the table. (R2117) A handle to a squeegee was found in the bathroom waste basket. (R2138)

While Officer Santiago was at the crime scene, Willacy appeared at his house next door. (R2140) Willacy's house was taped off by police officers that found the bathroom window was broken. (R2140) Santiago interviewed Willacy, and he told Santiago that the bathroom window was broken for about a week. (R2142) Santiago then entered the house with Willacy and they walked through the house. (R2143) Willacy stated to Santiago that there was nothing unusual in the house. (R2144) Willacy told Santiago that he occasionally cut the victim's lawn next door and used her lawn cutting equipment. (R2144) Willacy also stated that he had not seen the victim in a couple days and also refused Santiago's request to provide fingerprint samples. (R2144) However, Willacy agreed to come down to the station at 5:00 p.m. and give Santiago a statement. (R2146)

Willacy missed his 5:00 appointment with Santiago.

(R2148) Santiago subsequently returned to the crime scene at 6:40 p.m. where he observed Willacy in the front lawn of his house with his girlfriend and his girlfriend's father. (R2148) Santiago then took a recorded statement from Willacy. (R2153) In the recorded statement, Willacy stated that he last saw the victim on the Sunday before the murder. (R2158) The victim had asked Willacy to cut her lawn, which he did, and the victim paid him for it. (R2158) Willacy went to Orlando the next day and returned home around midnight. (R2159) The following day Willacy woke up late, around 11:00 a.m., had breakfast, and did some outside work around the house. (R2173) He did not go to work that day because he had a job interview. (R2174) Officer Santiago asked if Willacy had been jogging in the neighborhood the day before, and Willacy could not recall. (R2180) Willacy did say, however, that he had been removing rubbish from the back yard. (R2181) Willacy also had been in the victim's garage and in the front doorway related to cutting her lawn. (R2163)

Later that evening, at about 9:40 p.m., Santiago received a phone call from Willacy's girlfriend. (R2152) Santiago went to Willacy's house and met with him. (R2184) Officer Santiago advised Willacy that he did not have to invite him into the house or give him anything. (R2184) Willacy then let Santiago into the house and led him to the guest bedroom where a checkbook was in the waste basket. (R2185-86) Willacy had no

knowledge of how the item got into the house. (R2188-89)

Officer Santiago left Willacy under the supervision of other police officers and went to confer with other crime scene technicians. (R2190) After those discussions, Santiago placed Willacy under arrest. (R2190) A search warrant of Willacy's house was sought and subsequently a search was conducted. (R2191)

Under cross-examination, Officer Santiago testified that a confidential informant stated that another person was at the murder scene and had checks of the victim. (R2254-56) The C.I. stated that Larry or Alonzo Love was present and involved in the murder. (R2257-59) According to Santiago, Alonzo Love was interviewed and he stated he was at work at the time of the murder. (R2261) Love's employer was contacted and the employer stated Love was at work the day of the murder. (R2262) Alonzo Love's fingerprints were taken and compared to prints found at the crime scene. (R2265)

The search of Willacy's house uncovered a blood stained pair of shorts in the hamper. (R2215) Also found was a tie clip, a miniature Colt M16, a miniature M16, an Indian head coin collection, foreign currency, wrapped coins, a ladies ring, and a telephone. (R2221-22) A gym bag was found under Willacy's bed containing coins. (R2225-26)

Observations of Neighbors and Co-Workers.

Edith Creel was a neighbor of both Willacy and Sather.

(R1745) Creel saw Willacy to the left of her house coming out of a wooded area and enter a two-tone red and white car at 12:45 p.m. on September 5th. (R1747) Minutes later a co-worker of the victim, Louise Rodriguez, saw the victim's car go into a bank on Menton Road. (R1971-75) Marta Anderson, left her house after 3:00 p.m. on September 5th to pick up her children at the nearby bus stop. (R1977-79) While nearing the bus stop, Anderson observed a fairly well dressed black male in a jogging suit with a hat sort of jogging on Jarvis looking for something. (R1983-85) The person was muscular, 5'10" to 6'1" tall. (R1985) Anderson then observed the black male passing her car in a two-tone car. (R1987) At the same time, John Barton, was a student returning home from school. (R1994-95) After getting off at the wrong bus stop, Barton observed a maroon and white Ford LTD pulling out of a ditch on the side of a building at the corner of Jupiter and Almonte. (R1994-95) He identified the maroon and white Ford LTD as being the car belonging to the victim. (R1995) The victim's car was subsequently found at that same location, also known as Lynnbrook Plaza. (R2018-22,2147)

Fingerprint Evidence

Palm Bay Police Officer Jody Phillips and Brevard County Deputy Sheriff Russell Cockriel processed the crime scene for fingerprints. (R2365,2673) The victim's house and cars were thoroughly processed for latent prints. (R2427,2428) Officer

Phillips found Willacy's fingerprints on the bottom of the fan motor in the victim's front bedroom where the victim was found, and on the gas can found in the kitchen. (R2433,2434) Deputy Cockriel found Willacy's fingerprint on the VCR rewinder in the back porch, and on the top of the fan motor of the oscillating fan found in the victim's northeast bedroom. (R2675) There were 13 fingerprints found at the crime scene that could not be matched to any known print, including a fingerprint found on the VCR in the back porch area, a fingerprint from the telephone in the master bedroom, and a fingerprint on the blue Ford in the garage. (R2443,2444,2450,2709)

Tammy Jergovich, a micro-analyst, testified that a wood handle and squeegee piece were once together. (R2501) She further testified that the roll of black cord used to tie the wrists of the victim did not originate from the screen/blinds found in the victim's house. (R2506-7) According to Scott Ryland, a FDLE crime analyst, duct tape on the victim's ankles was similar in construction and characteristics to a roll of tape recovered at Willacy's house. (R2527)

According to FDLE serologist Yvette McNab, the victim had Type A blood and Willacy had Type O blood. (R2545) Paper towels found in Willacy's house contained Type A blood. (R2545) Type A blood was also found on a hammer handle found in the yard and on Willacy's sneakers. (R2550-51) A pair of shorts also

recovered from Willacy's house was covered by blood, both Type A and Type O. (R2551-52)

Debbie Demers of the Brevard County Sheriff's Office was declared an expert in blood stain pattern analysis. (R2288) Agent Demers photographed the crime scene and spread the blood detecting chemical luminal throughout the crime scene. (R2290) According to Demers' blood stain pattern analysis, the victim was initially struck by a left-handed swing motion in front of the dining room table. (R2321) The victim then was dragged across the floor to the foyer, where the victim then stood up and went into the garage. (R2324) The victim's head then made forceful contact with the foyer floor. (R2326) There was then a drag or swipe pattern of blood on the carpet in between the chair and end table. (R2326) Blood then pooled in the living room area. (R2326,2330) The victim's head was then wrapped in a comforter and the victim was carried into the northeast bedroom. (R2326-27,2331) Agent Demers also found blood stains and burnt hair about twelve inches up on the door frame in the northeast bedroom. (R2332) According to arson investigator Randy Gore, a fire was deliberately started in the victim's house by pouring gasoline and lighting it with matches. (R2465)

Bank ATM Evidence

The victim's ATM card was used at 12:52 p.m. on September 5th. (R2589) There were two further ATM withdrawals

from the victim's account at the First Florida Bank in West Melbourne on September 5th, 1990. (R2597-2619) The ATM machine at the bank took a photograph of the person making the ATM withdrawal, and that photo was introduced into evidence. (R2641)

The victim's daughter, Diana Loveridge, identified her mother's property that was recovered from Willacy's house. (R2536) The victim's wedding ring was the only item that was missing and not recovered from Willacy's house. (R2537) Loveridge also testified that her mother did not ordinarily keep a fan in the front northeast bedroom.

Evidence of Mitigation

Eric Jiles has known Willacy for twenty years and has been best friends since childhood. (R2752) According to Jiles, Willacy was a thoughtful person. (R2753) Jiles provided a specific example where Willacy once helped a drunk person passed out in a restaurant parking lot. (R2753) According to Jiles, on that particular day it was below freezing temperatures and if the drunk person stayed in the parking lot he would have froze to death; however, Willacy helped the person up sat him down in the restaurant. (R2753) During Willacy's senior year of high school, he developed a drug abuse problem with cocaine and sought help from Jiles. (R2755-60) Thereafter Willacy volunteered for admission into a drug detox center. (R2760) Willacy subsequently relapsed. (R2756) Willacy decided to come to Florida to get away

from the bad elements in New York. (R2757)

Andrew Jiles is the father of Eric Jiles, and testified that Willacy was a polite, helpful, and hardworking person. (R2767) Willacy came to Jiles for help with his cocaine abuse (R2766), and Willacy was embarrassed that he got into that situation. (R2767) Jiles then arranged for Willacy to be hospitalized for seven days in a detox center. (R2767) Willacy ultimately returned to drugs and would avoid Jiles because of his embarrassment over the situation. (R2767)

Paul Limmer was Willacy's track coach from high school. (R2771) Limmer stated that Willacy was a bright, well-liked young man and was ultimately selected to be captain of the track team in one of the best track programs in the state of New York. (R2772) Limmer trusted Willacy and would lend him money because he would always pay him back. (R2775) According to Coach Limmer, Willacy was a model citizen. (R2778)

According to family friend Arthur Anderson, Willacy was a role model to his friends. (R2783) Anderson stated that Willacy was the kind of person you would want as a son. Willacy was the type of person who believed in doing right and achieving something worthy in this world. (R2785)

Ismail Viena was a high school friend of Willacy. (R2790) According to Viena, Willacy was a very close friend -- a good friend. He was reliable, caring, the kind of person you

could speak to. (R2790) Viena also stated that Willacy was very popular in school and got along very well with his teachers. (R2791) Viena's parents also loved him. (R2792) According to Viena, Willacy never displayed a violent temper or violence. (R2792)

Willacy's sister, Heather Willacy, testified that her brother was a very helpful person. (R2797) She also stated her brother had no temper and never got into trouble at school for fighting. (R2815) She testified that Willacy was just a very kind and generous, caring person, and he lived in a very loving and caring home which was very supportive. (R2816)

Willacy's grandfather, Joseph Robinson, testified that Willacy was very respectful of adults, never displayed a violent temper, and liked to work. (R2819-20) Robinson also testified that he never knew Willacy to be violent. (R2821)

Defendant's mother, Audrey Willacy, testified that her son went to Catholic school, played the piano, and went to Sunday school. (R2824) She further stated that Willacy was offered scholarships all over the place. (R2825) Willacy was also very helpful to neighbors and was polite. (R2825) She further stated that Willacy was not violent and the charges against him were out of character for him. (R2825)

