IN THE SUPREME COURT OF FLORIDA

MICHAEL LEE LOCKHART, :

Appellant, :

vs. : Case No. 82-096

STATE OF FLORIDA, :

Appellee. :

_____:

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ANDREA NORGARD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 661066

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STATEMENT OF THE CASE

Appellant, MICHAEL LEE LOCKHART, was indicted on July 12, 1988, for the first degree murder of Jennifer Colhouer which occurred on January 20, 1988 (R1-2). The murder took place in Pasco County, Florida, and the indictment was returned by the Grand Jury for the Sixth Circuit. (R1-2)

Appellant was arraigned on September 11, 1989. The public defender was appointed on September 9, 1989. (R6-8)

On September 14, 1989, the State filed numerous Notices of Intent to To Use Evidence of Other Crimes. (R12-20) Included among these were two other murders allegedly committed by Appellant -- one in Indiana (R13) and one in Texas. (R19)

On October 26, 1989, the public defender filed a motion to withdraw as counsel or, in the alternative, to schedule trial past the December 4 date set earlier in October. (R48-54) The motion alleged that counsel was unable to provide constitutionally mandated effective assistance due to caseload consideration, office funding, the complexity of Mr. Lockhart's case, and related issues within the 40-day period prior to the scheduled trial date. (R48-54) A hearing on the motion was conducted on October 26 before the Honorable Maynard F. Swanson, Jr. (R107-119) The court denied the motion to withdraw and to continue. (R119)

Following the motion's denial, Appellant moved to dismiss counsel (R121) and to enter a plea of guilty. (R122)

The public defender moved to withdraw, stating the plea was against counsel's advice. (R122)

The Court, after some discussion, entered into a plea colloquy with Appellant. (R129-132) The court accepted the plea. (R132) Counsel was ordered to remain as advisory counsel. (R133-134)

Later that same day, the public defender filed a Motion for Directions from the Court, seeking clarification of his duties and responsibilities to Appellant. (R149) The motion was denied and counsel was ordered to do nothing against the wishes of Appellant. (R60,151)

On November 9, 1989, the public defender again moved to withdraw, arguing that to act as advisory counsel was not statutorily permissible and that representation of Appellant would cause the public defender to violate the Rules of Professional Conduct. (R61-71) A second motion requesting directions from the court was filed on November 13, 1989. (R74-75)

On November 13, 1989, the penalty phase began in Appellant's case with the Honorable Maynard F. Swanson, Jr. presiding. (R165-591) The public defender's Motion to Withdraw was heard first and the Court granted the motion to withdraw. (R178-179)

A jury was selected and sworn. Following the presentation of evidence, the jury returned an advisory recommendation for death by a vote of 12-0 on November 14, 1989. (R87,591)

Appellant appeared for sentencing on December 12, 1989. (R631-640) The Court sentenced Appellant to death. (R639) Written findings setting forth the aggravating factors were filed on December 12. (R91-96)

A notice of appeal was filed on August 30, 1993. (R102-103) The Office of the public defender was appointed on September 9, 1992. (R104)

PRELIMINARY STATEMENT

Appellant, MICHAEL LEE LOCKHART, is before this Court appealing a sentence of death. Appellant was the defendant in the lower court, and will be referred to as "Appellant" or by name in this brief.

Respondent, the State of Florida, is prosecuting authority in both the lower and instant proceedings. The record on appeal, consisting of four volumes, shall be designated "R".

The exhibits included in this record are not numbered. For purposes of this brief, counsel has numbered them and they will be referred to as "ER."

STATEMENT OF THE FACTS

For the sake of clarity, the Statement of the Facts will be divided into two parts: A. Plea Proceedings and Motions to Withdraw, and B. Penalty Phase.

A. Plea Proceedings and Motions to Withdraw

On October 26, 1989, Appellant appeared before the Honorable Maynard Swanson pursuant to a motion to withdraw filed by the public defender. (R107) The basis for the motion was counsel's inability to have Appellant's case adequately prepared by the December 4th trial date. (R108-09) Counsel outlined the complexities of the case which included (1) travel to Washington, D.C.; Toledo, Ohio; Germantown, Maryland; Chicago, Illinois; and Indiana (A107-108), and (2) transcripts of two separate trials in Indiana and Texas being utilized as Williams Rule evidence, one of which was still incomplete. (R108)

The State countered that they were ready, had twice the workload of the public defender, and labeled counsel's assertions "hogwash." (R111) The State alleged delay was the only motive (R111-12), and admonished the public defender to "stop the bellyaching and stop the crying and stop the complaining because that's all they do, constantly, all the time." (R112) The State suggested defense counsel should just quit. (R113)

Defense counsel noted that numerous other capital cases in that circuit had been continued by the State for lack of diligence.

(R114-15) Defense counsel claimed the State was attempting to "railroad" Mr. Lockhart. (R116)

The court found no grounds for the continuance, denying it and the motion to withdraw. (R119-21) After the denial of these motions, Mr. Lockhart asked to address the court. (R121)

Appellant requested to dismiss counsel and to waive his right to be represented. (R121-22) Appellant then stated he wished to plead guilty and proceed to an immediate sentencing. (R122) The public defender immediately moved to withdraw, stating such action was contrary to the advice of counsel. (R122)

The Court then told Appellant that if he pled guilty, he would still be required to proceed to a full penalty phase before a jury. (R123-24) Mr. Lockhart stated that:

> THE DEFENDANT: It was never -- I was never told that. I was told that -- what I understood is you could set sentencing. What you're asking me to do is go in front of a jury, in front of twelve people, to decide life or death.
>
> I understand that me pleading guilty would eventually come to my death. I understand that. But for me to sit here in front of a jury and have this man tell these people things where I think that I could rebut them with Mr. Eble, I don't think I'm willing to do it because I do believe with Mr. Eble -- (R124)

The Court then assured Mr. Lockhart that the public defender would be required to be present during penalty phase and would be available to assist. (R125) The choice of whether or not to avail himself of the use of counsel was Appellant's. (R125)

Mr. Lockhart then stated he was trying to spare the victim's family by avoiding trial and to save the county money, whereupon

the Court stated there was a substantial difference between a jury recommendation and a determination of guilt. (R126) The Court told Mr. Lockhart if he pled, the public defender would remain as counsel and, even if dismissed, would remain available. (R127) The Court stated Appellant was to have a "competent, experienced lawyer available at all times during the course of the proceedings."(R128)

Mr. Lockhart then stated he wished to enter a plea of guilty. (R129) The judge entered into a plea colloquy with Mr. Lockhart and then found he was "alert, intelligent, knew full well the consequences of your act, that you are represented by able trial counsel and there is an adequate factual basis of guilt." (R132) Counsel again moved to withdraw and the court then denied the motion. Counsel objected, stating he believed he was to the only "advisory," an opinion echoed by Mr. Lockhart. The following dialogue then resulted in the following response:

> THE COURT: In every capital case a person must be represented. I will not permit a person to represent themselves completely on every capital case. I am permitting you to do what you're doing. I will permit Mr. Eble to advise that this is against his advice and it is against his professional advice to do so. But Mr. Eble must still be representing you. He must still be available at any time.
>
> THE DEFENDANT: As an advisory?
>
> THE COURT: As an advisory capacity. If at any time you want to ask questions or you want him to do something for you -- if you want him to cross-examine witnesses, or examine witnesses, or subpoena witnesses, whatever you may want him to do --

(R135)

The Court stated he would address withdrawal if representation would violate the Code of Professional Responsibility. (R135-36)

The plea was accepted and a date for penalty phase set (R142) Mr. Lockhart indicated he was ready. Counsel objected, asking if he was able to conduct an investigation into the penalty phase, at which point the Court stated that counsel's responsibility was to comply with Appellant's wishes. (R143)

A recess was taken, during which time counsel filed a Motion for Directions from the court. (R148) Mr. Lockhart concurred in the recitation of facts contained in the motion. (R149) The Court ruled counsel was not authorized to conduct any further discovery, or to take further depositions, or any other matters set froth in the motion. (R151) The denial was premised upon "Mr. Lockhart's opinion, recommendation, and direction." (R159)

An order preventing counsel from conducting any preparation or investigation in the case was signed by the court. (R151)

B. Penalty Phase

The penalty phase began on November 13, 1989. (R159) In moving to withdraw, counsel argued that Chapter 27, Florida Statutes (1989) precluded "advisory" counsel and ethical obligations required counsel to act against Mr. Lockhart's wishes. (R169) Counsel stated that Mr. Lockhart wished to represent himself. (R167-68)

The Court inquired of Appellant, who stated he wished to represent himself. (R173) Mr. Lockhart was then sworn and the

court inquired as to his education, work experience, and age. (R175) The Court then inquired about self-representation. (R175-76) The Court assured Mr. Lockhart that although he would be required to follow procedural rules the court would

> . . . try to make clear to you what these are, you're goint to have to follow the same rules as everybody else; do you understand that?
>
> THE DEFENDANT: Yes.

(R176)

The Court then held that Mr. Lockhart had been adequately advised of his rights concerning self-representation. (R178) The public defender was then permitted to withdraw. (R178) Mr. Eble would be available as needed, but not present in the courtroom. (R181)

Mr. Lockhart then requested two items from the State: (1) medical records from his hospitalization at the St. Charles Hospital in Toledo (R182); and (2) help in securing the presence of a witness, Janet Lockhart, from Ohio.

The State advised Janet Lockhart would not attend voluntarily. (R183-84) Mr. Lockhart stated he felt her testimony was relevant to his mental state and mental deterioration. (R186) Mr. Lockhart requested she be extradited. (R187) The Court told Mr. Lockhart he would permit Janet Lockhart's prior statements to be read to the jury. (R188) The Court promised Mr. Lockhart "considerable latitude" as to what goes to the jury. (R189) The Court then denied the extradition request. (R189)

Mr. Lockhart requested individual voir dire. (R183) The Court denied the motion, reasoning that the jurors would hear prejudicial things anyway. (R184)

The venire was then brought into the courtroom and voir dire began. (R190-96) During the initial questioning by the State, two jurors, Flannery and Gillman, indicated they had knowledge of the case. (R109) Juror Gillman was a retired police officer. (R230) Another juror, Ms. Lee, knew the victim's uncle through work after the incident (R223,238) and was unsure of her ability to serve. (R238)

Mr. Lockhart was then given an opportunity to begin questing the panel. (R245) He told the panel he was terrified. (R246) He later referred to his nervousness. (R262)

Juror Campbell stated he had seen news reports. (R248) Juror Flannery commented that the articles he recalled were "like a trial in the newspaper." (R249) Juror Baxter recalled reading of the case in the newspaper and seeing it on the news. (R259) Juror Barker recalled seeing something on the news "awhile" ago. (R264-65) Jurors Drummond and Gallagher recalled seeing newsbroadcasts from two years previous. (R293,295)

Mr. Lockhart attempted to question the jurors concerning their individual religious beliefs. (R273) The Court refused to permit a questioning as to religious beliefs except as related exclusively to capital punishment. (R273)

Mr. Lockhart then attempted to question Juror Lee about her feelings in this case. (R176) Juror Lee admitted to reading the

news reports, seeing the news, and discussing the case with co-workers and her husband. (R276) She had thoughts of anger and felt that everyone she discussed the case the had felt that the perpetrator of this crime should die. (R276) She recalled having "concern" about the trial and sentencing. (R277) During her discussions with others Lee knew she might be called as a juror to this case. (R278) The Court refused to allow Mr. Lockhart to question Lee as to what her husband's beliefs were concerning the appropriate penalty in this case. (R278)

Mr. Lockhart questioned Juror Gillman concerning his views on the death penalty and this case in particular. (R299-300) Gillman replied:

> PROSPECTIVE JUROR GILLMAN: My feelings on that are very ambivalent. If you asked me last week whether Michael Lee Lockhart should be executed, I would have very impersonally said yes, but this is not last week. This is not a game. This is for real. It's a heavy load.