Willacy's father, Colin Willacy, testified that his son was popular in school, average academically, and an exceptional

athlete. (R2832) He also stated that Willacy was a very caring person. (R2832) Colin Willacy gave a particular example of his son's caring nature. (R2834) He confided about a time where his son came to the aid of a classmate who was going through severe emotional problems. (R2834) The young girl was apparently contemplating suicide and went down to the railroad tracks. (R2834) Willacy went down to the railroad tracks after her and talked her back to his parents home. (R2834) After that incident Willacy continued give his friend further help with her problem. (R2834) Colin Willacy also stated his son was very helpful to the neighbors, never had any disciplinary problems in school, and the teachers loved him very much. (R2835)

State Rebuttal

In rebuttal the state introduced victim impact evidence from the son and two daughters of the victim. (R2890,2895,2908) The victim's son, John Sather, testified that his mother was very loving and caring, always there if he needed counseling, and very hard-working and dependable. (R2890) John Sather further testified that his mother's death caused a great deal of emotions and pain. (R2893) He further testified that it hurts to think that his daughter Rachel will never see her, and that his other children will not have her guidance. (R2893) He concluded with the observation that you do not get to say goodbye. (R2893)

The victim's daughter, Nona Breeden, testified that her

mother was her best friend and was very supportive. (R2895) She also testified that her mother would mediate disputes with her sister when they were younger. (R2896) Breeden also stated that her mother would call her out of the blue and chit chat, and that these telephone conversations were very rewarding to her. (R2898) Breeden also testified that during one of her last visits at her mother's house she found a birthday card that was meant for her because her birthday was coming in the following weeks, and it was sad that her mother never got to send that card to her. (R2900)

Diana Loveridge testified that her mother spent a lot of time with her blind granddaughter. (R2908) She further stated that her mother helped her daughter learn to play piano. (R2908)

To rebut potential claims by Willacy that he lacked significant prior criminal activity, the defense and state entered into a stipulation that Willacy was convicted of possession of marijuana, presenting false identification to the police, and arrested for possession of cocaine. (R2970,3081)

At sentencing a videotaped statement by Willacy was entered into evidence. (R66) Willacy stated that he went into the victim's house to get keys in the garage. (R69) Willacy was high at the time and a matter of impulse he was thinking of getting her car for a ride. (R70) Willacy denied killing anybody, and he did not know what happened in the house at the time because

Willacy was not in the house when the murder occurred. (R78-79) Willacy was simply there to take the victim's keys and drive the victim's car. He drove the victim's car to Lynnbrook Plaza. (R78-81) The whole thing was about taking some of the victim's stuff, and Willacy was just following. (R81) Willacy further claimed he did not take anything from the house for himself, however, he did help bring things out of the house. (R84) According to Willacy, the murderer in this case was a drug dealer friend named Goose. (R633) Goose's real name could be Carl, and he was 6'2" or 6'1", a black male who was muscular and bigger than Willacy. (R633)

SUMMARY OF ARGUMENTS

POINT I: The trial court erred by not granting the defense motion to disqualify the trial court judge where the defense motion was legally sufficient.

POINT II: The Appellant was denied a fair resentencing hearing by the unnecessary presentation of evidence whose probative value was outweighed by its prejudicial effect.

POINT III: The evidence is legally insufficient to show beyond a reasonable doubt that the murder was especially heinous, atrocious or cruel. The evidence demonstrated that the victim was likely unconscious within moments of the initial attack. Pursuant to Herzog v. State, 439 So.2d 1372 (Fla. 1983), the HAC statutory aggravating factor must be disallowed.

POINT IV: The trial court erred in finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest where the evidence was insufficient to show that witness elimination was the dominant reason for the murder.

POINT V: The trial court erred in finding the separate aggravating circumstance that the murder was committed for pecuniary gain where the dominant reason for the crime was the burglarizing of the victim's home.

POINT VI: The trial court erred in finding that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification where

the finding is unsupported by the evidence.

POINT VII: The death penalty is disproportionate to the facts of this case because other similarly culpable defendants have been sentenced to life imprisonment.

POINT VIII: The trial court erred in permitting victim impact evidence in rebuttal that was not relevant to the uniqueness of the victim and went beyond the narrow application of the statutory scheme.

POINT IX: The trial court denied five defense challenges for cause. After exhausting peremptory challenges to remove those jurors which are not denied for cause, the defense moved for additional peremptory challenges. The trial court denied the defense's motion contrary to this Court's expressed directive in Castro v. State, 597 So.2d 259, 261 (Fla. 1992).

POINT X: The Appellant was denied his right to a fair trial based upon the cumulative effect of errors that occurred at trial, namely the jury taint from questioning jurors about pre-trial publicity in front of the remaining jury venire; the denial of the motion to continue to determine whether blacks were systematically excluded from the jury venire; the trial court's order precluding defense counsel from asking leading questions on cross-examination; and the failure of the trial court to recess to consider evidence presented at the sentencing hearing.

POINT XI: The death penalty in Florida is

unconstitutional.

POINT I

THE TRIAL COURT ERRED BY NOT GRANTING THE DEFENSE MOTION TO RECUSE AND OR DISQUALIFY WHERE THE MOTION WAS LEGALLY SUFFICIENT.

Willacy asserted that the trial judge was biased and prejudiced against him and that he could not get a fair trial. Willacy's motion for disqualification of the judge was brought pursuant to Florida Rules of Judicial Administration 2.160, 2.030(3) and 2.030(4)(c), as well as constitutional grounds.

The disqualification of a trial court judge is an especially sensitive and serious matter. When raised in a capital case where the trial court judge has the power to override the jury recommendation, it is an even more serious and delicate matter. This Court has recognized the sensitivity and seriousness involved whenever the issue of judicial prejudice is raised. This Court has stated that:

> Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned....
>
> ... It is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes. The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the law as instrumental-

> ities to work out and arrive at the truth of the controversy.
>
> The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised.
>
> Dickenson v. Parks, 104 Fla. 577, 582-84, 140 So. 459, 462 (1932).

This Court has also expressed the policy that the appearance of the courts as honest arbiters of cases and controversies is necessary for the proper administration of justice:

> "Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge." It is the duty of courts to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice.
>
> State ex rel. Mickle v. Rowe, 100 Fla. 1382, 1385, 131 So. 331, 332 (1930).

Willacy relied upon Rule 2.160 which states in relevant part that:

> (d) Grounds. A motion to disqualify shall show:
>
> (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge;
>
> ....
>
> (f) Determination-Initial Motion. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall

> determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.
>
> Fla.R.Jud.Admin. 2.160(d), (f).

The substantive right to have a judge disqualified is found in Florida Statute Section 38.10 which states in relevant part:

> Disqualification of judge for prejudice; application; affidavits; etc.--Whenever a party to any action or proceeding makes and files an affidavit stating that he fears he will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

Sec. 38.10, Fla.Stat. (1993). Section 38.10 provides the substantive right to seek disqualification, whereas Rule 2.160 controls the procedural process. See Rogers v. State, 630 So.2d 513, 515 (Fla.1993). The procedural process specially provides

that the judge shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. When presented with a motion for disqualification, the judge "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Fla.R.Crim.P. 3.230(d).

In the instant case, Willacy's Motion for Recusal contained all the technical procedural requirements required in the Judicial Rule. Therefore, the motion is legally sufficient if the facts alleged demonstrate that the moving party has a well grounded fear that he or she will not receive a fair trial at the hands of the judge. In Livingston v. State, 441 So.2d 1083, 1087 (Fla.1983) this Court provided the formula for evaluating the sufficiency of the allegations in the movant's affidavit:

> In considering the sufficiency of the allegations to meet the requirements of our procedural process, the technical requirements of the contents of the affidavits need not be strictly applied but, rather, they will be deemed sufficient "[i]f taken as a whole, the suggestion and supporting affidavits are sufficient to warrant fear on the part of" a party that he will not receive a fair trial by the assigned judge. Parks, 141 Fla. at 519, 194 So. at 614-15.
>
> The facts alleged in the motion need only show that "the party making it has a well grounded fear that he will not receive a fair trial at the hands of the judge." Dewell, 131 Fla. at 573, 179 So. at 697. "If the attested facts supporting the suggestion are reasonably sufficient to create such a fear, it is not for the trial judge to say that it is not there." Parks, 141 Fla. at

> 518, 194 So. at 614. Further, "it is a question of what feeling resides in the affiant's mind and the basis for such feeling." Dewell, 131 Fla. at 573, 179 So. at 697-98.

Livingston, at 1087

In the instant case, Willacy's affidavit stated specific facts about his first trial that would reasonably show that Willacy feared getting a fair trial before Judge Yawn. The kind of behavior that Willacy believed that the trial court manifested in the first trial showed in this current resentencing hearing. For example, the sua sponte berating by Judge Yawn before the jury of defense counsel cross-examination technique during the critical cross-examination of the medical examiner is the exact kind of judicial behavior that Willacy stated would affect his ability to get a fair trial. Willacy's affidavit was legally sufficient and Judge Yawn should have immediately disqualified himself.

POINT II

WILLACY WAS DENIED A FAIR RESENTENCING HEARING BY THE UNNECESSARY PRESENTATION OF EVIDENCE WHOSE PROBATIVE VALUE WAS OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

Florida Rules of Evidence Sections 402 and 403 provide that "all relevant evidence is admissible, except as provided by law" (section 402); and that "relevant evidence is inadmissible if its probative value is substantially outweighed by the unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence" (section 403). In the instant case, the medical examiner testified that the cause of death was a result of smoke inhalation following strangulation and blunt force injury to the head. (R1955) Therefore, the fact that a fire was started in the room where the victim was located that produced smoke was relevant to show cause of death.[1] However, in the context of proving aggravating circumstances, the relevance of fire in the house, especially fire damage to the house and victim is very limited because evidence that the house or victim's flesh burned was not relevant to any aggravating circumstance sought by the state. This issue has been thoroughly preserved through pretrial Motion in Limine (R233), standing

---

[1] (Defense Counsel) "Am I correct, sir, that to a reasonable degree of medical certainty that the most you can say is that she was alive when there was a fire in the room?"

(Dr. Wickham) "That's correct." (R1964)

objection to medical examiner testimony granted by trial court (R1884), and objections to gruesome crime scene photos and video. (R1864)

At trial Dr. Dennis J. Wickham, District Medical Examiner, testified that he performed an investigation into the death of Marlys Sather. (R1891) An examination of the victim's body by the doctor found that the victim had a number of bruises and lacerations. (R1935) The victim had bruises on the left side of the forehead, left upper eyelid, inside lower lip, and tip of the tongue. (R1936) The doctor also observed a laceration on the scalp behind the right ear and a chip of bone was chipped out of the skull. (R1936) There were also small bruises on the back of the left hand, the right forearm, and the left leg towards the knee. (R1936) The doctor testified that the injuries to the head were caused by something that is long and probably had some sort of angle on it. (R1943) The injuries to the lip and tongue occurred during a blow to the mouth or strangulation. (R1946)

Dr. Wickham made the following findings related to the victim's cause of death: lining of skull and brain had a thin layer of blood over the right back portion; the left temporal lobe of the brain had bruises and the back of the head had small bruises; neck tissues had blood (R1946); two cartilages in the neck were broken; trachea mucus had soot; black soot was found down into the lungs and into the medium sized bronchi. (R1947)

The doctor further testified that the strangulation to the victim was intermittent, or after strangulation the victim lived for a time because of the amount of blood seepage in the eyes. (R1949, R1959) In the doctor's opinion, the victim was alive and breathing when the fire started because the victim inhaled smoke; but, the doctor could not determine the amount of time that the victim may have been alive while the fire was burning based upon the amount of soot in the victim's lung. (R1951) However, the victim was dead before the fire burned the victim's face and mouth area because if the victim had been alive there would not have been soot deposits in the victim's trachea. (R1841) The doctor concluded, that the fire was not started over the face and mouth area of the victim. (R1964)

The cross-examination of Dr. Wickham shed further doubt on the relevancy of the burning of the victim. First, Dr. Wickham admitted under cross-examination that the blows to the head could have been sufficient to cause unconsciousness; (R1958) and that strangulation caused by the ligature alone could have caused the death of the victim. (R1961) To make matters worse, the wording of doctor's testimony was slightly, albeit profoundly different at the initial trial. In the 1991 initial trial, the doctor testified that the manual strangulation (meaning ligature strangulation) "would" have caused the death of the victim. (R1963)

Also, the victim was "agonal," meaning the victim was dying at the time the fire was started. (R1967) The doctor further admitted that once the victim was bound the victim showed no sign of struggle. (R1958) The doctor also admitted that the blows to the skull came in from the left, while the defendant is right-handed. (R1965)

Despite the evidence that the burning of the victim's flesh occurred after death, and the repeated objections by defense counsel, the trial court allowed the medical examiner to testify to victim's body being burned, and the trial court permitted the state to introduce both photographs and video depicting the victim's burnt body. This was error.

In Smith v. State, 573 So.2d 306 (Fla. 1990) Smith was charged with first-degree murder and presented at trial some evidence of excusable homicide. Evidence showed that the defendant had just begun living together with Josette Estes. Estes was Smith's seventeen-year-old stepdaughter from a prior marriage, with whom he was having a sexual relationship. Smith was a friend of the victim, John Cascio. Cascio and Estes left Smith's residence to make a telephone call, whereupon Cascio made sexual advances to Estes. Estes rejected the advances and became upset. When they returned, Smith asked why Estes appeared to be so upset. Estes described the incident to Smith. Smith asked Cascio to leave, but Cascio refused. Smith grabbed

Cascio and picked up a gun that had been sitting out on a table all night. Estes testified that Cascio said to Smith, "Why don't you put the gun where your mouth is?" Cascio then motioned toward Smith's face and moved toward him. Smith tried to keep Cascio away but Cascio persisted. Smith testified that he yelled for Cascio to stop, and when he did not, Smith fired. Estes testified that Cascio nudged Smith and the gun went off. Cascio died of a gunshot wound to his head.

During trial, the state sought to show Estes' autopsy of the victim Cascio for the purpose of identifying the victim. The trial court permitted the state to show her the pictures over defense objection. When Estes was showed the autopsy photographs, she became upset and sobbed out loud. The defense moved for mistrial which was denied. In review, this Court held that:

> Before Estes testified, an associate medical examiner identified Cascio for the jury by referring to those autopsy photographs. Nonetheless, the prosecutor showed those photos to Estes, contending that his sole purpose was to have her identify Cascio. Yet we can find in this record no valid reason for showing the gruesome photographs to Estes once the body had been identified, especially when the only issue contested at trial was Smith's reason for killing Cascio. The evidence also was cumulative and unfairly prejudicial. Sec. 90.403, Fla.Stat. (1985).

Smith at 311. Likewise, in the instant case the medical examiner's testimony, photographs and video were presented to

show cause of death. Since this was a penalty phase resentencing, the fact that the victim died has already been established by the conviction of first degree murder. The testimony, photographs and video must therefore be relevant to a proposed aggravating circumstance.

The trial court makes reference to the fact that the victim's body was burned for purposes of establishing the heinous, atrocious and cruel (HAC) aggravating circumstance. (See Point III) However, based upon the testimony of the medical examiner any burning of the victim's body occurred after death. Therefore, the burning of the body after death is not relevant evidence to establish the HAC aggravating circumstance. (See Point III)

Even if the fact that the victim's body was burned is marginally relevant for some purpose, the gruesome nature of the photos and prejudice outweigh the probative value. This Court in Czubak v. State, 570 So.2d 925 (Fla. 1990). In Czubak, this Court discussed the law concerning the admission of gruesome photographs in Florida:

> This Court has long followed the rule that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance. See Bush v. State, 461 So.2d 936, 939-40 (Fla. 1984), cert. denied, 47 5 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986); Williams v. State, 228 So.2d 377, 378 (Fla. 1969). Where photographs are relevant, "then the

> trial judge in the first [instance] and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence." Leach v. State, 132 So.2d 329, 331-32 (Fla. 1961), cert denied, 368 U.S. 1005, 82 S.Ct. 636, 7 L.Ed.2d 543 (1962).

Czubak, 570 So.2d at 928.

In the instant case, Willacy's defense counsel duly objected to presentation of the photographs and video of the burnt corpse of the victim. Specific objections were made arguing that the photograph was cumulative, irrelevant, and that the inflaming effect on the jury denied Willacy a fair sentencing hearing in violation of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (R549-50)

The photograph and video taken of the burnt corpse could in no way enhance the jury's understanding of the issues in the penalty phase context. Insofar as determining whether the murder was especially heinous, atrocious or cruel, the jury may well have been greatly influenced by the offensiveness of the photographs and video. Mutilation of a body after death cannot be properly considered in establishing that statutory aggravating factor. See Halliwell v. State, 323 So.2d 557 (Fla. 1975). However, lay people may attribute weight to the HAC factor solely

because of such graphic photos and video.

The unnecessary, prejudicial introduction of this photograph over timely objection denied Willacy a fair jury recommendation in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 9, and 22 of the Florida Constitution. Further, due to the inflammatory nature of this photograph, the jury recommendation has become unreliable as being based on inflamed emotion in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Accordingly, the death sentence must be reversed and the matter remanded for a new penalty phase with a new jury recommendation.

POINT III

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

In making its finding that the murder of Sather was especially heinous, atrocious or cruel murder the court stated:

> In accomplishing Mrs. Sather's death the defendant bludgeoned, strangled and choked her. He immobilized her, binding her hands and feet with duct tape and affixing a ligature to her throat. He directed the flow of air from an electric fan over her helpless body which he doused with gasoline and set on fire while still alive. Death was caused by the inhalation of smoke and flame from the inferno fueled by her own body.
>
> The defendant's actions raise his conduct to a level setting this case apart from the norm of capital felonies. It was conscienceless, pitiless and unnecessarily tortuous to the victim and well within the definition of "heinous, atrocious and cruel." Dixon v. State, 283 So.2d 1 (Fla. 1983).
>
> This aggravating factor was proven beyond a reasonable doubt. (R617, 618)

The appellant contends that because of the contradictory evidence and gaps in evidence of the manner of the victims death, the trial court erred in finding that this aggravating factor was proven beyond a reasonable doubt. Under Florida law, aggravating circumstances "must be proved beyond a reasonable doubt." Hamilton v. State, 547 So.2d 630, 633 (Fla. 1989). Moreover, the state must prove **each element** of the aggravating circumstance beyond a reasonable doubt. Banda v. State, 536 So.2d 221, 224 (Fla. 1988). The appellant submits that the state failed to meet

its burden in this case.

In Rhodes v. State, 547 So.2d 1201 (Fla. 1989) the decomposing body of an approximately forty-year-old female, missing her lower right leg, was found in debris being used to construct a berm in St. Petersburg. The medical examiner determined manual strangulation to be the cause of death because the hyoid bone in the victim's throat was broken. No evidence was found of sexual intercourse, sexual molestation, or rape.

Rhodes was interviewed by detectives, and during that and subsequent interviews, Rhodes gave different and sometimes conflicting statements to his interviewers, always denying that he raped or killed the victim. He subsequently offered to tell how the victim had died if he could be guaranteed he would spend the rest of his life in a mental health facility. Rhodes then claimed the victim died accidentally when she fell three stories while in a hotel. At trial three of Rhodes' fellow inmates at the jail were called as witnesses for the state. Each inmate testified that Rhodes admitted killing the victim.

The trial court in Rhodes found that HAC applied stating:

> That the murder of Karen Nieradka was especially heinous, atrocious and cruel in that the victim was manually strangled and the clumps of her own hair found in her clenched hands indicates the pain and mental anguish that she must have suffered in the process.

This court rejected the trial court's finding of the HAC aggravating circumstance stating:

> The trial court found the murder was especially heinous, atrocious, or cruel because the evidence suggested the victim was manually strangled. We note, however, that in the many conflicting stories told by Rhodes, he repeatedly referred to the victim as "knocked out" or drunk. Other evidence supports Rhodes' statement that the victim may have been semiconscious at the time of her death. She was known to frequent bars and to be a heavy drinker. On the night she disappeared, she was last seen drinking in a bar. In Herzog v. State, 439 So.2d 1372 (Fla.1983), we declined to apply this aggravating factor in a situation in which the victim, who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of this capital felony "to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So.2d at 9. Due to the conflicting stories told by Rhodes we cannot find that the aggravating circumstance of heinous, atrocious, and cruel has been proven beyond a reasonable doubt.

The facts and circumstances of the murder in DeAngelo v. State, 616 So.2d 440 (Fla. 1993) is remarkably similar to the instant case. In DeAngelo, the defendant struck the victim on the head, used manual strangulation, and then strangled the victim with a ligature. In rejecting the state request for the HAC aggravating circumstance this Court stated:

> This Court has previously stated that "it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is

> applicable." Tompkins v. State, 502 So.2d 415, 421 (Fla.1986) Here, however, the trial court carefully considered the evidence and found that the State failed to prove beyond a reasonable doubt that Price was conscious during the ordeal. In reaching this conclusion, the trial court focused on the absence of defensive wounds, the lack of any evidence that there was a struggle, the presence of a substantial amount of marijuana in Price's system, and the medical examiner's testimony as to the possibility that at the time she was strangled Price was unconscious as a result of the pressure of the choking or as a result of a blow to her head. In certain limited circumstances where the aggravator is unquestionably established on the record and not subject to factual dispute, this Court will find an aggravator that the trial court has failed to find. (Citation omitted) Here, however, the existence of the heinousness aggravator is arguable given the conflicting evidence regarding Price's consciousness, and we will not disturb the trial court's finding.