(R300)

After this response, Mr. Lockhart moved to exclude Gillman for cause, which was denied. (R300) Mr. Lockhart next requested to voir dire Gillman alone, which was denied. (R300)

During further questioning Gillman acknowledged he had read the news accounts of this case. (R303) Gillman was also aware that one of the other victims had been a police officer. (R303-04) Gillman stated he would be much more comfortable if excused from the jury and would rather not serve. (R304)

Juror Flannery was then questioned more extensively concerning opinions on this case. Flannery denied having a preformed opinion as to the sentence, but noted that given brutal evidence could probably vote for execution. (R307) Flannery stated he would choose not to sit on the jury. (R307)

Mr. Lockhart then began to question Juror Lee a second time regarding preconceived beliefs. The State objected and the Court ruled that Mr. Lockhart could ask no further questions on that particular point. (R312) Mr. Lockhart objected to the ruling. He stated he felt the Court was not affording him the same opportunities that a lawyer would have had. (R312) Mr. Lockhart stated he was being improperly restricted in his voir dire. (R313) Mr. Lockhart believed Gillman and Lee were excludable for cause and stated:

> I am sure if Mr. Bill Eble was standing up here, he wouldn't tolerate any of those two being up here. And I am sure, since he can dictate the law better than I can, he would have cause for Mr. Gillman and Mrs. Lee to be off this jury.

(R313)

The Court acknowledged that although cause might exist for guilt phase, it did not for penalty phase. (R313) The Court stated prior knowledge of the case was not relevant on penalty phase. (R313-14) When Mr. Lockhart continued to argue, the Court refused to listen. (R314)

Mr. Lockhart then struck Lee and Gillman, exerciseing peremptory strikes. (R315) He then asked to question Juror Courier further and the Court refused to let him. (R315-16)

Two jurors were then called and the State began questioning. During questioning, the State referred to the Court sustaining a couple of the State's objections. (R322) The State said Mr. Lockhart's questions could not be asked because they were improper. (R327)

Mr. Lockhart questioned briefly, then exercised peremptory challenges on two jurors. (R334-35) Two new jurors were called. (R351)

Both new jurors indicated they had heard about the case. (R347-48,351) Juror Fessel remarked he thought the crime was horrendous, but denied having made any prejudgment as to the appropriate sentence. (R353) Mr. Lockhart then attempted to question Juror Fessel about the strength of his feelings or belief in the death penalty. (R357-58) The Court sustained the State's objection, ruling the question was irrelevant because it asked for a qualitative belief. (R358) The Court held the strength of belief was irrelevant. (R358-59) When Mr. Lockhart objected to the ruling, the Court refused to explain further. (R359)

The Court then directed Mr. Lockhart to make additional strikes. (R360) Mr. Lockhart struck Fessel and Flannery. (R360) He then requested two additional strikes to be used after he exhausted all peremptories. (R360-61) The Court refused, stating that Mr. Lockhart had only four strikes remaining. (R361) Two additional jurors were then called and questioned. (R362-63) Mr. Lockhart then struck two jurors. (R383-84)

Jurors Hines and Henley were called. (R392) Juror Henley had heard about the case on radio, television, and had read of it in the papers. (R392) Juror Hines had heard of the case in the past, two years ago. (R393) Juror Hines had read bout the Texas crime in the paper. (R407-08) She felt she could be fair, but preferred not to be on the jury. (R407-09)

After concluding questioning, Mr. Lockhart discussed his remaining strikes with the Court. (R414) The Court stated he had two remaining strikes and no more strikes would be given. (R414) Mr. Lockhart stated he did not feel the panel was fair or impartial and that he needed four strikes. (R414-15) The Court denied the request for additional strikes. (R415) Mr. Lockhart then asked to strike Duquette for cause, which was denied. (R415) Mr. Lockhart then tried to strike each juror for cause, all of which were denied. (R416-17)

Mr. Lockhart then moved for a change of venue, which was also denied. (R417) Mr. Lockhart made no further strikes from the panel. (R418)

Following opening statements, the following testimony was presented by the State:

Initially the State introduced a judgment from the State of Wyoming against Mr. Lockhart for robbery. (R433-434) Lieutenant Anthony Miller, a correctional officer at the Wyoming State Penitentiary identified Appellant as a prior inmate. (R435) He presented Mr. Lockhart's complete prison file, which was introduced into evidence. (R436) Lieutenant Miller stated Mr. Lockhart had

caused no problems while incarcerated and his sentence was commuted to nine months from 2-4 years. (R438-440) Latent examiner Bill Ferguson compared the known prints of Appellant with those on the Wyoming judgment and determined they matched. (R441-443)

Detective Fay Wilbur of the Pasco County Sheriff's Office was the case officer assigned to the murder of Jennifer Colhouer. (R445) Jennifer's body was found in an upstairs bedroom of her home in Land O' Lakes in January 20, 1989. (R443) She was lying on her right side in a considerable amount of blood. (R446-47) She was naked from the waist down. (R446) She had been bound. (R454) Upon further investigation, it was determined she had been strangled, and there was a large incised wound from the sternum to the navel. (R447) There was also several "pricking" wounds around the sternum. (R447) A semen stain was present on her thigh. (R447)

Over objection, Detective Wilbur stated Jennifer had been sexually assaulted anally. (R448-449) A DNA analysis was made from the semen on her thigh, which linked the semen to Appellant. (R448) Over objection, Wilbur opined the pricking wounds around the sternum had been made so the sternum could be located. (R449) Wilbur also opined the wounds had been made while Jennifer was alive. (R450) Appellant objected to Wilbur's testimony, arguing it was outside his expertise. (R450-451) The objection was denied. (R451)

Detective Wilbur continued to speculate that, in his opinion, the stomach wound had a sexual meaning. (R451) He believed the wound was shaped like a vagina and that the "whole thing" was sexual. (R451)

There was no sign of forced entry. (R452) Wilbur believed Appellant talked his way inside. (R451-452) The knife used to make the wounds was also found in the bedroom just behind the body. (R452) It had a lot of blood on it. (R452,457-458) Photographs of the body were then shown to the jury. (R454-457)

The photographs indicated Jennifer's arms had been bound. (R459) A handprint was visible on her upper right inner thigh, near the semen. (R459-460) Her brassiere and shirt were pulled up, exposing her breasts. (R460) The photos also showed petechiae, or burst blood vessels, present in Jennifer's face, which occur during strangulation. (R460)

Photos of the rectal area showed an enlarged rectum. (R461-462) The muscles did not tighten up after penetration, indicating penetration occurred after death. (R462)

According to Detective Wilbur, Jennifer was strangled to unconsciousness, cut while on her back, and then rolled over. (R462-463) She was then sexually assaulted. (R463-464)

Detective Wilbur testified a towel found under Jennifer's head was used to strangle her. (R464) There were nail marks on her neck, indicating she fought or tried to get whatever was around her neck off. (R464) There was also an abrasion on her chin, indicating a struggle. (R464) The pattern of her shirt collar left an impression in her neck. (R464-465)

Dr. Joan Wood is the Chief Medical Examiner for Pasco County. (R506) She did not personally perform the crime scene investigation or autopsy in this case, that was done by Doctor Gallagher who

is since deceased. (R511) Dr. Wood testified from the report prepared by Dr. Gallagher. (R511) Her testimony concerning Jennifer was as follows:

A towel found near the head contained blood and there was blood on the floor surrounding the body. (R513) Jennifer had been bound, but the bindings were missing. (R525) The blood patterns indicated the body was moved after the abdominal wounds occurred. (R513) Blood accumulated in the abdomen and was propelled out when the body was moved to form the pattern. There were also three individual streams of blood on the right side of the body extending from the back, mouth, and nose, indicating movement. (R516) The blood on the carpet formed a spurting pattern and had clotted. (R516) A bloody handprint on the upper right thigh could not have come from the victim and was consistent with abdominal bleeding bloodying the hand, which then was used to turn the body.

Dr. Wood confirmed strangulation. The face was darkened, but there was a pallor on the neck. (R517) There were tiny hemorrhages or petechiae in the mouth, ears, eyelids, and face. (R517) Petechiae are caused when blood flows in, but because of pressure cannot exit. (R519-520) It had taken significant pressure of at least one minute to cause petechiae. (519) The petechiae in this case were likely caused by garrotment -- probably by the towel found near the body. (R521) There were blood stains on the towel corresponding to the nose and mouth. (R521) There was also an abrasion on the chin, much like a fabric burn. (R518)

Dr. Wood believed the choking occurred from behind. (R522) She believed that Jennifer fought against the strangulation. (R524) Dr. Wood stated it would take anywhere from 30-45 seconds to well over a minute, and as long as three minutes, to choke a fourteen-year-old such as Jennifer into unconsciousness. (R524)

Dr. Wood believed the "pricking, prodding, or teasing" wounds on the abdomen were inflicted prior to garrotting. (R523) It was the doctor's opinion, however, that Jennifer was unconscious at the time when the large abdominal wound was inflicted. (R522)

The abdominal wound was seven inches long and traced through several major organs. Dr. Wood found evidence of seven separate insertions of the knife. The upper wound was a stab in the upper abdomen, midline and down to the right. It did not pierce the heart. There was a 4 inch cutting wound to the liver, and a second separate cut through the liver. (R529) There were three separate stabs in the muscle between the ribs, each between 2 and 4 inches long and 6.9 inches deep. (R529) There was a fine cut to the diaphragm between the eleventh and twelfth ribs. (R529)

In examining the rectal area, Dr. Wood noted the sphincter muscle was open and relaxed. (R531) This is unusual. (R531) The circumference of the opening was consistent with the insertion of a penis into the rectum after death. (R531)

Dr. Wood found the crime to be clearly sexually oriented. (R530) The insertion of the knife into the abdomen is similar to the insertion of the penis into the vagina. (R536)

The State also presented the following testimony about Mr. Lockhart's two additional capital convictions in Indiana and Texas:

The State introduced into evidence Mr. Lockhart's conviction for the killing of Windy Gallagher in Indiana. (R466-467)

Detective Fay Wilbur testified he had been present for the Gallagher trial and gave the following factual summary (R466):

Windy Gallagher, age 16, was last seen around 4:00. (R468) Several hours later she was found dead in a bedroom of the family residence by her sister. (R469) The body was naked from the waist down, with the shirt and brassiere pushed up over her breasts. (R469) There were between twenty-one and twenty-seven pricking or torture wounds on the body. (R469-70) There was also a large incised wound on the abdomen. (R469) Over objection, eight photos of the body were introduced into evidence. (R470-71) Mr. Lockhart requested a standing objection to all further testimony concerning the Indiana murder. (R485)