This court dealt with an analogous situation as the instant case in Jackson v. State, 451 So.2d 458 (Fla. 1984). In Jackson, this court held that the facts of that case did not support a finding that the murder was especially heinous, atrocious, or cruel. Specifically, the defendant shot the victim in the back, put him in the trunk of a car while he was still alive, wrapped him in plastic bags, and subsequently shot the victim again while he was still alive. This Court held:

> When the victim becomes unconscious the circumstances of further acts contributing to his death cannot support a finding of heinousness. The record contains no evidence that [the victim] remained conscious more than a few moments after he was shot in the

> back the first time, and he therefore was incapable of suffering to the extent contemplated by this aggravating circumstance.

Jackson at 463.

The uncontroverted physical evidence presented in this case through the State's own witness, Dr. Wickham, was that the decedent could have lost consciousness very quickly, and that she was immobile at the time she suffered the fatal wounds. Moreover, based upon the blood splatter evidence, the victim was struck immediately about the head with such force that bone from the victim's skull was chipped away. Based upon the circumstantial evidence, the attack to the head was with both a hammer and a squeegee. After these initial blows to the head the victim fell to the foyer and struck her head with great force to the floor. After this initial attack, the victim was immobile, showed no defensive wounds, and was dragged across the floor on two separate occasions without signs of movement or struggle. Therefore, the logical and common sense inference from this evidence is that the victim lost consciousness quickly during the initial frenzied attack.

Willacy urges this Court to carefully read the trial court's reasoning in its finding of the circumstance. It would have been easy for the trial court to conclude that the murder must have been heinous, since the victim died as a result of

asphyxiation due to strangulation. However, this Court should review the evidence more closely. This Court should focus on the absence of defensive wounds, the lack of evidence that there was a struggle, the hard fall suffered by the victim and lack of mobility after that fall, and the likelihood that, at the time she was strangled, the decedent was unconscious as a result of the blows to her head and falling to the floor and never regained consciousness. Taking all these factors into account, and focusing on the issue of consciousness *vel non*, this Court should conclude that the State of Florida had failed to prove, beyond a reasonable doubt, the existence of this aggravating circumstance.

The real problem with the trial court's written finding is its lack of discussion of the varied evidence presented in the case. The trial court states that: "In accomplishing Mrs. Sather's death the defendant bludgeoned, strangled and choked her." The trial court provides no discussion of the evidence concerning the "bludgeoning" of the victim and whether the victim was rendered unconscious by this initial attack. The appellant asserts that the only common sense conclusion is that the victim was unconscious and unaware of her pending death. The trial court apparently does not understand the burden of proof as far as aggravating circumstances are concerned. The State's own evidence clearly showed that it was "possible" that the victim was unconscious prior to her strangulation. This evidence, in

and of itself, reveals that the State failed to prove this aggravating circumstance beyond a reasonable doubt.

The appellant finds fault with the trial judge for failing to explain how the absence of defensive wounds in a strangling situation is significant. The trial court obviously ignored that the victim's failure to fight back is further evidence that she was unconscious during the attack. This is significant in that it tends to show that she was unaware of the pain or of what was happening to her. The absence of defensive wounds is extremely important. This proves that it is unlikely that the victim remained conscious during the attack. She probably never woke up. The absence of the defensive wounds indicates that she necessarily lost consciousness almost instantly. See e.g. Hansbrough v. State, 409 So.2d 1081 (Fla. 1987); Nibert v. State, 508 So.2d 1 (Fla. 1987); and Bundy v. State, 471 So.2d 9 (Fla. 1985).

In Scott v. State, 494 So.2d 1134 (Fla. 1986), the victim was run over and pinned by the car while Scott spun the wheels thereby pushing the victim down into the sand to suffocate. Since there was no evidence that the victim was conscious at the time, this Court refused to uphold the finding that the murder was heinous, atrocious and cruel. This Court did uphold the circumstance based on other available facts indicating that the victim was twice beaten and terrorized at two separate

locations before finally being murdered. The evidence in Willacy's case indicates that the victim was knocked unconscious by a blow to the head and then strangled while she was still unconscious.

The evidence, even if viewed in the light most favorable to the State, supports the conclusion that the victim was unconscious shortly after she was surprised in the kitchen area by Willacy. There is no proof offered by the State that she regained consciousness. The absence of defensive wounds indicate the contrary. The evidence presented by the State is just as consistent with the theory that the victim remained unconscious, and therefore unaware, throughout the subsequent binding and burning of the victim. The bruises on her head and the ligature mark around her neck support this conclusion. Rhodes v. State, 547 So.2d 1201 (Fla. 1989) and Herzog v. State, 439 So.2d 1372 (Fla. 1983). Therefore, the murder was not "unnecessarily torturous to the victim" as required by State v. Dixon, 283 So.2d 1 (Fla. 1973) and Tedder v. State, 322 So.2d 908 (Fla. 1975). Appellant submits that there was no testimony that the victim was aware of her impending death. Furthermore, there was no testimony that the victim suffered any pain as a result of the fatal strangulation. After thorough and thoughtful analysis of the evidence by this Court, the conclusion of the trial court should be rejected.

The introduction by the state of the fact that the defendant set the victim on fire was improper (see Point II), and resulted in the erroneous HAC jury instruction, and erroneous finding that the HAC aggravating circumstance applied to the instant case by providing additional facts that set this capital felony apart from the norm of capital felonies. "A homicide is especially heinous, atrocious or cruel when 'the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Boenoano v. State, 527 So.2d 194 (Fla. 1988), quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

In this case the arson was an independent act of the capital felony because the victim was unconscious and in the process of dying when the fire was started. Therefore, "Acts committed independently from the capital felony for which the offender is being sentenced are not relevant to the question of whether the capital felony itself was especially heinous, atrocious, or cruel." Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985); See Halliwell v. State, 323 So.2d 557 (Fla. 1975).

The presence of the instruction was prejudicial and confusing. This was not a situation where the jury was read verbatim all of the statutory aggravating circumstances which, if

unobjected to, is apparently not reversible error. The jury in this case received instructions on only five aggravating circumstances.

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge of balance the facts of the case against the standard of activity which can only be developed by involvement with the trials of numerous defendants. Thus, the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1975)(emphasis added). See Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980).

The jury in this case ought not to have had before them the consideration that the murder was especially heinous, atrocious or cruel, because clearly as a matter of law it was not. Moreover, the trial court should not have found this aggravating circumstance. Appellant submits that the trial court erred by finding beyond a reasonable doubt that the conduct of Mr. Willacy was "designed to inflict a high degree of pain with indifference to the suffering of the victim." The state presented no evidence that the victim suffered any pain at all.

In anticipation of an argument by the State that the error is harmless, it is submitted that the erroneous presence of this particular instruction led the jurors to conclude, and

reasonably so, that they were entitled to consider whether in their opinion this murder was especially heinous, or cruel and to base the death recommendation on this erroneous consideration. Furthermore, the trial court relied upon this aggravating factor in determining that death was the appropriate sentence in this case. A lay person would inevitably conclude that these murders were especially heinous, atrocious or cruel. The State cannot meet its burden of showing beyond a reasonable doubt that the erroneous presence of this particular instruction in the face of a timely objection did not affect the recommendations of death by the jury. See State v. Lee, 531 So.2d 133 (Fla. 1988); Ciccarelli v. State, 531 So.2d 129 (Fla. 1988).

The death sentence must be reversed and the matter remanded for a new penalty phase with a new jury due to violations of the Fifth, Sixth, Eighth and Fourteenth Amendments. These violations were caused by the presence of an improper instruction and finding by the trial court that was wholly unsupported by the evidence. Timely and specific objections by defense counsel were overruled. The presence of that particular instruction under the facts of this case was so susceptible to confusion and misapplication by the jury that distortion of the reasoned sentencing procedure required by the Eighth Amendment as occurred; the recommendation of the jury is unreliable and flawed.

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

This aggravating circumstance is typically found where the evidence clearly demonstrates that the defendant killed a police officer who was attempting to apprehend the defendant. See Mikenas v. State, 367 So.2d 606 (Fla. 1978); Cooper v. State, 336 So.2d 1133 (Fla. 1976). However, the circumstance is not limited to those situations, and it has been found to exist where civilians were killed. This Court has held that when the victim is not a police officer, this circumstance cannot be found unless the evidence clearly shows elimination of witnesses was the dominant or only motive, and the state must prove by positive evidence, rather than by default or elimination, that the dominant motive was to eliminate a witness. See Scull v. State, 533 So.2d 1137 (Fla. 1988); Jackson v. State, 592 So.2d 409 (Fla. 1986). Even where the victim may know the defendant, this factor does not apply unless the state shows witness elimination was the dominant reason for the murder. Perry v. State, 522 So.2d 817 (Fla. 1988); Floyd v. State, 497 So.2d 1211 (Fla.1986); Caruthers v. State, 465 So.2d 496 (Fla. 1985).

The trial court found that this murder was committed for the purpose of avoiding or preventing a lawful arrest based upon the following:

> The defendant and his victim were next-door neighbors. He had mowed her lawn for her. She knew him. She could identify him as the assailant and the person who she suprised in the act of burglarizing her home and robbing her. The victim was beaten into submission and securely bound rendering her incapable of interfering with or thwarting his purpose or preventing his escape. She could cause him no harm and posed no threat to him whatever. The dominant motive for this murder was the elimination of Marlys Sather as a witness and to avoid detection and arrest. (R616)

Appellant contends that the trial court relied very heavily upon circumstantial evidence to support his finding that witness elimination was the dominant motive for the murder of Marlys Sather. This evidence was not sufficient and this aggravating circumstance is not supported by the weight of the evidence.

Circumstantial evidence can prove this aggravator, but the evidence proving the defendant's primary reason for committing the murder was to avoid lawful arrest must be strong. See Riley v. State, 366 So.2d 19 (Fla. 1979) In those cases where this Court has found this factor inapplicable, it has done so because the evidence was circumstantial and inconclusive. In Menendez v. State, 368 So.2d 1278 (Fla. 1979), Menendez used a silencer on his gun when he killed a shop owner whose body was found with it arms outstretched in a supplicating manner. Likewise, in Armstrong v. State, 339 So.2d 953 (Fla. 1981) and Enmund v. State, 399 So.2d 1362 (Fla. 1981) the equivocal nature of the pathologist's conclusions that the victims were laid out

prone to "finish [them] off" was insufficient to find that they were killed to prevent or avoid lawful arrest. See also Jackson v. State, 502 So.2d 409 (Fla. 1986). In Amazon v. State, 487 So.2d 8 (Fla. 1986), the Court found evidence inconclusive where the defendant killed his next door neighbor as he called for help during the burglary and the detective said the defendant told him he killed to avoid arrest. In Cook v. State, 542 So.2d 964 (Fla. 1989,) the defendant said he shot the victim to keep her from screaming. That was insufficient to support this aggravating factor because the killing was not a calculated plan to eliminate the victim as a witness. See also Garron v. State, 528 So.2d 353 (Fla. 1988).

Finally, in Green v. State, 583 So.2d 649 (Fla. 1991) this Court rejected this aggravating circumstance in a factually similar case. The facts in Green are as follows: Green confessed to the murders of his landlords the Nichols. Green stated that he paid his rent with a check, and after making payment decided he wanted to get the check back to buy cocaine. Green stated that he came home, put on a clean work shirt, and then armed himself with the largest butcher knife from the house. Green subsequently went to the Nicholses' home and was admitted by Mr. Nichols. The Nicholses denied Green's demand for his check, and in fact Mrs. Nichols was adamant about keeping Green's check. According to Green, the next thing he knew was that Mrs.

Nichols was on the floor, stabbed and bleeding. Green then followed Mr. Nichols to the back bedroom, and the next thing he knew was that Mr. Nichols was on the floor stabbed, bleeding and moaning. (Emphasis added) Green then stuffed the blanket into Mr. Nichols' mouth, wiped the blood from his hands onto his shirt, which he stuck into his back pocket. As Green started to leave, he saw a white neighbor, who also rented from the Nicholses. Green then jumped over several fences and returned to his apartment, changed clothes, and walked to the Boston Bar. In rejecting the trial court's finding of the avoiding lawful arrest aggravating circumstance this Court held:

> With regard to the first claim, we agree with Green that the use of the aggravating circumstance of avoiding a lawful arrest is not supported by this record. As we stated in Caruthers v. State, 465 So.2d 496 (Fla.1985), the state must show that the elimination of witnesses was at least a dominant motive. We find that the state clearly failed to make such a showing. Consequently, that aggravating circumstance must be eliminated from consideration.

Green at 653.

In the instant case there is no factual difference between the murder of Mr. Nichols and the murder of Marlys Sather. In each case the victim was witness to a crime. In Green, Mr. Nichols was a witness to the murder of his wife and fled from the assailant to the back bedroom where he was subsequently murdered by Green. In the instant case, Sather was

witness to a burglary and was immediately assualted in the dining room. Thereafter, Sather likely fled to the garage area where she was likely beaten upon the head with a hammer and collapsed in the foyer. Her body was dragged to the middle of the livingroom where she was bound and strangled. At this point Sather was "agonal" or in the process of dying.

In conclusion, there was not sufficient positive evidence to support this aggravating circumstance. The trial court in the instant case could have written the exact factual findings in Green that was written in the instant case. Like Green, this Court should reject this aggravating circumstance because the state failed to make the proper factual showing to support it.

POINT V

THE TRIAL COURT ERRED IN FINDING THE SEPARATE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN.

The trial court found that this murder was committed for pecuniary gain while also finding that the murder occurred during the course of a felony: robbery, burglary, arson. This finding is an improper "doubling" of aggravating circumstances Admittedly, this aggravating circumstance can be found any time the proof demonstrates that financial gain was a reason for the killing. Although robberies or other financially motivated crimes committed during the course of the homicide can provide this aggravating circumstance, it cannot be doubled with the aggravating circumstance of commission during a specified felony. See, Maggard v. State, 399 So.2d 973 (Fla. 1981) (burglary); Provence v. State, 337 So.2d 783 (Fla. 1976) (robbery).

In the instant case, the additional specified felony of arson was used to support the circumstance, so that the pecuniary gain factor can also be found without an improper doubling. In general this has been upheld where the additional specified stands on it own as a dominant aspect of the homicide. See Routly v. State, 440 So.2d 1257 (Fla. 1983); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Brown v. State, 473 So.2d 1260 (Fla. 1985).

However, this Court rejected this circumstance where

the defendant had taken a car but later abandoned it, reasoning that escape, not financial gain, was the motive. Scull v. State, 533 So.2d 1137 (Fla. 1988); Peek v. State, 395 So.2d 492 (Fla. 1980). In the instant case, the primary motive of the crime was burglary. By pure circumstance a robbery subsequently occurred, and thereafter arson was an afterthought of the criminal episode. Moreover, the arson began when the victim was "agonal" or in irreversible process of dying. The victim was dead before any flame consumed the body. In an analagous situation where the evidence shows that the taking of property occurred after the murder, as an afterthought, the circumstance is not applicable. Hill v. State, 549 So.2d 179 (Fla. 1989).

POINT VI

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

The trial court found that this murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification based upon the following:

> The victim returned home unexpectedly from work to find the defendant engaged in the burglary of her home and the theft of some of its contents. There is no evidence of any initial intent of his part to kill her. His surprise at being caught, and the fear of the consequences, spawned in his mind an urgent need to eliminate her as a witness. Killing her was the obvious solution of his problem and the intention to do so was thus born.
>
> There is no evidence of the exact amount of time spanned by the conception, planning and execution of this murder. However, the various and numerous activities devoted to its accomplishment show a level of heightened premeditation, and the resulting murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. This aggravating circumstance has been proven beyond a reasonable doubt. (R618)

The trial court, lacking evidence of whether this murder was the result of cool reflection and heightened premeditation, nonetheless found this circumstance based upon the pyramiding of bits and pieces of circumstantial evidence. The result was an erroneous conclusion that is aggravating circumstance is

applicable.

The aggravating circumstance of murder committed in a cold and calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. Gorham v. State, 454 So.2d 556 (Fla. 1984), cert denied 105 S.Ct. 941; Rogers v. State, 511 So.2d 526 (Fla. 1987) "This aggravating factor is not to be utilized in every premeditated murder prosecution," and is reserved primarily for "those murders which are characterized as execution or contract murders or witness elimination murders.' (citation omitted)." Bates v. State, 465 So.2d 490, 493 (Fla. 1985). See also Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987).

Moreover, the evidence must prove beyond a reasonable doubt that he murder was committed with reflection and planning -- a cold, calculated manner without any pretense of moral or legal justification, and there must be "...a careful plan or pre-arranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987). Where HAC focuses primarily on the suffering of the victim and the nature of the crime itself, CCP focuses on the state of mind of the perpetrator. Mason v. State, 438 So.2d 374 (Fla. 1983); Michael v. State, 437 So.2d 138 (Fla. 1983). Consequently, if in the perpetrator's mind he had a pretense of a

justification for the murder, even if objectively no justification at all, this aggravating circumstance is inapplicable. Blanco v. State, 452 So.2d 520 (Fla. 1984)(victim confronted and struggled with the defendant during a burglary); Banda v. State, 536 So.2d 221 (Fla. 1988); Cannady v. State, 427 So.2d 723 (Fla. 1983)(CCP improperly found where the victim jumped at the defendant before the fatal shot).

An intentional and deliberate killing during the commission of another felony does not necessarily qualify for the premeditation aggravating circumstance. Maxwell v. State, 443 So.2d 967 (Fla. 1983). Impulsive killings during a felony do not qualify for the premeditation aggravating circumstance. See Hamblen v. State, 527 So.2d 800 (Fla. 1988)(defendant shot robbery victim in the back of the head after becoming angry with her for activating the silent alarm); White v. State, 446 So.2d 1031 (Fla. 1984)(defendant shot two people and attempted to shoot two others during a robbery). The fact that the underlying felony may have been fully planned ahead of time does not qualify the crime for the CCP factor if the plan did not include the commission of the murder. Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla.1984).

Circumstantial evidence can support this aggravating factor. But, a plan to kill cannot be inferred from a lack of evidence -- a mere suspicion is insufficient. Lloyd v. State, 524

So.2d 396, 403 (Fla. 1988); see, also, Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Drake v. State, 441 So.2d 1079 (Fla. 1983); King v. State, 436 So.2d 50 (Fla. 1983); Mann v. State, 420 So.2d 578 (Fla. 1982) Moreover, this Court has rejected this circumstance where the evidence showed multiple wounds. This Court reasoned that without more evidence, multiple wounds do not prove the heightened premeditation required. Hamilton v. State, 547 So.2d 630 (Fla. 1989) (multiple wounds to two victims); Caruthers v. State, 465 So.2d 496 (Fla. 1985)(victim shot three times); Blanco v. State, 452 So.2d 520 (Fla. 1984)(victim shot seven times). A beating death with multiple wounds does not necessarily qualify for this aggravating circumstance. King v. State, 436 So.2d 50 (Fla. 1983); Wilson v. State, 436 So.2d 912 (Fla. 1983). Additionally, strangulation and asphyxiation without a prior plan to kill does not qualify. Hardwick v. State, 461 So.2d 79 (Fla. 1984).

In Jackson v. State, 648 So.2d 85 (Fla. 1994) this Court detailed a formula for determining whether the CCP aggravating factor should be applied:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richardson, 604 So.2d at 1109; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), Rogers, 511 So.2d at 533; and that the

> defendant exhibited heightened premeditation (premeditated), Id.; and that the defendant had no pretense of moral or legal justification. Banda v. State, 536 So.2d 221, 224-25 (Fla.1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989).

Jackson at 89.

In the instant case, the trial court relied heavily upon the manner of killing to support the finding of heightened premeditation to kill. What is known about the manner of killing is gleaned from the testimony of the medical examiner and blood-splatter expert. The evidence supports the inference that the victim was attacked immediately with a squeegee or hammer upon entering her home with groceries. After the initial blows the victim likely fled to the garage area where she was likely beaten upon the head with a hammer, with her head ultimately impacting on the foyer floor. At this point there is no sign of struggle, likely because the repeated blows to the victim's skull and the crushing blow to the head from striking the floor rendered her unconscious. Her body was dragged to the middle of the living room where she was bound and strangled. From the blows to the head and the strangulation, the victim was "agonal" or in the process of dying.

There is no evidence that the physical attack upon the victm had any planning or preparation. The trial court confused the subsequent dousing of the house and victim with gasoline and

the attempt to burn the house down as somehow changing the character of this murder to one of heightened premeditation. The state pushed this characterization very hard in this second penalty phase proceeding, after this same trial judge rejected this aggravating circumstance in the first sentencing proceeding. The state's persistence on this issue was successful in leading the trial court to commit error. Accordingly, this aggravating circumstance should be struck, the death sentences vacated and the matter remanded for resentencing.

POINT VII

UNDER FLORIDA LAW, THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE.