A bloody knife imprint was found. (R469) Detective Wilbur was then asked to compare the Indiana case with the instant case. (R484) Wilbur stated in both cases that Mr. Lockhart "conned" or sweet-talked his way into the residence. (R484) Both victims had incised abdominal wounds. (R485) Both had hesitation wounds. (R486) The purpose of this type wound is torture. (R487) Windy was found gagged and bound in a manner which would cause excruciating pain. (R485-87) Detective Wilbur stated the whole crime scene "was sex." (R483)

The State then sought to have the judgment and sentence entered into evidence. (R479-80) Mr. Lockhart objected and requested that the "amendment of charge" entered in Indiana also be included. (R489) Mr. Lockhart explained any reference to any sexual activity had been deleted from the Indiana charges in an amendment. (R490) The Court denied the request, but told Mr. Lockhart he could testify later and clear up this to the jury. (R490) On cross, Detective Wilbur denied knowing what an amendment of charge was or what the charging requirements are for capital crimes in Indiana. (R495) Wilbur didn't believe the police or medical reports in the Indiana case mentioned sexual assault, but stated he believed it took place based upon his looking at the photographs. (R496-97)

Dr. Wood testified that Windy was not choked, but stabbed four times in the neck. (R533) Those injuries were not life-threatening. (R533) The abdominal wound on Windy was 5 inches long. (R534) The wound path was identical in both girls, an upward cut separating the chest and abdominal organs and into the pericardial sack. (R534)

Both girls were moved (R535), Jennifer to effectuate a sexual assault. (R535) Windy was moved, in Dr. Woods' opinion, to also effectuate a sexual assault. Dr. Wood felt both crimes were "clearly sexually oriented." (R536)

Detective Wilbur was also present during parts of Mr. Lockhart's trial in Texas. Wilbur testified Mr. Lockhart was convicted of killing Officer Paul Halsey in Beaumont, Texas. (R491) Officer

Halsey spotted a red Corvette with Florida tags in a high crime area. (R491) On his way home later he saw the same car parked outside the Best Western. (R491) Officer Halsey ran a check and found the tag had been reported stolen in Florida. (R491) Halsey went to Mr. Lockhart's room and a scuffle broke out. (R491-92) Officer Halsey was shot once and begged for his life. (R492) Mr. Lockhart objected, which was denied. (R492) Wilbur testified that Mr. Lockhart shot Halsey a second time and then left. (R492) On cross, Mr. Lockhart attempted to impeach Wilbur with the actual facts of the Texas murder. (R498-501) The Court halted Mr. Lockhart's efforts, admonishing him that he was testifying by giving statements. (R501)

Following the resting of the State's case, Mr. Lockhart asked to go over his records from the Wyoming State Penitentiary. (R541) Mr. Lockhart also asked if he would be able to make statements to the jury regarding other witnesses' statements as he had been promised. (R541) The State objected, arguing that Mr. Lockhart should only be allowed to comment on the testimony which had been presented. (R542) Mr. Lockhart stated he wasn't planning to introduce evidence; he just intended to let the jury know about him. (R542)

The Court then ruled that Mr. Lockhart could only comment on testimony; he could not tell the jury of his background unless he was put under oath and gave testimony subject to cross-examination. (R542-45) After the Court's ruling, Mr. Lockhart asked to seek legal counsel. (R546) The public defender was brought to Mr. Lockhart.

Following a discussion with counsel, the Court then inquired of Mr. Lockhart if he intended to testify. (R547) Mr. Lockhart stated the jury needed to hear two sides and that he would testify. (R547) Mr. Lockhart asked for some time to prepare his statements and to return to the jail to get some statements he wished to introduce into evidence. (R547) The Court stated it saw no reason to delay. The public defender then explained that Mr. Lockhart had not understood the limitations of closing arguments. He had thought he would be able to talk about himself. (R548-49) The documents in the jail corroborated many of his anticipated comments. (R549) The public defender suggested a recess, which the Court granted. (R550-51)

Upon returning from the recess, Mr. Lockhart informed the Court he felt he needed to do the "right" thing. (R552) He stated he didn't want to do anything to inflame or upset the victim's mother, so he would not put on evidence. (R553) Mr. Lockhart requested they begin closing arguments. (R553)

The Court presented the jury instructions and advisory verdict form to Mr. Lockhart. (R553-54) Mr. Lockhart made no objections. (R553-54)

The State argued they had established four aggravating factors: (1) prior conviction of a capital felony (R562); (2) the instant crime was committed while Mr. Lockhart was engaged in the commission of a sexual battery, burglary, or both (R562-63); (3) that the murder was especially heinous, atrocious, and cruel (R564), and (4) that the murder was committed in a cold, calculat-

ed, and premeditated manner without any pretense of moral or legal justification. (R566) The State argued no mitigation had been proven. (R568-572)

Mr. Lockhart addressed the jury. (R574) He spoke of great remorse for his actions. (R574-75,580) Mr. Lockhart stated he pled guilty and dismissed his lawyer to spare the victim's family from the trial. (R576)

Mr. Lockhart spoke of the crime problem in the United States, then told the jury to "Do the right thing and that is return the death penalty." (R582)

The jury, by a vote of 12 to 0 returned a recommendation for death. (R591-92) The Court set sentencing for December 12. (R596) A PSI was ordered. (R596) The Court told Mr. Lockhart he could present additional evidence for consideration to the Court if he wished. (R596)

On December 12, 1989, Mr. Lockhart appeared for sentencing. (R632) The Court noted he had previously proceeded without counsel and asked if he wished counsel. Mr. Lockhart responded "No." (R632) The Court made no further inquiry. (R632)

Mr. Lockhart stated he had nothing further to present. (R633) He apologized again for the harm he caused. (R633)

The Court then found the following aggravators existed: (1) previous conviction of a capital felony (R634); (2) the offense was committed while Mr. Lockhart was engaged in the commission of a sexual battery (R635); (3) the murder was heinous, atrocious, and

cruel (R635); and (4) the murder was cold, calculated, and premeditated. (R636)

The Court found no statutory mitigators were proven. (R637-38) Ironically, the court noted that "it is hard for me to believe any sane, normal person could commit such an act as has been committed." (R637) The Court made reference to information given in newspapers, but stated it was not supported by evidence admitted to the Court. (R638) The Court then imposed a sentence of death. (R639)

SUMMARY OF THE ARGUMENT

I. The plea of guilty entered by Appellant was not intelligently and voluntarily made. The record fails to establish an adequate plea colloquy due to insufficient questioning concerning Appellant's mental health and insufficient explanation of the rights Appellant was waiving.

II. The trial court's misleading representation to Appellant as to what standards Appellant would be held to if he proceeded pro se and what assistance the court would give Appellant as a pro se defendant failed to ensure that Appellant understood the dangers and disadvantages of self-representation.

Appellant dismissed counsel based upon the court's promises only to later be faced with contrary rulings by the court in matters of procedure. The court's promises of considerable latitude were broken. As such, the waiver of counsel was not knowing, intelligent, and voluntary.

III. The court improperly precluded Appellant from questioning the jurors about key areas vital to the determination of utilizing peremptory challenges and developing cause challenges. The court further erred in failing to exclude for cause two jurors whose preconceived beliefs prevented them from sitting as impartial jurors. The two errors combined denied Appellant a fair and impartial jury.

IV. The trial court unconstitutionally minimized the role of the jury in a capital sentencing proceeding.

V. The court erred in permitting the State to introduce hearsay testimony of Appellant's two prior convictions. The testimony was unreliable because of the self-imposed limitation of the witness, Detective Fay Wilbur. Wilbur's testimony was not subject to fair rebuttal. The court so severely limited Appellant's ability to cross-examine Wilbur that Appellant's Sixth Amendment right to confront the witnesses against him was violated.

VI. The trial court impermissibly allowed evidence of the collateral offenses to become a feature of the trial. Extensive testimony concerning the two prior homicides was inflammatory and irrelevant to the instant proceedings.

VII. The trial court precluded Appellant from investigating and presenting mitigating evidence to the jury. The court erred in requiring Appellant to testify as the only means of presenting mitigation, thereby forcing Appellant to choose between two constitutional rights and when he had earlier promised Appellant he would be permitted to introduce evidence with considerable latitude.

VIII. The trial court erred in failing to adequately renew the offer of counsel to Appellant prior to the sentencing. The record fails to establish Appellant was made aware of the dangers and disadvantages of self-representation, thus rendering the waiver involuntary.

IX. The trial court erred in determining what mitigation existed in Appellant's case. The court ignored and failed to find valid mitigation present in the record. The court failed to properly weigh mitigation it found existed by finding it had no

weight. Lastly, the court failed to adequately determine the existence of mental mitigation under the unique facts presented.

X. The instant homicide was not proved to meet the standards for cold, calculated, and premeditated where there was no showing of a careful plan or prearranged design to kill. Collateral crimes cannot supply the requisite facts to establish cold, calculated, and premeditated.

XI. The trial court improperly read and considered evidence not in the record when sentencing Appellant, namely interviews in the press given by Appellant.

XII. This Court must recede from Hamblen v. State, 527 So. 2d 800 (Fla. 1988) and its progeny and require the appointment of independent counsel to present mitigation to the court even when a defendant requests death. Such a procedure is the only way to ensure constitutional consistency in the application of the death penalty and effectuate meaningful adversarial appellate review.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ACCEPTING APPELLANT'S PLEA OF GUILTY IN THE INSTANT CASE.

The United States Supreme Court in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), established the constitutional standards for the acceptance of pleas of guilty. Boykin requires the plea be intelligent and voluntary and that the record affirmatively establish this. Boykin requires that when

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.

Boykin, at 280.

In Williams v. State, 316 So. 2d 267 (Fla. 1975), this Court noted that the taking of a plea "is one of the most important tasks of a trial judge. [Footnote omitted]." 316 So. 2d at 270. " The entry of a plea is an extremely important step in the criminal process and should not be hurried or treated summarily [Footnote omitted]." 316 So. 2d at 271. Williams set forth three essential requirements: (1) The plea must be voluntary; (2) the defendant must understand the nature of his plea; and (3) there must be a factual basis for the plea.

A thorough and extensive plea colloquy is absolutely necessary to ensure a plea is entered knowingly and voluntarily. Koenig v. State, 597 So. 2d 256 (Fla. 1992). It must include information

detailing what rights are given up by the plea. See Koenig. It must establish that the defendant is competent to enter the plea. Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966), citing Bishop v. United States, 350 U.S. 961, 76 S. Ct. 440, 100 L. Ed. 2d 835 (1956).

The plea colloquy engaged in between the court and Appellant was too limited for a capital case. The court gave a laundry list of rights Appellant would waive, but took no time to explain them. (R130) The court failed to inquire if Appellant had prior mental disturbances. The court did inquire about present psychiatric care; but, given that Appellant had been in Pasco County approximately three weeks and counsel had been unable to have him seen by mental health professionals, inquiry into the past was necessary.

The court's conclusion that Appellant was represented by able counsel was also incorrect. (R132) Counsel had little contact with Appellant, had done little to no investigation, and had been requesting to withdraw. Counsel continued to object to the court's finding that Appellant was well-represented. (R132-33)

Under the standards set forth in Koenig v. State, 597 So. 2d 256 (Fla. 1992), Appellant's plea must be found to be lacking. The record does not demonstrate an intelligent and voluntary waiver of Appellant's rights.

Appellant is entitled to appellate review of the validity of his plea. Trawick v. State, 473 So. 2d 1235, 1238 (Fla. 1985); cert.denied, 476 U.S. 1143, 106 S. Ct. 2254, 90 L. Ed. 2d 699 (1986). He is permitted to raise a claim that the record fails to

show his guilty plea was intelligent and voluntary on direct appeal in a capital case despite the absence of a motion to withdraw the plea in the trial court. See §921.141(4), Fla. Stat. (1991) and Koenig, supra.

The circumstances surrounding Appellant's plea and the inadequate colloquy demand that the plea be set aside and Appellant afforded an opportunity to either enter a new plea or proceed to trial.

ISSUE II

APPELLANT'S WAIVER OF COUNSEL WAS NOT FREELY, INTELLIGENTLY, AND VOLUNTARILY MADE WHERE IT WAS PREMISED UPON MISREPRESENTATIONS BY THE TRIAL COURT CONCERNING THE COURT'S ROLE AND THE STANDARDS TO WHICH APPELLANT WOULD BE HELD IF HE PROCEEDED PRO SE.

In Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975), the U.S. Supreme Court held that before a defendant may represent himself he "should be made aware of the dangers and disadvantages of self-representation so that the record establishes that he knows what he's doing and his choice is made with eyes open."

In Traylor v. State, 596 So. 2d 957, 968 (Fla. 1992), this Court held:

> Any waiver of this right must be knowing, intelligent, and voluntary and courts generally will indulge every reasonable presumption against waiver of this fundamental right.

Appellant's waiver of counsel failed to meet these standards due to the trial court's misleading instruction to Appellant as to what standards Appellant would be held and what role the trial court would take if Appellant proceeded on his own.

When engaging in a dialogue with Appellant regarding self-representation, the trial court told Appellant that, while he would be required to follow rules, the court would

> . . . try to make clear to you what these are, but nonetheless, you're going to have to follow the same rules as everybody else.

(R176) The court promised Appellant he could present evidence to him that the jury would not hear. (R185-86) The court told Mr. Lockhart he would be allowed to ". . . read almost anything to the jury" instead of requiring live testimony (R188) The court promised Mr. Lockhart "considerable latitude as to what goes to the jury." (R189)

What the court promised vastly differed from his later rulings. First, the court did not explain his rulings to Appellant. Often, when Appellant attempted to ascertain why the State's objections were sustained, the Court would only state that the ruling was made. At no time did the court make clear to Appellant the rules of procedure and evidence, and it was never made clear to Appellant what was necessary for the preservation of issues for appellate purposes. The court failed to "make clear" to Appellant what any of the rules were, and it is clear from this record that Appellant had a totally inadequate understanding of the rules.

The court certainly did not give Appellant considerable latitude in the presentation of evidence. Ultimately, the court limited Mr. Lockhart from presenting any evidence unless he took the stand. (R541-44) Not only did the court not grant Appellant wide latitude, but the court's ruling were contrary to what Mr. Lockhart believed he would be able to do. (R544-551) For example, Appellant believed he would be able to present Janet Lockhart's statement without calling up any witnesses. The court's earlier statements clearly implied Appellant would be permitted to do this. However, when Appellant attempted to do so, the court would not

allow the statement absent Appellant testifying. This ruling was in direct contradiction to the court's prior promise.

The court's representations to Mr. Lockhart that he would be assisted by the court and given considerable latitude were obviously relied upon by Appellant and factored into his decision to proceed pro se. Appellant's reliance on these implied false benefits render Appellant's waiver involuntary. The trial court's promises of "considerable latitude" and instruction on procedure and the "rules" were not an accurate portrayal of the dangers and disadvantages of self-representation. Based upon the trial court's statements, Appellant could have reasonably believed the judge was going to explain the rules to him, guide him through the proceedings, and ensure issues were preserved appropriately. Believing the judge will help you comes quite close to making self-representation appear to be a preferable alternative to a court-appointed lawyer, especially one who had previously admitted he was overworked and underprepared. Appellant's decision was not made with open eyes as to the true picture of the standards he would have to meet. Appellant has established, at minimum, that a reasonable presumption exists that the waiver was invalid because it was obtained as a result of misleading information about the realities of self-representation. Appellant is entitled to new proceedings with counsel.

ISSUE III

THE TRIAL COURT ERRED IN RESTRICTING APPELLANT'S VOIR DIRE EXAMINATION AND IN DENYING APPELLANT'S CAUSE CHALLENGE TO JURORS LEE AND GILLMAN.

A. Restriction of Voir Dire

"In Florida a reasonable voir dire examination of prospective jurors by counsel is assured by Florida Rule of Criminal Procedure 3.300(b)." Williams v. State, 424 So. 2d 148, 149 (Fla. 1982). A criminal defendant has a constitutional right to a fair trial and an impartial jury. "The purpose of voir dire is to remove prospective jurors who will not be able to impartially evaluate the evidence." Conners v. United States, 158 U.S. 408, 413, 15 S.Ct. 951, 953, 39 L. Ed. 2d 1033 (1895).

A meaningful voir dire is critical to effectuate a defendant's constitutionally guaranteed right to a fair and impartial jury. A meaningful voir dire "should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case seem to require . . . ." Lavado v. State, 469 So. 2d 917, 916 (Fla. 3d DCA 1989) (Pearson, J. dissenting) [quoting, Pinder v. State, 27 Fla. 370, 375, 8 So. 837, 839 (1981)], dissenting opinion adopted, Lavado v. State, 492 So. 2d 1322 (Fla. 1986). A meaningful voir dire is essential in order to permit the defendant to not only ascertain which potential jurors are excludable for cause, but also to exercise informed peremptory challenges. "The examination of a juror on voir dire has a dual purpose, namely to ascertain whether a legal cause for challenge exists and to also

determine whether prudent and good judgment suggest the use of a peremptory challenge." Mitchell v. State, 458 So. 2d 819, 821 (Fla. 1st DCA 1984). A voir dire which has the effect of impairing a defendant's ability to exercise his challenges does not comport with "the essential demands of fairness." United States v. Rucker, 557 F.2d 1046, 1049 (4th Cir. 1977); Lavado, supra.

The trial court refused to permit Appellant to voir dire the panel concerning the strengths of their belief in the death penalty (R357-59), their religious beliefs (R272-73), and their preconceived opinions about what was an appropriate punishment in this case. (R312) In most instances the trial court's ruling was based upon his feeling that these types of questions were irrelevant. (R274, 358-59) The trial court's rulings were incorrect. The restrictions imposed substantially impaired Appellant's ability to intelligently exercise peremptory challenges and to adequately determine which jurors were cause excludable.

The strength of a potential juror's belief in the death penalty is clearly an area which must be subject to examination. Jurors who believe so strongly in capital punishment that they will impose a death sentence automatically are cause-excludable. Morgan v. Illinois, 504 U.S. ___, 119 L. Ed. 2d 492, 112 S. Ct. ___ (1992); Bryant v. State, 601 So. 2d 529 (Fla. 1992). Jurors who give equivocal expressions of their views on capital punishment can properly be excluded by the use of peremptory challenges. For example, in Williams v. State, 622 So. 2d 456 (Fla. 1993), the defendant claimed the State had improperly exercised a peremptory challenge

against a black juror. This Court upheld the exclusion, finding the prosecutor's claim that he believed she was equivocal on the death penalty but not Witherspoon excludable was a race-neutral reason. Again, in Atwater v. State, 626 So. 2d 1325 (Fla. 1993), the exclusion of the sole black person in the venire by the State was upheld by this Court where the State argued that the juror's demeanor and difficulty in answering questions indicated she was hesitant and uncomfortable regarding the death penalty. See also, Valle v. State, 581 So. 2d 40, 43-41 nn.3 & 4 (Fla. 1981); Green v. State, 583 So. 2d 647 (Fla. 1991). Certainly, if the strength of belief in capital punishments can be utilized by the State as a basis for exclusion of jurors, a defendant should be afforded the same opportunity to exercise peremptory strikes against those he feels would cast a vote for death too quickly. Appellant was completely precluded from being able to consider this critical information about the jury when deciding whom to exclude by the court's refusal to permit Appellant to inquire into the strength of their commitment to capital punishment.

An individual's religious beliefs are also relevant to the making of an informed exercise of peremptory challenges. Various denominations take differing positions on capital punishment. Religious beliefs greatly influence a person's feelings on the sanctity of life and capital punishment. For example, a person who believes in "an eye for an eye" Old Testament theology may be more inclined to impose a death sentence than someone who believes to "turn the other cheek" is more appropriate. Certainly, if given

two persons with beliefs on each end of that spectrum, a defendant would wish to exclude the former. A person's religious denomination has been held to be a basis for race-neutral exclusion by this Court in Happ v. State, 596 So. 2d 991 (Fla. 1992) (black juror who was Catholic and a psychology teacher was valid race-neutral basis for exclusion by State). A lack of membership in religious organizations can also serve as a basis for exclusion through the use of a peremptory challenge. Mitchell v. State, 622 So. 2d 1156 (Fla. 5th DCA 1993). Appellant should have been permitted to question the venire on their religious beliefs and affiliations in order to intelligently determine whom he wished to excuse peremptorily.

Lastly, the Court precluded Appellant from questioning the venire about their preconceived ideas about Appellant and this case. "A juror 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). The trial court's ruling completely precluded Appellant from determining which jurors were impartial. In some instances, cause challenges may have been appropriate. See B, below. Absent a thorough and meaningful voir dire on the venire's preconceived attitudes concerning Appellant, an impartial jury was an impossibility. Appellant's case must be reversed and a new jury impaneled.

B. Excusal for Cause

The trial court should have excused Jurors Lee and Gillman for cause. When there is any reasonable doubt as to a juror's possessing the requisite state of mind to render an impartial verdict,

the juror should be excused. Singer v. State, 109 So. 2d 7 (Fla. 1959); accord Bryant v. State, 601 So. 2d 529, 532 (Fla. 1992); Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989); Moore v. State, 525 So. 2d 870, 872 (Fla. 1988). This Court noted in Hamilton that the Singer rule must be read together with the test set out in Lusk v. State, 446 So. 2d 1038, 1040 (Fla.), cert.denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984):

> The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely on the evidence presented and the instructions on the law given to him by the judge.

When a juror's preconceived opinions give rise to a reasonable doubt as to his or her ability to render an impartial verdict, that juror should be excused. The impartiality of the finders of fact is an absolute prerequisite to our system of justice. Close cases should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality. See Longshore v. Fronrath Chevrolet Inc., 527 So. 2d 922 (Fla. 4th DCA 1988); Sydleman v. Benson, 463 So. 2d 533 (Fla. 4th DCA 1985); Frazzalari v. City of West Palm Beach, 608 So. 2d 927 (Fla. 4th DCA 1992). Thus, "a juror's statement that he can and will return a verdict in accordance with the evidence submitted and the law announced at trial is not determinative of his competence, if it appears from other statements made by him . . . that he is not possessed of a state of mind which will enable him to do so." Singer, 109 So. 2d at 24.

Mrs. Lee initially indicated to the State that she was unsure that she could set aside any preconceived ideas about this case and

the death penalty. (R238) This was due to her working with the victim's uncle for the last seven years and having a child the same age as the victim. (R238) The Court then asked Lee if she could be fair and impartial since the court would impose the sentence, not the jury. (R239) The court told Ms. Lee "the most you will be asked to do is to recommend the death penalty. The decision as to the imposition of sentence is mine and mine alone. So, none of you will have that moral responsibility of determining what happens in this case. That's mine." (R239) Lee then stated she thought she could be fair and impartial.