The trial court imposed a death sentence here after finding five statutory aggravating factors. (R321-32) As previously set forth, the findings of witness elimination, of a cold, calculated and premeditated murder, pecuniary gain and an especially heinous, atrocious or cruel murder were improper both legally and factually. Only one statutory aggravating factor may properly be said to have been proven beyond a reasonable doubt, that being that this murder was committed during the commission of a burglary. This Court has rejected imposition of the death penalty based solely on this one statutory aggravating factor and where, as here, substantial mitigation exists, the death penalty is disproportionate to the offense. See Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988)

The only instances where this Court has affirmed a death sentence based on one statutory aggravating factor is where the murder was especially heinous, atrocious or cruel; or a prior violent felony. See Arrango v. State, 411 So.2d 172 (Fla. 1982); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Douglas v. State, 328 So.2d 18 (Fla. 1976), Gardner v. State, 313 So.2d 675 (Fla. 1975)(A torture murder occurred in each of the foregoing cases, with little or no mitigation); and Duncan v. State, 619

So.2d 279 (Fla. 1993) (Duncan had previously been convicted of murder). Here, there is no torture murder, or no prior murder conviction, and there is substantial mitigation.

Even assuming that the previous conviction, CCP and/or the HAC statutory factor(s) apply, a death sentence is disproportionate where other defendants who committed similar crimes received life sentences rather than death sentences. At the onset, it must be noted that the jury death recommendation is of no significance here because it is unreliable as a matter of law. The instructions were faulty not only because of vagueness, but also because of improper doubling of factors over timely objection. In that regard, comparison of this case to any cases involving death recommendations is unfair and improper. The correct standard for comparison/proportionality review is to cases where there is either a life recommendation or no recommendation at all.

In Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), this Court noted that "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of five statutory aggravating factors, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentence because "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes."

Fitzpatrick, 527 So.2d at 811.

Like Fitzpatrick, this is not the most aggravated and unmitigated of most serious crimes. When the facts of this crime are compared to those of the following cases where death sentences were ruled to be disproportionate, it is evident that the death sentence must be reversed and the matter remanded for imposition of a life sentence: Blakely v. State, 561 So.2d 560 (Fla.1990)(death penalty disproportionate despite finding that murder was especially heinous, atrocious or cruel and cold, calculated, and premeditated, without pretense of moral or legal justification); Amoros v. State, 531 So.2d 1256 (Fla.1988); Garron v. State, 528 So.2d 353 (Fla.1988); Fead v. State, 512 So.2d 176 (Fla.1987), receded from on other grounds, Pentecost v. State, 545 So.2d 861, 863 n. 3 (Fla.1989); Proffitt v. State, 510 So.2d 896 (Fla.1987); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Wilson v. State, 493 So.2d 1019 (Fla.1986); Ross v. State, 474 So.2d 1170 (Fla.1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla.1981); Blair v. State, 406 So.2d 1103 (Fla.1981); Phippen v. State, 389 So.2d 991 (Fla.1980); Kampff v. State, 371 So.2d 1007 (Fla.1979); Menendez v. State, 368 So.2d 1278 (Fla.1979); Chambers v. State, 339 So.2d 204 (Fla.1976); Halliwell v. State, 323 So.2d 557 (Fla.1975); DeAngelo v. State, 616 So.2d 440 (Fla. 1993).

Comparison of the facts of this case to those of the

preceding cases shows that the death penalty is here disproportionate because other similarly culpable defendants have been sentenced to life imprisonment. Accordingly, the death sentence should be reversed and the matter remanded for imposition of a life sentence, with no possibility of parole for twenty-five years.

POINT VIII

THE TRIAL COURT ERRED IN PERMITTING VICTIM IMPACT EVIDENCE THAT WAS NOT RELEVANT TO THE ISSUE OF THE UNIQUENESS OF THE VICTIM AND WENT BEYOND THE NARROW APPLICATION OF THE STATUTORY SCHEME.

The Appellant objected to the victim's son and daughters testifying to victim impact in rebuttal. The trial permitted the statement made to the jury over objection. The "victim impact" evidence should have been excluded by the trial court. The introduction of the improper evidence unfairly and unconstitutionally tainted the jury's recommendation. Section 921.141(7), Florida Statutes (1992) provides:

> ...the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be presented as a part of victim impact evidence.

Florida has consistently excluded evidence designed to create sympathy for the deceased. Jones v. State, 569 So.2d 1234 (Fla. 1990). See also Lewis v. State, 377 So.2d 640 (Fla. 1979) and Rowe v. State, 120 Fla. 649, 163 So. 22 (1935). This rule of law provides even more protection to a capital defendant at a penalty phase.

Florida's death penalty statute, section

> 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. § 921.141(5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978).

Grossman v. State, 525 So.2d 833, 842 (Fla. 1988).

In the case of Payne v. Tennessee, 111 S.Ct. 2597 (1991) the United States Supreme Court held that there is no Eighth Amendment bar to victim impact evidence during the penalty phase of a capital trial. Id. at 2601. Neither Payne, nor any other United States Supreme Court case, deals with the question of whether such evidence is permissible under state law.

Since the issuance of the Payne opinion, this Court has addressed the introduction of victim impact evidence only a few times. In those cases, this Court has rejected an Eighth Amendment challenge, pointing out that Payne receded from Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989). See, e.g., Jones v. State, 612 So.2d 1370 (Fla. 1992); Burns v. State, 609 So.2d 600 (Fla. 1992); and Hodges v. State, 595 So.2d 929 (Fla. 1992). When dealing with the broader contention that victim impact evidence

was improperly admitted, this Court focused on the relatively minor effect that the evidence had in each particular case. See, e.g., Sims v. State, 602 So.2d 1253 (Fla. 1992) and Burns v. State, 609 So.2d 600 (Fla. 1992). In Windom v. State, 656 So.2d 432 (Fla. 1995) this Court found that victim impact evidence is separate from the weighing of the aggravating and mitigating factors, and must be relevant to the issue of the uniqueness of the victim. So even after Payne and Windom, to be admissible, evidence must be relevant to a material fact in issue. The challenged testimony in this case was not. [2]

During the victim impact statement of the victim's son, he stated:

> {Mother's} death caused a great deal of emotions and pain. It hurts to think that my daughter Rachel will never see her again.... You do not get to say goodbye. (R2893)

The victim's daughter, Nona Bredin, also testified. She stated that after her mother's death she found a birthday card in her mother's house that was meant to be sent to her, but due to the murder Bredin never received it. (R2900) The state also

---

[3] See Bryan v. State, 533 So.2d 744, 746-47 (Fla. 1988); §§90.401, 90.402, Fla. Stat. (1991). This Court's opinion in Burns v. State, 609 So.2d 600 (Fla. 1992) is dispositive of the issue at hand. The Burns trial court allowed evidence of the police officer/victim's professional training, education and conduct to "rebut" statements made by defense counsel during opening statement of the guilt phase. This Court held that the admission of evidence was error, although harmless in that particular case.

introduced a picture of the victim through Bredin over defense objection.

Appellant submits that the above does not speak about the unique characteristics of the victim and instead inflames the passions of the jury and taints there sentencing recommendation. The error is not harmless in his case. In Burns, the evidence was admitted during the guilt phase. Since numerous eyewitnesses testified about the shooting, the error was harmless. The objectionable evidence was admitted at Appellant's penalty phase. "Substantially different issues arise at the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase." Castro v. State, 547 So.2d 111, 115 (Fla. 1989). The jury used the objectionable evidence to determine that Chadwick Willacy should die, not to determine that he was guilty of the crimes charged.

The appellant further submits that the trial court abused its discretion in permitting victim impact evidence in rebuttal over objection. The appellant recognizes that the trial court has broad discretion in determining the mode and order of the presentation of evidence. See Florida Evidence Code Section 612. However, rebuttal evidence is ordinarily offered after the defense has rested its case and is introduced to refute the evidence introduced by the defendant. See Rose v. Madden & McClure Grove Services, 629 So.2d 234 (Fla. 1st DCA 1993) In the

instant case, Willacy introduced evidence of mitigation during the defense case. The victim impact evidence was irrelevant as rebuttal evidence, since it did not rebut anything that had not already been elicited by the defense. Dornau v. State, 306 So.2d 167, 170 (Fla. 2d DCA 1975) See also Agnello v. United States, 269 U.S. 20 (1925)

To be sure, the victim impact evidence was additional evidence that the state should have introduced in its case-in-chief. The only conceivable reason to present this victim impact in rebuttal was to "get in the last word" with highly emotionally charged testimony from the victim's family members. This is fundamentally unfair. The trial court clearly abused its discretion and committed error. Surely the result of the above testimony was to inflame the passions of the jury and impair the sentencing recommendation. As a result, the jury voted that Chadwick Willacy should die in Florida's electric chair.

POINT IX

THE TRIAL COURT ERRED IN REFUSING TO STRIKE JURORS FOR CAUSE WHERE THE JURORS WOULD AUTOMATICALLY PRESUME THAT DEATH IS THE APPROPRIATE PENALTY AND OTHERWISE EXPRESSED THEIR DOUBT ABOUT THEIR ABILITY TO BE FAIR AND IMPARTIAL DUE TO THEIR SUPPORT OF THE DEATH PENALTY.