When questioned by Appellant, Ms. Lee admitted to discussing with her husband within the last two weeks whether Appellant should live or die. (R276) She had thoughts of "anger" and believed "everyone" felt Appellant should die when first hearing about the case. (R276) The court refused to permit Lee to answer what her preconceived opinion as to sentence was. (R311-12)

Although Ms. Lee did not answer the ultimate question, there is little doubt as to what that answer would be. She stated she felt like Mr. Gillman, who opined Appellant should die. Clearly, Ms. Lee entered the courtroom believing Appellant should die. Her belief that she could be impartial was based upon an improper explanation of her duties as a juror by the court.

In all likelihood nothing presented could have changed her mind. That, however, is not what is required; rather "it is not enough that an opinion will readily yield to the evidence, for evidence of innocence is not required to be presented by the accused."

Singer, 109 So. 2d at 24. Lee, due to her preconceived beliefs, should have been removed for cause. Her prior statements clearly indicated Appellant would have to "prove" that he should live. Her statements, contrary to her assertion of impartiality, belie her ability to be so. Lee was obviously convinced, prior to her service, that Appellant should die and nothing in the record indicates that she had or could overcome this.

Mr. Gillman should also have been excluded for cause. He, too, stated that if asked last week, he would have "impersonally" stated Appellant should be executed. (R300-01) He would only change his mind if proper evidence was presented. (R303) In addition, Mr. Gillman was a retired police officer. It would only be natural for him to have strong feelings about the murder of a fellow officer, which in this case had occurred in one of the collateral offenses. Gillman also stated he had rather not sit on the jury. (R304)

The Court undeniably recognized the unsuitability of Lee and Gillman. When Appellant argued that Lee and Gillman were cause excludable, the Court responded:

> THE COURT: The cause for which you make reference may very well be sufficient to discharge these jurors if we were talking about the guilty or not guilty phase of the trial. In a penalty phase, there are different considerations used to determine whether a juror would be fair and impartial.
>
> The fact that the juror knows about the case, the fact that the juror has information, perhaps you can ask personal opinions about the case, is not relevant on the penalty phase. The relevancy is as to whether or not they'll apply the aggravating circumstances and the other mitigating circumstances that

> will be presented and they'll apply it to the facts as they find them. Every one of the jurors has so far indicated they are.
>
> The questioning which you're now doing, you have indicated was cross-examination, you don't cross-examine a juror. You ask questions of a juror during voir dire.

(R313-314)

The trial court's reasoning that different considerations are used to determine whether a jury is fair and impartial in a penalty phase as opposed to the guilt phase were wrong. Each phase demands jurors who are able to set aside preconceived beliefs about the case and able to honestly evaluate the evidence presented to them and then apply the law to it in a just fashion. Morgan v. Illinois, 504 U.S. ___, 112 S. Ct. ___ 119 L. Ed. 2d 492, 502 (1992); Bryant v. State, 601 So. 2d 529 (Fla. 1992). Jurors Lee and Gillman did not possess those abilities and should have been stricken for cause.

Appellant was required, however, to exercise peremptory challenges to remove them from the jury. This reduced the number of peremptories available to Appellant. Counsel acknowledges that in Hill the court required an exhaustion of peremptory challenges in order to find error. The State will most likely contend that because Appellant did not use his final two peremptory challenges that he is not entitled to relief. Appellant, while recognizing this rule,[1] respectfully submits that he is entitled to relief

[1] Trotter v. State, 576 So. 2d 691 (Fla. 1990). The Trotter standard requires that in order to preserve the issue of cause challenges for appeal a defendant must identify which juror is objectionable, that juror must serve, and the defendant must have exercised all of his peremptory challenges.

based upon the unique factual considerations in this case. It is Appellant's position that as a defendant appearing pro se the issue was preserved for appeal as well as could be expected within the confines of the trial court's ruling when Appellant was seeking to exercise cause challenges.

It is reversible error to force a party to use peremptory challenges on jurors who should have been excused for cause. Hill v. State, 477 So. 2d 553 (Fla. 1985).

When Appellant had exercised all but two of his peremptory challenges, the following exchange occurred:

> THE DEFENDANT: Your Honor, if I use my two strikes, that means I am forced to go with the next two jurors, no matter what; am I correct?
>
> THE COURT: That's correct.
>
> THE DEFENDANT: If I choose to strike these two jurors, it would be at that time where I would approach the bench and ask Your Honor that I be given more strikes, because I feel that this jury here is definitely not a fair and impartial jury. I feel that I have -- I have proven without a reasonable doubt that the majority of these people have heard about this case, have already reached a conclusion on my case. We had two of them state that they thought I was guilty, but since now they're in front of this courtroom, they tell you that they can follow your opinion.
>
> Your Honor, they can't change their opinions because you tell them to follow the law. And I feel that you're being very unfair, because you're not giving me anything for cause. I believe that it's -- as it stands right now, I have got four people there, four on cause.
>
> THE COURT: Your request for additional strikes is denied.
>
> THE DEFENDANT: Will you give me any cause?

THE COURT: The Court does not explain its ruling.

THE DEFENDANT: Can I try to strike someone for cause?

(R414-415)

The trial court's pronouncements to Appellant as to what would happen if he exercised his last two challenges was a blatant misstatement of the law.

The law is simply not what the court told Appellant it was. The court told Appellant that if he used his peremptories, the next two individuals called would sit on the jury. The trial court did not tell Appellant that he would be able to question them to determine if they were excludable for cause, which Appellant would have been entitled to do. Appellant was led to believe by the court that the next two were on the jury, period. For all Appellant knew, the next called jurors could have been the victim's grandparents, neighbors, or best friends. They could have been jurors who would fail to follow the law and automatically impose the death penalty with no consideration to mitigation. The next to be called were potentially far more objectionable, biased, or prejudiced than those currently seated. No matter, according to the court, they would be the jury. Given the trial court's instruction Appellant had no reasonable alternatives other than to proceed as he did. Quite literally, Appellant was damned if he did and dammed if he didn't. Appellant should not have been expected to accept jurors he believed he would have no ability to question.

Appellant should not be expected to have used his last challenges and then asked again for more. A defendant, to preserve an issue for appellate review, is not required to engage in futile motions. Spurlock v. State, 420 So. 2d 875 (Fla. 1982). The record is crystal clear that the court was not going to grant any additional challenges. Any further attempts by Appellant to obtain a different ruling would have been an exercise in futility.

The recent case of Hopkins v. State, 19 FLW S 162 (Fla. Jan. 20, 1994), indicates that the requirements of objection are intended to provide trial judges a sort of due process against reversal rather than to pad an appellate record with futile formalities. Counsel is not required to do a useless act in the face of an already unfavorable ruling and neither should a pro se defendant. See also, Reaves v. State, 531 So. 2d 401 (Fla. 5th DCA 1988).

A pro se defendant who relies upon the direction of the court should not be put to unfair disadvantage nor should he be required to proceed at his own peril when his decisions are based upon erroneous instruction from the bench.

Appellant relied, to great prejudice and to his detriment, upon the trial judge's misstatement of the law. The court's ruling that he would be required to have the next two persons seated on his jury left Appellant no choice but to keep the panel he had at least questioned. The court did not explain to Appellant the rules regarding the exhaustion of challenges for preservation, thus Appellant had no way to make an informed decision.

Neither should Appellant have been forced to chose between accepting jurors he had not been allowed to even question to determine their impartiality or preserving his appellate rights. A defendant should not have to choose between two fundamental co-existing rights.

Requiring Appellant to comply with Trotter under the untenable circumstances of the judge's ruling unjustifiably puts form over substance. This Court observed in Mancini v. State, 273 So. 2d 371, 373 (1973): "As important as procedure may be, it must yield to substance where manifest injustice appears." And, in the case of In re Gottschalk's Estate, 143 Fla. 371, 196 So. 844 (1940), it was observed:

> . . . The administration of justice is the most precious function a democracy is called on to perform and no rule of procedure was ever intended to defeat it. Courts must have rules to guide them in the performance of this function, but it has never been considered improper to toss right and common sense in the scales and weigh them with the evidence to reach a just result. Rules of procedure are as essential to administer justice as they are to conduct a baseball game, but they should never be permitted to become so technical, fossilized, and antiquated that they obscure the justice of the cause and lead to results that bring its administration into disrepute.
>
> Rules of procedure are of value only as they point the path to justice or lead the litigants to the truth of the controversy. Any other purpose in their observance is beside the question. There is nothing sacrosanct about them, they should never be permitted to overshadow the main purpose of the litigation, to lead the Court to detachment from the more vital issues or to absorption in shop worn technicalities that defeat the very purpose of the litigation.

Appellant was put into an untenable position by the trial judge. He should not be penalized by the trial court's blatantly wrong ruling. Thus, under the facts presented in this case, this Court must find that the denial of cause challenges was adequately preserved for appeal. Appellant is entitled to a new penalty phase before an impartial jury.

ISSUE IV

THE TRIAL COURT'S STATEMENTS TO THE VENIRE CONSTITUTED AN IMPROPER DENIGRATION OF THE JUROR'S SENTENCING RESPONSIBILITIES IN A CAPITAL PROCEEDING REQUIRING REVERSAL FOR A NEW PENALTY PHASE.

During the voir dire examination, Juror Lee was asked by the prosecutor if she could set aside her preconceived beliefs and be impartial. (R239) When Lee indicated she was unsure of her ability to do this, the Court responded:

> Counsel, let me interrupt one question. I want to make sure the jurors understand: You will never be asked to impose the death penalty. The most that you will be asked to do is to recommend the death penalty. The decision as to the imposition of sentence is mine and mine alone. So, none of you will have that moral responsibility of determining what happens in this case. That's mine.
>
> I am sorry to interrupt you, but I don't want any juror to feel that you are ever going to be called upone to determine the sentence. What you're called upon to do is to recommend the sentence. I impose the sentence.

(R239)

The trial court's admonishment to the jury improperly minimized their role in the capital sentencing process.

The U.S. Supreme Court in Caldwell v. Mississippi, 472 U.S. 320, 86 L. Ed. 231, 105 S. Ct. 2633 (1985), held that the jury's role in the capital sentencing scheme cannot be minimized. The Court ruled that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for the defendant's death rests elsewhere. Caldwell, 86 L. Ed. at 239.

The trial court's statements to the jury clearly impermissibly minimized the sentencing responsibilities of the jury. The court informed them they had no "moral responsibility" for what happened. They would "at most" recommend death. Those statements are clearly not the law. They did not acknowledge the importance of the jury as a co-sentencer, nor did they acknowledge that the court is required to give the jury recommendation great weight. The jury was not told that their recommendation must be made with the appropriate amount of gravity, that they should carefully weigh and consider the mitigation and aggravation.

Appellant acknowledges this Court's opinion in Grossman v. State, 525 So. 2d 833 (Fla. 1988), which rejects Caldwell in Florida on the theory that the jury in this State is not the actual sentencer so that there is nothing improper about such instructions. The federal courts have not adopted this point of view. Grossman, however, is contradicted by the United States Supreme Court decision in Espinosa v. State, 505 U.S. ___, 120 L. Ed. 2d 854, 112 S. Ct. ___ (1992). In Espinosa, the Court found that the jury in Florida operates as a co-sentencer. Espinosa refers to the judge and jury as "co-actors." Espinosa, 120 L. Ed. 2d at 859. In Mann v. Dugger, 817 F. 2d 1471, rehearing granted and opinion vacated, 828 F. 2d 1498, on rehearing, 844 F. 2d 1446, cert. denied, 109 S. Ct. 1353, 489 U.S. 1071, 103 L. Ed. 2d 1141, modified on denial of rehearing, cert. denied, 113 S. Ct. 1063 (1987), a case arising from Florida, the Eleventh Circuit reversed Mann's sentence of death because the jury had been misled as to its' critical role

in sentencing. In Mann, the prosecutor told the jury that the death penalty was "not on your shoulders" and the court instructed the jury that sentencing came solely from the judge.

In this case, the court said basically the same thing -- no "moral responsibility" as opposed to "not on your shoulders." Even more egregious than in Mann was that the statements in Appellant's case were literally instructions to the jury from the bench and not just statements by the prosecutor.

A second reason compelling reversal in Appellant's case due to the improper statements of the court is Appellant's status as a pro se defendant. A trial judge should take great care to be scrupulously correct on matters of law where dealing with a pro se defendant. A pro se defendant is at an obvious disadvantage in the courtroom, in particular where nuances of law and procedure are at issue. When the trial court instructs a jury on the law, the pro se defendant's natural and logical expectation should be that the court's instructions are clear and correct, not vague, misleading, or a misstatement of the law.

Appellant had little way to know the trial judge's instructions to the jury were improper. If he could not depend upon the trial court to abide by the law and give proper instructions, what was he to do? The court is to be impartial. A defendant should not have to defend himself against the court as well as the prosecutor.

Appellant should have been able to rely on the trial court to properly state to the jury their duties and responsibilities in the

captial sentencing process. Even though Appellant did not object on the record to the judge's misstatements, his status as a pro se defendant should vitiate that requirement. A new penalty phase before a new jury must be ordered.

ISSUE V

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE UNRELIABLE HEARSAY TESTIMONY DURING THE PENALTY PHASE PROCEEDINGS WHICH APPELLANT HAD NO OPPORTUNITY TO REBUT, AND IN DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO CONFRONT THAT WITNESS AS QUARANTEED BY THE 6TH & 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, § 16, OF THE FLORIDA CONSTITUTION.

Generally, hearsay is inadmissible. However, in the capital sentencing proceeding, Section 921.141(1), Florida Statute (1993), permits the introduction of "any evidence which the court deems to have probative value . . . provided the defendant is accorded a fair opportunity to rebut any hearsay statements." The Sixth Amendment requires that hearsay evidence must be reliable to be admissible. Maryland v. Craig, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666, 682 (1990).

Even though hearsay may be admitted, the defendant's rights to confront and cross-examine the witness against him still apply. Engle v. State, 438 So. 2d 803 (Fla. 1983); Walton v. State, 481 So. 2d 1197 (Fla. 1986).

Thus, even though hearsay may be admitted, it can be done so only if the defendant is afforded certain constitutional protections. If the defendant does not have a fair opportunity at rebuttal or his Sixth Amendment rights are violated, the hearsay testimony is inadmissible.

Appellant was not afforded a fair opportunity to rebut the hearsay testimony of Detective Fay Wilbur and the trial court so

severely limited Appellant's ability to cross-examine Wilbur that Appellant was unable to meaningfully exercise his Sixth Amendment right to confrontation of witnesses.

The State used Detective Faye Wilbur to introduce evidence concerning the other violent felonies Appellant had been convicted of, specifically the Indiana and Texas homicides. Detective Wilbur claimed to have been a spectator as parts of both trials. Wilbur admitted he was present only at the end of the Texas and Indiana trials. (R494,497) Wilbur also admitted that he only knew "the facts that concerned him" (R502) and could "care less" about anything else in those trials which he had not felt was important to his case. Wilbur's limited knowledge and absolute determination to testify only to the facts he considered relevant rendered his hearsay testimony inherently unreliable.

Appellant objected to Detective Wilbur's recitations, which are summarized as follows:

Wilbur was permitted to give detailed descriptions of eight crime scene photos from Indiana which depicted the victim, Windy Gallagher. (R484-85) Wilbur also gave his opinion that the whole crime (in Indiana) was sex. (R488) The State, through Wilbur, entered into evidence the judgment and sentence from Indiana, but, despite Appellant's request, did not introduce the amendment of charge. (R489) The amendment had deleted any claims of sexual battery from the Indiana homicide. (R490) On cross, Wilbur stated he had no idea what a charge amendment was. He stated he left those things to his attorneys:

A. I wasn't concerned with what the attorneys were doing up there. I was concerned about what happened to Windy Gallagher and how it pertained to our case.

Q. Well, have you gone over the Indiana case, Mr. Wilber? Have you read the medical reports from Indiana?

A. Sure.

Q. Have you read the police reports from Indiana?

A. Sure have.

Q. Does it say anything in there about sexual assault?

A. I don't think they had to. All you have to do is look at the photographs.

Q. Well, are you saying it took place?

A. Yes.

THE DEFENDANT: Okay. I am asking the District Attorney, Your Honor, to provide medical statements right now saying the girl was raped.

THE COURT: Request is denied.

Q. (By the Defendant) Let me refresh your memory for you, Mr. Wilbur. Amendment of charge in Indiana stated that a robbery occurred, and they could not prove that, and also that I already killed somebody in the State of Texas. Now, I appreciate your opinion, in your own words, that the girl was sexually assaulted, but that is your opinion; is that correct?

A. That's my opinion. I believe that, yes.

Q. Okay. Thanks. Going to Texas. Were you there for the three-month trial?

A. No. I was there towards the end of the trial.

> Q. What did the defendant plead in this case?
>
> A. That wasn't my concern. My concern was how the killing --
>
> Q. Did he plead guilty? Did he plead self defense? Come on, Mr. Wilber. You should know.
> A. Why should I know? All I am concerned with is what happened.

(R496-97)

Wilbur continually claimed he was not concerned or knew nothing about Appellant's theory of defense in the Texas case, claiming it was, once again, not relevant to him. (R497-502)

Wilbur stated the only thing of concern to him was that the red Corvette Appellant was driving in Texas during the time of the homicide provided him with a link to the instant case. (R500,501) Wilbur stated he could care less about any other facts besides that an officer had died. (R500-502)

Wilbur's testimony should not have been permitted because it was too unreliable, and quite likely, factually incorrect.

A heightened reliability is required in cases involving the death penalty. In Lockett v. Ohio, 438 U.S. 586, 605, 57 L. Ed. 2d 973, 98 S.Ct. 2954 (1973), the U.S. Supreme Court explained:

> On the other hand, because there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'

See also, Zant v. Stephens, 462 U.S. 862 (1983); Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Sumner v. Shuman, 483 U.S. 66, 72 (1987).

Wilbur's testimony failed to meet the heightened reliability standard required in death cases and, as a result, violated Appellant's constitutional rights as guaranteed by the 5th, 6th, 8th and 14th amendments of the United States Constitution and Article I, §§ 9 & 16 of the Florida Constitution. He admitted he observed only portions of the trial and paid little attention during his limited attendance to those proceedings which he did not deem important. Wilbur's testimony, because of its self-imposed limitation, was unreliable to serve as the basis upon which a sentence of death could be imposed.

Not only was the testimony patently unreliable, but its very nature was such that Appellant had no fair opportunity to rebut it. Wilbur's refusal to remember or to admit to any testimony other than that which served his purpose made rebuttal impossible. Whenever Appellant attempted to elicit factually accurate testimony, Wilbur would simply claim he paid no attention to that portion of the trial because it didn't concern him. Wilbur's refusal to present an accurate or even minimally balanced account of the prior trials made a fair rebuttal through cross-examination an exercise in futility.

For example, when questioned about the veracity of his claim that the victim in Indiana was raped and the whole scene was sex, Wilbur hedged on whether a sexual assault had been alleged in

either the Indiana police or medical reports, stating that "I don't think they had to" (R490), yet went on to insist that, in his opinion, the victim was sexually assaulted. Wilbur refused to relate accurately the evidence at trial.

In another example, Wilbur claimed to have no knowledge of the amendment of charges in Indiana which had deleted any claim of sexual attacks, maintaining he knew nothing of these things, but left them to his attorney. Yet, "those things" were the substantive criminal charges on which Appellant stood trial and Wilbur was held forth by the State as being knowledgeable. Because of Wilbur's tunnel-visioned testimony, Appellant had only two possible ways to attempt to rebut his testimony, neither of which accorded Appellant a fair opportunity to rebut the hearsay statements.

The first possibility was that Appellant could call the pertinent witnesses from each of the prior trials. In the Indiana case this would have been the only alternative because the record transcripts had not been prepared at the time of these proceedings. Calling all the pertinent witnesses to rebut Wilbur's claims and to accurately portray the Texas case would have amounted to nothing less than retrying the collateral crimes in a Florida courtroom. Such a practice has been rejected by this Court in Dragovich v. State, 492 So. 2d 350 (Fla. 1986). In Dragovich, this Court found the State's hearsay evidence during penalty phase was not susceptible to fair rebuttal because fair rebuttal would have resulted in the penalty phase turning into "mini-trials" on the collateral matters. No less would be true in this case.

The second alternative Appellant might have been able to use to rebut Wilbur would have been to testify himself. In Rhodes v. State, 547 So. 2d 1201 (Fla. 1981), this Court rejected this option as being a fair opportunity at rebuttal. In Rhodes, the State introduced a tape-recorded statement made by a victim on a collateral offense. The witness was unavailable to testify. This Court, in rejecting the use of the tape, noted that the only way to rebut the testimony was if Rhodes were to testify. This Court found that Rhodes' Sixth Amendment right to confrontation was not met and rejected requiring him to testify as a means of fair rebuttal.

Whatever unlikely and remote hope Appellant had for any sort of rebuttal through Wilbur himself was completely obliterated by the trial court's unconstitutional restriction of Appellant's cross-examination of Wilbur. When the prosecutor chose to introduce Wilbur's testimony in aggravation, Appellant was constitutionally entitled to cross-examination. As this Court observed in Engle v. State, 438 So. 2d 803, 814 (Fla. 1983):

> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L. Ed. 2d 923 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. Pointer v. Texas. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. Specht v. Patterson.

In the case of Steinhorst v. State, 412 So. 2d 332 (Fla. 1982), this Court detailed the right of cross-examination as follows:

> The right of a criminal defendant to cross-examine adverse witnesses is derived from the Sixth Amendment and due process right to confront one's accusers. One accused of crime therefore has an absolute right to full and fair cross-examination. Coco v. State, 62 So. 2d 892 (Fla. 1953). A limitation on cross-examination that prevents the defendant from achieving the purposes for which it exists may be harmful error.
>
> The proper purposes of cross-examination are: (1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the witness, which may involve, among other things, showing his possible interest in the outcome of the case. Burns v. Freund, 49 So. 2d 592 (Fla. 1950)' Louette v. State, 152 Fla. 495, 12 So. 2d 168 (1943); Leavine v. State, 109 Fla. 447, 147 So. 897 (1933); Padgett v. State, 64 Fla. 389, 59 So. 946 (1912). Therefore it is held that questions on cross-examination must either relate to credibility or be germane to the matters brought out on direct examination. Pearce v. State, 93 Fla. 504, 112 So. 83 (1927); Wallace v. State, 41 Fla. 547, 26 So. 713 (1899).