The defense challenged for cause five prospective jurors either because of their expressed presumption that death was automatically the appropriate penalty, or other factors related to their support of the death penalty that raised doubt about their ability to be fair and impartial. The defense exhausted their peremptory challenges and requested additional peremptory challenges, and the request for additional peremptory challenges was denied. (R1397) The defense stated that had they had the opportunity, they would have used a peremptory challenge on Juror Williams, Juror Wittfeldt and Juror Gordon. (R1397,1415)

JURORS THAT SHOULD HAVE BEEN EXCUSED FOR CAUSE

Juror Akers

Juror Akers was questioned about his opinions concerning the death penalty. Responding from questioning from the state, Juror Akers admitted that he believed in the death penalty, but would follow trial court instructions. (R74)

Upon further inquiry from the defense about whether Juror Akers "agreed" or "strongly agreed" with death penalty Juror Akers admitted:

> AKERS: Well, I'm a strong law and order advocate. I think I would strongly agree depending on the circumstances. I mean, you know, I think all of us have a conscious and we're not going to take a chance on sending a man to the chair or hanging him if there's any doubt at all; but if there's no doubt, I would be for it. (164)

Additionally Juror Akers stated that his decision would be based on whether he was sure "100 percent sure" in his mind. (R166) The state attempted to rehabilitate Juror Akers concerning the above attitudes he expressed, and he was agreeable to the state's leading questions asking whether Jurors Akers would follow the law and hold the state to their burden of proof. (R289, 290) Juror Akers was questioned again by the defense. The defense asked Juror Akers what the appropriate sentence for a premeditated murder where Juror Akers was "100 percent sure" and there was no evidence of aggravation or mitigation, and Juror Akers stated he would vote for death. (R293)

Juror Hemple

Juror Hemple was asked to characterize how he felt about the death penalty, wherein Juror Hemple responded: "Very strongly for." (R160) Juror Hemple admitted that he has held this belief for as long as he could remember. (R160) Juror Hemple further believed that the death penalty should be automatic when an individual is convicted of first degree murder and robbery. (R161)

The state attempted to rehabilitate Juror Hemple and asked him whether he can wait for the judge's instruction on what is an aggravating circumstance before making a judgement. Juror Hemple responded: "Murder itself isn't aggravating enough?" (R294, 295) Upon further questioning from the state, Juror Hemple promised that he would follow trial court instructions. (R295)

Juror Harrell

Juror Harrell was asked a general question by the state to describe how she felt about her experience as a juror candidate and she volunteered that she was in favor of the death penalty. (R927) Upon being questioned by the defense, Juror Harrell stated that she had a strong belief in the death penalty (R1034), and also stated: "I feel like, if he definitely did it, he should get the death penalty." (R1035) Juror Harrell was asked specifically whether her strong personal beliefs in the death penalty could affect her ability to follow the court's instructions, and she replied: "Maybe it's a possibility, but I can assure you I will try." Juror Harrell also voiced her frustration that trials take too long. (R1066)

The state attempted to rehabilitate Juror Harrell and asked her leading questions as to whether she could follow the law, and she responded yes to all relevant questions on that issue. (R1103-1108) Upon further questioning from the defense, Juror Harrell agreed with the proposition that a life sentence

should only be given in rare cases. (R1111)

Juror Cioffi

Juror Cioffi's son-in-law is a Brevard County Deputy Sheriff, one of the law enforcement agencies involved in the murder investigation. (R950) Juror Cioffi stated that he was in favor of the death penalty, and a strong advocate if the crime involved children. (R971, 973) Juror Cioffi stated that he was annoyed about delays in the criminal justice system caused by technicalities and "legal shenanigans." (R1061)

The state attempted to rehabilitate Juror Cioffi asked him leading questions as to whether he could follow the law, and he responded yes to all relevant questions on that issue. (R1100-1103).

Juror Warrensford

Juror Warrensford stated that she was in favor of the death penalty, and a strong advocate if the crime involved children. (R971, 973) Juror Warrensford stated that she has always "felt bad that somebody who was proven guilty of a crime and sentenced to death....They sit on death row making appeals. Meanwhile the victim's family is paying taxes and paying for that person to live in jail." (R1290) This is a strong feeling that she has held since being a child. (R1290) Juror Warrensford also stated that the death penalty should be automatic where the perpetrator broke into someone's home and killed an occupant.

(R1293)

ARGUMENT

Appellant submits that the state led these potential jurors down the "path of impartiality." No one, in any situation, likes to admit that they could not be fair. See Williams v. Griswald, 743 F.2d 1533 no. 14 (11th Cir. 1984) The state asked no hard questions to probe the genuine feelings of Juror Akers, Juror Hemple, Juror Harrell or Juror Cioffi. Rather, the state prompted Jurors to agree with their statements whether they could put aside their obvious bias and follow the law. Indeed, "going through the form of obtaining the jurors' assurances of impartiality is insufficient .... " Silverthorne v. United States, 400 F. 2d 627, 638 (Fifth Cir. 1968); see also, Irvin v. Dowd, 366 U.S. 717, 728 (1961)(jurors' statements of their own impartiality to be given "little weight"). General conclusory protestations of impartiality during voir dire are not sufficient to rebut the prejudice due to pre-trial publicity. Coleman v. Kemp, 778 F.2d 1487, 1543 (11th Cir. 1985) see also, Robinson v. State, 506 So.2d 1070 (Fla. 5th DCA 1987). Under certain circumstances, a trial court commits reversible error by permitting the jurors to decide whether their ability to render an impartial verdict is impaired. United States v. Gerald, 624 F.2d 1291, 1297 (5th Cir. 1980).

As noted by this Court, "A jury is not impartial when

one side must overcome a preconceived opinion in order to prevail." Hill v. State, 477 So.2d 553, 556 (Fla. 1985). In Singer v. State, 109 So.2d 7 (Fla. 1959), this Court established the following rule:

> [I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the time he should be excused on motion of a party, or by the court on its own motion.

Singer, 109 So.2d at 2324. The foregoing rule has been consistently adhered to by this Court. See Hamilton v. State, 547 So.2d 630 (Fla. 1989)(denial of challenge for cause of juror who had preconceived opinion which would require evidence to displace was reversible error despite juror's assurance that she could hear case with open mind); Moore v. State, 525 So.2d 870 (Fla. 1988)(refusal of trial court to grant challenge for cause to juror who gave equivocal answers concerning his ability to accept insanity as defense was reversible error); Hill v. State, 477 So.2d 553 (Fla. 1985)("A jury is not impartial when one side must overcome a preconceived opinion in order to prevail."); See also Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986)(juror's ability to be fair and impartial must be unequivocally asserted in the record).

Appellant submits that based upon the examples set out above, the record is replete with instances where the Court

wrongfully denying cause challenges. As a result, defense counsel was put in the position of having to use peremptory challenges to remove those jurors. After exhausting his peremptory challenges, Willacy's defense counsel moved for additional peremptory challenges which was denied.

It is respectfully submitted that the refusal of the trial court to strike jurors for cause and/or grant an additional peremptory challenge was a denial of due process and the right to a fair jury recommendation under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 22 of the Constitution of Florida.

POINT X

THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BASED UPON THE CUMULATIVE EFFECT OF ERRORS THAT OCCURRED AT TRIAL.

Due Process Clauses of the United States and the Florida Constitution provide an accused the right to a fair trial. Although an accused is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error. **See** Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977). Appellant submits that he was denied his right to a fair trial and is entitled to a new trial based upon the culmative error of the points presented in this argument. Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979) The following issues which either considered alone, in combination with another,or in combination with other points presented in this brief have the culmative effect of denying Willacy his constitutional right to a fair trial. In presenting these points, Appellant is also mindful of the growing application of the doctrine of procedural bar in our State and Federal court systems.

The following are the errors that occurred at trial that taken in total denied Appellant a fair trial: Jury taint from questioning jurors about pre-trial publicity in front of the remaining jury venire (R1310); Denial of Motion to Continue to determine whether blacks were systematically excluded from the jury venire. (R359); Order by trial court to defense counsel to

not ask leading questions on cross-examination (R2269); Failure by trial court to recess to consider evidence presented at sentencing. (R104)

A. Motion for Mistrial based upon the jury taint from questioning jurors about pre-trial publicity in front of the remaining jury venire.

The appellant asserts that the jury venire was improperly tainted by the conduct of the trial court in questioning jurors about pretrial publicity in the presence of the jury venire. During the jury selection process, some jurors were questioned in the witness box about their knowledge of pre-trial publicity in front of the jury venire. (R1311)

In Derrick v. State, 581 So.2d 31 (Fla. 1991) this Court detailed the procedure the trial court is to use to determine whether pre-trial publicity has tainted a jury:

> Initially, the trial court must determine whether the published material has the potential for prejudice. United States v. Perrotta, 553 F.2d 247 (1st Cir.1977); Commonwealth v. Jackson, 376 Mass. 790, 383 N.E.2d 835 (Mass.1978); Brown v. State, 601 P.2d 221 (Alaska 1979). If it does, then a two-step process is necessary. First, the court should inquire of the jurors as to whether any of them read the material in question. If none of the jurors read the material, then its publication could not have prejudiced the defendant and the trial may proceed. United States v. Carter, 602 F.2d 799 (7th Cir.1979); United States v. Khoury, 539 F.2d 441 (5th Cir.1976). If any of the jurors indicate they have read the material, they must be questioned to determine the effect of the publicity, i.e., whether they can disregard what they read and render an

> impartial verdict based solely on the evidence at trial. See, e.g., Margoles v. United States, 407 F.2d 727 (7th Cir.1969). This procedure has been deemed necessary even though the trial court repeatedly admonished the jury, as here, regarding the reading of newspapers during the trial. See, e.g., United States v. Carter; United States v. Pomponio, 517 F.2d 460 (4th Cir.1975); United States v. Barrett, 505 F.2d 1091 (7th Cir.1975).
>
> Derrick at 39.

In the instant case, the jurors were exposed to other jurors' opinions of this case based upon their exposure to pre-trial publicity. The trial court, after being alerted to this by defense counsel, should have followed the procedure provided in Derrick above. Failure to do so was error.

B. Motion to Continue to determine whether blacks were systematically excluded from the jury venire.

The appellant recognizes that the trial court has broad discretion concerning whether to deny a motion to continue, and that absent an abuse of that discretion, the appellate courts will not disturb such denial. In the instant case, the defense counsel brought to the trial court's attention the lack of blacks in the jury venire. (R359) The appellant asserts that the lack of blacks in the jury venire is prima facie proof that the system of jury selection and notification is improper in Brevard County.

The appellant is mindful of this Court's decision in Foster v. State, 614 So.2d 455 (Fla. 1992) wherein this Court rejected Foster's claim that the death penalty is racially

discriminatory in Bay County. Appellant submits that the Foster case is distinguishable in that the defense counsel discovered that the jury venire selection process was racially discriminatory at trial after viewing the venire. In Foster, defense counsel made the general assertion that based upon the numbers of past prosecutions, the death penalty had been used in a racially discriminatory manner without making a factual showing that it was done in Foster's case. In the instant case the trial court stated that the selection process in Willacy's case was discriminatory because of lack of blacks in the venire. The only manner to make a factual showing that the process was in fact discriminatory was to grant a short continuance to investigate the entire jury pool selection process. This was not done in the instant case, thereby denying Willacy a fair trial.

C. Order by trial court to defense counsel to not ask leading questions on cross-examination.

In the instant case the trial court on its own initiative held a trial advocacy clinic on the fine art of cross-examining a witness in front of the jury during defense counsel's crucial cross-examination of the medical examiner. It got to be so bothersome to defense counsel that he was compelled to ask for a mistrial. (R2269)

In the instant case defense counsel was cross-examining the medical examiner for the purpose of impeachment. Section 90.608 of the Florida Statutes (1991) provides:

> 90.608 Who may impeach.--
>
> (1) Any party, except the party calling the witness, may attack the credibility of a witness by:
> (a) Introducing statements of the witness which are inconsistent with his present testimony.
> (b) Showing that the witness is biased.
> (c) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.
> (d) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which he testified.
> (e) Proof by other witnesses that material facts are not as testified to by the witness being impeached.
> (2) A party calling a witness shall not be allowed to impeach his character as provided in s. 90.609 or s. 90.610, but, if the witness proves adverse, such party may contradict the witness by other evidence or may prove that the witness has made an inconsistent statement at another time, without regard to whether the party was surprised by the testimony of the witness. **Leading questions** may be used during any examination under this subsection.