When Appellant attempted to ascertain Wilbur's knowledge of all the facts in the Texas trial by asking him if he recalled certain testimony, the court halted Appellant's inquiry. The court ordered Appellant to stop making statements, admonishing him that he could only ask questions and instructing Appellant that he could testify later. In effect, the trial court completely stopped Appellant from rebutting Wilbur's statements and informed Appellant that the only form of rebuttal was to take the stand. The trial

court's ruling was clear error and its result was to deny Appellant his constitutional right to confrontation.

There was no basis for the trial court's ruling. First of all, the questions Appellant was asking were entirely proper. Appellant asked leading questions of Wilbur such as:

> Isn't it true that when Paul Halsey spotted a red Corvette, and in Beaumont, that he said he thought it was a known drug dealer? (R498)
>
> Your facts are just not straight on the Texas trial. Tell me. -- (R501) (objection sustained)

This court has specifically approved the use of leading questions on cross and they are specifically sanctioned under Florida Rule of Criminal Procedure 90.612 (Fla. 1993), and in Shere v. State, 579 So. 2d 86 (Fla. 1991).

The information Appellant sought to elicit was the proper subject and within the proper scope of cross-examination. In calling Wilbur, the State not only vouched for his credibility, but held him forth as a reliable repository of information concerning Appellant's two previous trials. Florida Rule of Criminal Procedure 90.608 (Fla. 1993) provides in part:

> (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.

Appellant's questions were within the permissible scope of impeachment. Appellant was not seeking to introduce "new evidence." Every question Appellant asked was in direct reference to matters and facts elicited from Wilbur by the State on direct. Appellant's ability to cross-examine Wilbur was crucial. Wilbur was the State's key witness. The trustworthiness of his testimony was crucial. Cross-examination of such a witness ought to be given wide latitude with every opportunity provided for the defendant to delve into the memory and perceptions of that witness and to impeach him. Mendez v. State, 412 So. 2d 965 (Fla. 2d DCA 1982). Appellant was provided none of these opportunities. Because the trial court so severely restricted his cross-examination of Wilbur and allowed the introduction of unreliable hearsay, a new penalty phase is required with a new jury.

ISSUE VI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO DETECTIVE FAY WILBUR'S TESTIMONY AND PHOTOGRAPHS OF THE COLLATERAL CRIMES DURING PENALTY PHASE WHERE THE COLLATERAL CRIMES BECAME AN IMPERMISSIBLE FEATURE OF THE TRIAL AND THE PREJUDICE OUTWEIGHED THE PROBATIVE VALUE OF THE EVIDENCE.

In a capital sentencing proceeding, the State may introduce testimony as to the circumstances of a prior violent felony conviction, rather than just the bare facts of that conviction. Stano v. State, 473 So. 2d 1281, 1289 (Fla. 1985). See e.g., Elledge v. State, 346 So. 2d 998. 1001 (Fla. 1977); Stewart v. State, 558 So. 2d 416, 419 (Fla. 1990). However, the details cannot be emphasized to the point where the other crimes become a feature of the penalty trial or the prejudice outweighs the probative value. Stano, 473 So. 2d at 1289; Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1981). See also, State v. Bey, 610 A. 2d 814, 833-34 (N.J. 1992); State v. Eraze, 594 A.2d 232, 243-4 (N.J. 1991).

In the instant case, the State called Detective Fay Wilbur and Dr. Joan Woods to testify about the homicides in Texas and Indiana. Additionally, 8 photographs of the victim in Indiana were introduced. Appellant objected vehemently and was granted a continuing objection to the testimony. (R485)

The admission of the eight crime scene photographs in Indiana was clearly wrong. In Duncan v. State, 619 So. 2d 279 (Fla. 1993), this Court found the admission of one gruesome photograph of a prior unrelated murder to be error. Duncan ruled the error was

harmless because it was not urged by the State as a basis for death, nor was it made a focal point of the penalty phase. The error in this case was harmful, distinguishing it from Duncan on that point. Eight photos were used instead of one. Detective Wilbur and Dr. Wood used the photos to highlight gruesome and inflammatory evidence about the Indiana trial. The photos in this case were made a focal point of Appellant's penalty proceeding.

Detective Wilbur's testimony on the murder of Windy Gallagher extended over 20 pages. Wilbur was permitted to describe in detail 8 separate photos of Windy Gallagher. He testified that the binding of Ms. Gallagher's hands was done in such a way as to cause excruciating pain. (R486-87) He characterized the wounds on Gallagher's hands as "It's a torture. It's not to kill . . . . It's just -- it's torture." (R487) Wilbur testified that Windy Gallagher was sexually abused (R484)

Dr. Wood was permitted to compare the instant case with the homicide in Indiana. (R533-37) She detailed the length and depth of the wounds on Windy Gallagher. (R534) Dr. Wood testified concerning the movements of the body and opined these were for sexual activity. (R535)

Detective Wilbur characterized the Texas homicide as execution-style. (R491-92) The jury was told that Officer Halsey was on his way home to have supper with his wife and two children when he stopped to investigate Appellant's car. (R491) Wilbur testified that Officer Halsey was shot once, and as he begged for his life,

was shot again.[2] (R492) Wilbur also stated that Appellant shot Officer Halsey with a weapon that was stolen from another police officer. (R492)

The detailed and extensive testimony given concerning the collateral crimes was entirely unnecessary and its prejudicial impact far exceeds its probative value. It was unnecessary for the detailing of the pain and suffering of the others when all the State had to establish was the existence of those convictions.

In Rhodes v. State, supra, 547 So. 2d at 1204-05 and n. 6, this Court found error in the introduction of a tape recorded statement of a victim in a prior offense

> Although this Court has proved the introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, Tompkins; Stano; the line must be drawn when a violation of defendant's confrontation rights, or the prejudicial value outweighs the probative value. Not only did the introduction of the tape recording deny Rhodes his right of cross-examination, but the testimony was irrelevant and highly prejudicial to Rhodes' case. The information presented to the jury did not directly relate to the crime for which Rhodes was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by the appellant.

In the instant case the emotional testimony detailing the prior homicides went too far. The details were not relevant to the case at hand and amounted to an improper appeal to the emotion of

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[2] Appellant disputed this scenario, claiming that Wilbur was not testifying accurately or truthfully. (R497-501) Appellant attempted to establish that his defense at trial was self-defense and that he did not shoot Halsey while he begged for his life. The propriety of Wilbur's testimony is the subject of Issue V.

the jury. For example, the jury was needlessly informed that Windy Gallagher's hand position was "torture", that Officer Halsey had a wife and two children, or that Officer Halsey begged for his life. Because the prejudicial impact of this evidence so far exceeded its probative value, it should have been excluded or severely limited. Because it was not and due to the other errors occurring during the penalty phase, the Appellant's sentence must be reversed and a new penalty proceeding must be conducted before a new jury.

ISSUE VII

THE TRIAL COURT IMPROPERLY RESTRICTED APPELLANT IN PRESENTING EVIDENCE IN MITIGATION TO THE JURY.

The sentencer in a capital case must consider all relevant mitigating factors. In Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1973), the U.S. Supreme Court recognized that death sentences demand a greater degree of reliability. "The heightened reliability standard is met only where the sentencer is not precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 57 L. Ed. 2d at 990. In Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1, (1982), the Court further held that not only is a sentencer required to examine mitigation, but he is required to give it weight and cannot exclude mitigation evidence by assigning it no weight.

Inherent in the requirements of Lockett and Eddings is that the defendant be able to produce and present mitigation to the sentencing court. Absent the ability to investigate, prepare, and present mitigating factors the requirements of Lockett and Eddings are hollow.

This Court, in Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), announced that it must examine the proportionality and appropriateness of each death sentence. Such review is only possible where mitigation has been developed and presented.

The trial court in this case so severely restricted Appellant's ability to present mitigation that the constitutional requirements of Lockett, Eddings, and Fitzpatrick have been violated. A series of rulings and orders issued by the court effectively deprived Appellant of his ability to present mitigation.

The first of these barriers was an order entered by the trial court pursuant to appointed counsel's motion for directions. Following the court's acceptance of a guilty plea from Appellant, counsel moved to withdraw. This motion was denied and counsel was ordered to remain. Counsel then requested directions from the court as to what he was to do for Appellant. Counsel stated he believed Appellant did not wish him to investigate the case and develop mitigation. See Koon v. Dugger, 619 So. 2d 246 (Fla. 1993) (requiring defense counsel to inform court of mitigating evidence despite defendant's waiver). The court instructed counsel that he was to do only what Appellant directed him to do and entered an order which precluded the county (obviously through the public defender) from expending funds for "investigation or expenses for depositions unless directed or requested by the Defendant." (R60)

At the beginning of the penalty phase, counsel requested that a witness, Janet Lockhart, be present to testify. Counsel made these representations after the court permitted him to withdraw as counsel. Appellant then requested of the court that Janet Lockhart's presence be obtained, if necessary through extradition. (R187) The court refused, but promised that Mr. Lockhart could

read her former statement to the jury. (R188) The court later refused to permit this.

Finally, the court ruled that Mr. Lockhart could present evidence only if he testified. (R542) Mr. Lockhart had sought to introduce to the jury Janet Lockhart's statement and rebuttal evidence concerning the Texas and Indiana homicides. (R547-551)

The order entered by the court regarding the rule of defense counsel is shocking. It absolutely prevented defense counsel from providing even minimal assistance of counsel. See Heiney v. State, 620 So. 2d 171 (Fla. 1993) (counsel found ineffective for failing to attempt to develop a case in mitigation). Counsel could have investigated and prepared a case so that if Appellant desired, evidence could be presented. The order halted any possibility of an adequately prepared defensive presentation. The record glaringly reflects the inadequate investigation of mitigation. Appellant, when confronted with having to testify in order to present anything in mitigation, was so taken aback that he had failed to bring or even prepare notes. Ultimately, he chose not to testify; however, had Appellant had at his disposal a well-investigated case in mitigation he may have chosen to proceed.

The trial court's refusal to extradite Janet Lockhart, coupled with his refusal to admit her statement after promising to do so, was grossly unfair. Appellant accepted the court at his word, that Janet Lockhart's statement would be allowed, only to later be refused. The trial court's ruling that it would not come in absent Appellant testifying forced Appellant to choose between two compel-

ling rights -- his Fifth Amendment right to silence and to not testify and his 8th and 14th amendment rights to a reliable determination of sentence. Such an untenable choice has been rejected by the courts. See State ex rel. Wright v. Yawn, 320 So. 2d 880, cert.denied, 334 So. 2d 609 (1976).

Certainly, other methods of introduction were available to Appellant, such as judicial notice or the calling of other witnesses, yet these were not offered by the trial court. Even more egregious was that prior promise made by the court to Appellant that he could "read almost anything to the jury." Appellant relied on this promise to his great detriment. Had the court not first promised to allow the statement with no restrictions, Appellant could have insisted on the witness being present or the officer who took the statement. He could have had much greater notice with which to consider testifying and to plan and reflect on his testimony.

The trial court's rulings precluded Appellant from developing and presenting mitigation. Thus, a new penalty phase is required.

ISSUE VIII

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO COUNSEL IN FAILING TO ADEQUATELY RENEW THE OFFER OF COUNSEL TO APPELLANT BEFORE THE FINAL SENTENCING HEARING THEREBY VIOLATING APPELLANT'S RIGHT TO COUNSEL.

A capital case in Florida is comprised of three separate and distinct stages: (1) The trial, during which guilt or innocence is determined; (2) The penalty phase before the jury; and (3) the final sentencing before the judges. The requirements of due process apply to each of these proceedings. Engle v. State, 438 So. 2d 803 (Fla. 1983). The entitlement to counsel embodied within the due process guarantees of the Federal and State constitutions also applies at each of these critical stages and, if a defendant chooses to proceed without counsel, there must be a constitutionally firm waiver at each of the three stages. See U.S. Const. amend. 6 and 14; Art. I, §16, Fla. Const.

Upon being charged with a crime, a defendant:

> . . . is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel. At the commencement of each such stage, an unrepresented defendant must be informed of the right to counsel and the consequences of waiver. Any waiver of this right must be knowing, intelligent, and voluntary, and courts generally will indulge every reasonable presumption against waiver of this fundamental right. Where the right to counsel has been properly waived, the State may proceed with the stage in issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented.

Traylor v. State, 596 So. 2d 957, 958 (Fla. 1992) [footnote omitted]. Traylor requires that each waiver must be intelligently and voluntarily made.

This basic premise is also codified in Florida Rule of Criminal Procedure 3.111(d)(5), which provides:

> If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

See also Pall v. State, 19 Fla. L. Weekly D450, 451 (Fla. 2d DCA 1994)

In order for the waiver of the right to counsel at any stage to be knowing, intelligent, and voluntary, the trial court must comply with the requirements of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975). Faretta requires that the defendant

> . . . should be made aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with eyes open.

Faretta, at 835, 95 S.Ct. at 2541.

This First District Court of Appeal has held that for a waiver to be voluntary the trial court is required

> to make the defendant aware of the benefits he must relinquish, and the dangers and disadvantages of self-representation. Thereafter the trial court must determine whether defendant has made his choice voluntarily and intelligently. We have further held that the trial court should determine whether unusual circumstances exist which would cause the accused to be deprived of a fair trial if permitted to conduct his own defense, and that the purpose

> of such inquiries, such as the accused's age, mental derangement, lack of knowledge, education or inexperience in criminal proceedings, is to make certain that defendant is aware of the disadvantage under which he is placing himself by waiving counsel. [Citations omitted]

Smith v. State, 444 So. 2d 542, 545 (Fla. 1st DCA 1984).

The trial court in the instant case failed to obtain a constitutionally sound waiver of counsel from Appellant prior to his sentencing. At the sentencing hearing on December 12, 1989, the court noted Appellant had previously proceeded without counsel and asked if he now wished counsel. Appellant responded, "No" and no further inquiry was made by the trial court. The trial court failed to advise Appellant of the dangers of self-representation at this third crucial stage. Thus, there was no knowing and intelligent waiver demonstrated on the record.

Even though the Court had previously engaged in a Faretta-based inquiry with Appellant prior to the penalty phase, that does not vitiate the requirement for a new inquiry. See, Pall, supra, Billions v. State, 399 So. 2d 1086 (Fla. 1st DCA 1981).

The failure to renew the offer of counsel prior to sentencing requires reversal for resentencing. Billions v. State, supra; Baranbo v. State, 406 So. 2d 1271 (Fla. 1st DCA 1981); Tucker v. State, 440 So. 2d 60, 61 (Fla. 1st DCA 1983); Smith v. State, 444 So. 2d 542, 547 (Fla. 1st DCA 1984).

In this case, the trial court's failure to meaningfully renew the offer of counsel and to advise Appellant of the dangers of self-representation in a sentencing proceeding violated Appellant's

rights under the Federal and State Constitutions and under Rule 3.111(d)(5) to the assistance of counsel at every critical stage of the proceedings. For this reason, Appellant's death sentence must be reversed.

ISSUE IX

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND WEIGH THE MITIGATING EVIDENCE AVAILABLE IN THE RECORD.

This Court has charged the trial courts with the responsibility in the capital sentencing scheme to "expressly find, consider, and weigh in its written order all mitigating evidence . . . , both statutory and non-statutory, apparent anywhere on the record . . ." Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993) (emphasis in opinion) citing Rogers v. State, 511 So. 2d 526 (Fla. 1987); Campbell v. State, 571 So. 2d 415 (Fla. 1990); and Santos v. State, 591 So. 2d 16 (Fla. 1991).

Despite the defendant's desires, "This requirement applies with no less force when the defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence." Farr v. State, 621 So. 2d 1368 (Fla. 1993).

In Farr, the trial court considered Farr's apparent intoxication at the time of the crime (which he erroneously found to be non-mitigating), but ignored other mitigating evidence present in the PSI and a psychological evaluation. Even though Farr had waived a penalty jury and asked to be sentenced to death, this Court vacated that sentence and remanded the case. The trial court was directed to conduct a new penalty phase hearing and to weigh all mitigating factors against the aggravating. In his concurrence, Justice Harding noted:

> The sentencing order does not reflect consideration of any mitigation. It is clearly the responsibility of the trial judge to affirma-

> tively show that all possible mitigation has been considered and it is error to fail to do so. In this case it is difficult to rule that the trial judge erred when he considered and did exactly what the defendant requested him to do. Yet, we have no alternative under our responsibility to review the record of each case to insure that the propriety of the sentence has been established according to law.

Farr, at 1371 (emphasis in opinion).

In Pettit v. State, 591 So. 21d 618, 620 (Fla. 1992), this Court held that although it had been previously ruled that a defendant could waive the presentation of mitigating evidence

> . . . the trial judge must carefully analyze the possible statutory and non-statutory mitigating factors against the aggravators to assure that death is appropriate.

In the instant case, the State sought the death penalty and Appellant acquiesced. Representing himself, he ultimately chose to present no evidence on his own behalf and argued to the jury that death was an appropriate sentence. The public defender, who was required to serve as "standby" counsel presented nothing and did not appear at sentencing at Appellant's direction. The evidence before the trial court at the time of sentencing consisted of the testimony and documents presented by the State.[3] A review of these documents and the testimony of several witnesses presented by the State establishes evidence of non-statutory mitigating evidence the trial court ignored.

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[3] The trial court apparently also considered and reviewed some newspaper articles which appeared after the jury recommendation which contained an interview with Appellant. The propriety of this and the absence of these articles from the record is discussed in Issue XI.

None of the mitigating factors contained in the State's presentation were found, weighed, considered or discussed by the trial court in either the written order or oral pronouncement. Not only did the Court fail to consider any mitigation, it also failed to comply with the established procedures regarding the weighing of those factors.

I. Mitigation Present In the Record and Ignored by the Trial Court.

A. Appellant's Good Prison Record.

The State introduced into evidence Appellant's prison records from the State of Wyoming and the testimony of Anthony Miller, a corrections of at the Wyoming Penitentiary and who knew Appellant while he was incarcerated in Wyoming.

Mr. Miller testified Appellant was a good inmate and received no disciplinary reports. Appellant's sentence was ultimately commuted to nine months. The prison records confirm this testimony. (R434-439) A record of good conduct while incarcerated can be a valid mitigating circumstance. Campbell v. State, 571 So. 2d 415 (Fla 1990). Appellant received an "excellent" rating as an inmate. (ER64)

B. Appellant's Military Service

The Wyoming prison records also reflect that Appellant had served in the military and was given an honorable discharge. (ER19) Such service to one's country is a valid mitigating factor. DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Campbell v. State, 571 So. 2d 415 (Fla. 1990). This factor was ignored by the trial court.

C. Appellant's Cooperation with Police

A defendant's cooperation with the police and that the defendant confessed have also been recognized to be mitigating circumstances. Maulden v. State, 617 So. 2d 298, 302 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988). The record is clear that Appellant did not hinder the investigation. Appellant readily cooperated by pleading guilty. Again the court failed to find and weigh Appellant's cooperation as mitigating circumstance.

D. Appellant's History of Drug & Alcohol Abuse

The record reflects Appellant had a history of drug and alcohol abuse. (ER 18,52,92). Appellant admitted to using cocaine, marijuana and LSD. (ER18,52,92). The Wyoming prison records reflect Appellant committed prior offenses while under the influence of drugs or alcohol. (ER64,82) Appellant underwent several treatment programs or hospitalizations for substance abuse. (ER 18,52,82).

A defendant's history of drug or alcohol abuse is a mitigating circumstance. See Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993); Kramer v. State, 619 So. 2d 274, 277-78 (Fla. 1993).

The trial court failed to find and weigh this factor as a mitigating circumstance.

II. Mitigation Present in the Record and Improperly Rejected by the Trial Court.

Appellant's Remorse

The Court has recognized that a defendant's remorse is a valid mitigating factor. Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011-12 (Fla. 1984).

Appellant repeatedly expressed his remorse for what he had done. His reason for pleading guilty was motivated by his desire to spare the victim's family additional anguish. (R574) Appellant's closing argument was grounded upon his sorrow for his acts. (R574,576,580,582) Again, Appellant's only comments at sentencing relating to the crime were that he was sorry and wished he could change things. (R633)

The trial court's written order states:

> Defendant pled guilty, dismissed his attorney, and sought to have this Court sentence him immediately. This Court declined to do so and impaneled a jury to advise the Court on an appropriate sentence. Defendant claimed he did so to spare the anguished feelings of the victim's parents that would be caused by a lengthy trial, and to save the taxpayers of Pasco County the enormous cost of a lengthy trial. Defendant has not cited either of these reasons as mitigators and this Court does not find either reason to support any mitigation . . . . Defendant's present conviction in no way mitigates the senseless, brutal fashion in which he committed this capital felony.

(R95-96)

The trial court failed to follow the requirements of the law relating to the finding and weighing of mitigating circumstances regarding Appellant's remorse.

A mitigating circumstance must be "reasonably established" by the greater weight of the evidence. In Campbell v. State, 571 So. wd 415, 419-420 (Fla. 1990), this Court described the duties of the trial judge in considering evidence offered in mitigation:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant [footnote omitted] to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L. Ed. 2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature [footnote omitted] and has been reasonably established by the greater weight of the evidence: [footnote omitted] "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla.Std.Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

Id., at 419-420

Continuing to discuss the proof required in regard to mitigation, this Court in Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) stated:

> Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. See Campbell. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. (Emphasis added)

In order to reject a mitigating circumstance, there must be competent substantial evidence to support that rejection. Id., at 1062.

The record reflects substantial competent proof of Appellant's remorse. It was error for the Court to determine otherwise. Once established, a court must then weigh that mitigating factor. As Campbell instructs, a proven mitigator cannot be given no weight. The written order reflects that the trial court found no weight should be given in mitigation to Appellant's "contrition." The trial court clearly failed to follow the dictates of Campbell and Nibert. Thus, this failure along with all the others which infected the sentencing proceeding require a reversal.

III. Mitigation the Trial Court Failed to Investigate

The trial court's written order states that neither statutory mental mitigator, that Appellant was under the influence of extreme mental or emotional disturbance [§ 921.141(6)(b), Fla. Stat. 1987)], or that Appellant was substantially impaired in his capacity to conform his conduct to the requirements of law [§921.141(6)(F), Fla. Stat 1987)], was established in this case.

(R94-95) Yet, in making this finding, the Court expressed the following reservations:

> B. It is hard to believe that any sane, normal person could commit the capital felony as it was committed, but there was no evidence presented to show that Defendant was under the influence of extreme mental or emotional disturbance and this Court cannot speculate as to the existence of such disturbance. . . .

(R94)

> F. There