This witness was surely adverse to the defense, and leading questions are an appropriate method of questioning for adverse witnesses. Moreover, Section 90.612 of the Florida Statutes (1991) provides:

> 90.612 Mode and order of interrogation and presentation.--
>
> (1) The judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence, so as to:
> (a) Facilitate, through effective interrogation and presentation, the discovery

of the truth.
(b) Avoid needless consumption of time.
(c) Protect witnesses from harassment or undue embarrassment.
(2) Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters.
(3) Except as provided by rule of court or when the interests of justice otherwise require:
(a) A party may not ask a witness a leading question on direct or redirect examination.
(b) **A party may ask a witness a leading question on cross-examination or re-cross examination.**

Based upon the above authority, defense counsel is entitled to ask leading questions on cross-examination. The trial court infringed upon that right during the crucial cross-examination of the medical examiner. This was clearly error.

The testimony of the medical examiner was essential for the state to establish three of the aggravating factors (HAC; CCP; and witness elimination). The trial court's repeated interruption of the defense counsel's cross-examination of this crucial witness in front of the jury impacted upon the juries ability to interpret the significance of the medical examiner's answer's on cross-examination and also likely fueled contemptuous feelings by the jury to defense counsel during this questioning. This Court should not underestimate the importance and credibility a trial court judge has in his courtroom among the jurors. The conduct of the trial court judge seriously

undermined the impact of the defense counsel's cross-examination of the medical examiner. In the context of this particular case where the medical examiner's testimony was relied upon to establish three aggravating circumstances, trial court's error can not be deemed harmless.

D. Failure of Trial Court to Recess to consider evidence presented at Sentencing Hearing.

At the final sentencing hearing, the defense entered into evidence for the first time a taped interview between police and Willacy. In that statement, Willacy claimed that he was a minor participant in the initial break-in of Sather's home and left. Willacy further claimed that a drug dealer named "Goose" was the actual killer.

Willacy's statement has some evidentiary corroboration. First, the likely killer was left-handed and Willacy was right-handed; Second, the evidence strongly suggests that Willacy drove the victim's car at 12:45 pm within an hour after the victim returned home, and was seen in the car at 3:00 pm when the car was abandoned around over two hours later. Each sighting of Willacy there was no report of Willacy having blood on his clothing, yet, the clothing he was wearing that day was found covered with blood. This supports Willacy's claim that another person committed the attack, and that upon Willacy's return to the crime scene he likely got bloodied while assisting in moving the victim's body. Third, this claim is further supported by the

fact that someone made a forced entry into Willacy's home that same day through Willacy's bathroom window. That person was the likely attacker needing to get into Willacy's house while Willacy was away in the victim's car. Fourth, there were 13 fingerprints found at the crime scene that could not be matched to any known print

After presenting the evidence at the sentencing hearing, the defense moved for a recess to give the trial court time to consider and weigh this new evidence before completing the sentencing order. The trial court denied the request for a recess and issued the pre-prepared sentencing order. This was error.

The sentencing order should reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, 283 So.2d 1, 10 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to "memorialize" the trial court's decision. Van Royal v. State, 497 So.2d 625, 628 (Fla. 1986). Specific findings of fact provide this Court with the opportunity for a meaningful review of a defendant's sentence. Unless the written findings are

supported by specific facts and are timely filed, this Court cannot be assured the trial court imposed the death sentence based on a "well-reasoned application" of the aggravating and mitigating factors.

In the instant case, the trial court's sentencing order wholly ignored the evidence presented in support of a statutory mitigator (accomplice) at the sentencing hearing. As a result, Willacy's sentencing order was not based on a "well-reasoned application" of the aggravating and mitigating factors. This Court should reject this sentencing order, and direct that a new sentencing order be prepared considering all the evidence presented.

NOTE: Appellant wishes to express that the aggravating circumstance of CCP was rejected in his first penalty phase and then found on the same evidence in this penalty phase resentencing. Appellant asserts that the finding of CCP in this subsequent proceeding is barred by the doctrines of rule of the case and res judicata; and violates due process of law, double jeopardy, and fundamental fairness. Appellant acknowledges that this Court has repeatedly rejected this argument, but nonetheless raises the issue mindful of the Federal and State tendency to use procedural bar as a means to prohibit otherwise meritorious claims.

POINT XI

SECTION 921.141, FLORIDA STATUTES (1989) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Violation of Separation of Powers

It is respectfully submitted that, by attempting to define the operative terms of the statutory aggravating factors set forth in Section 921.141, this Court is promulgating substantive law in violation of the separation of powers doctrine of the United States Constitution and Article II, Section 3 of the Florida Constitution. The Florida Legislature is charged with the responsibility of passing substantive laws. Legislative power, the authority to make laws, is expressly vested in the Florida Legislature. Article III, Florida Constitution (1976). In an exercise of that power, the Florida Legislature passed Section 921.141, Fla. Stat. (1975) which purportedly established the substantive criteria authorizing imposition of the death penalty. However, the statutory aggravating factors as written are unconstitutionally vague and overbroad. See Maynard v. Cartwright, 486 U.S. 356 (1988). In actuality, the substantive legislation was authored in State v. Dixon, 283 So.2d 1 (Fla. 1973) where this Court provided the working definitions of the statutory aggravating factors ostensibly promulgated by the Florida Legislature. This Court can **not** enact laws, either directly or indirectly.

As noted in the preceding point on appeal, this Court has rejected the premise that Florida's especially heinous, atrocious and cruel statutory aggravating factor is unconstitutionally vague based on Maynard, supra, because the working definition of the terms set forth in the HAC factor are provided by this Court through a limiting construction of that factor. See Smalley v. State, 546 So.2d 1201 (Fla. 1989). Other instances where the definitions of statutory aggravating factors have been provided by this Court demonstrate that the violation of the separation of powers doctrine is pervasive. See Peek v. State, 395 So.2d 492, 499 (Fla.1980)(parole and work release constitute being under sentence of imprisonment, but probation does not); Johnson v. State, 393 So.2d 1069 (Fla.1981)(more than three people required to constitute a great risk of death or injury to many persons)[3]; Banda v. State, 536 So.2d 221, 225 (Fla.1988) ("We conclude that, under the capital sentencing law of Florida, a 'pretense of justification' is any claim of justification or

---

[3] Interestingly, the initial working definition provided this statutory factor by this Court in King v. State, 390 So.2d 315 (Fla. 1980) was, after seven years of usage by juries and trial judges, categorically rejected when the King case was again reviewed by this Court. See King v. State, 514 So.2d 354, 360 (Fla. 1987) ("this case is a far cry from one where this factor could properly be found.") If King is a "far cry" from the proper case to find the "great risk to many persons" factor, how did the factor get approved in the first decision and, more importantly, why does this Court feel compelled to provide the working definitions of the substantive terms of the statutory aggravating factors?

excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide."). The passage of such broad legislation for it to be refined, defined and given substance by the Supreme Court of Florida is tantamount to a delegation of legislative power and a violation of the separation of powers doctrine of state and federal constitutions.

FAILURE OF AGGRAVATING FACTORS TO ADEQUATELY CHANNEL THE SENTENCER'S DISCRETION TO IMPOSE THE DEATH PENALTY.

"An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Supposedly, the things that may be considered as "aggravation" by a sentencer in Florida are limited to those statutory aggravating factors expressly listed in Section 921.141(5), Florida Statutes (1989). See Brown v. State, 381 So.2d 690 (Fla. 1980); Elledge v. State, 346 So.2d 998 (Fla. 1976); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977). It is respectfully submitted, however, that these "factors" are but open windows through which virtually unlimited facts may be put before the sentencer to achieve a death sentence, thereby providing unfettered discretion to recommend/impose a death penalty in violation of the Eighth and Fourteenth Amendments, Article I, Section 17 of the Florida Constitution and the holding

of Furman v. Georgia, 408 U.S. 238 (1972).

FAILURE TO ADEQUATELY INSTRUCT SENTENCER ON STANDARD OF PROOF

Due process under the Fourteenth Amendment must comport with prevailing notions of fundamental fairness. California v. Trombetta, 467 U.S. 479 (1984). In order to recommend/impose the death penalty in Florida, the statute requires that statutory aggravating factors "outweigh" the mitigation. Section 921.141(2) and (3), Florida Statutes (1989). In fact, the statute places the burden on the defendant to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." Section 921.141(2)(b), Fla. Stat. (1989). This Court has recognized that the burden must be on the State to prove that the aggravating factors outweigh the mitigating factors. See Arrango v. State, 411 So.2d 172, 174 (Fla. 1982); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975)("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors.") As written, the statute places the burden of proof on the defendant in violation of the Fifth and Fourteenth Amendments, Article I, Section 9 of the Florida Constitution and the holding of Mullaney v. Wilbur, 421 U.S. 684 (1975).

Even when the statute is changed by judicial fiat to place the burden on the state to show that the statutory aggravating factors "outweigh" the mitigation, a violation of due

process under the Fifth and Fourteenth Amendments and Article I, Section 9 of the Florida Constitution occurs because the bare "outweigh" standard fails to adequately apprise the jury/sentencer of what must objectively be present to determine whether imposition of the death penalty is warranted. As worded, the standard instructions dilute the requirement that the state prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted. The standard instruction requires only that the state show that the death penalty is warranted by a mere preponderance of the evidence, thereby resulting in a violation of due process. See Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). Imposition of the death penalty based on a preponderance of the evidence is unconstitutional. In re: Winship, 397 U.S. 358 (1970). By showing that the aggravation "outweighs" the mitigation the state achieves death penalty recommendations and/or sentences by a mere preponderance standard in violation of the aforesaid cases and the constitutional requirements to due process.

For the aforesaid reasons, the death penalty in Florida is unconstitutional both on its face and as applied. It must accordingly be declared unconstitutional and the death penalty must be reversed.

CONCLUSION

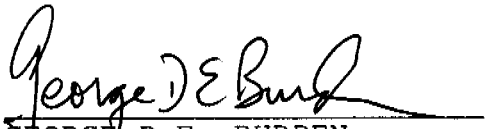
Based on the argument and authority previously set forth, this Court is respectfully asked to provide the following relief:

POINTS I - VII; IX-X: To reverse the death sentence and to remand for a new penalty proceeding before a new jury.

POINT VIII & XI: To vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO.353973
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904)252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118 in his basket at the Fifth District Court of Appeal and mailed to Mr. Chadwick Willacy, #707742 (43-2137-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 6th day of August, 1996.

George D.E. Burden

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER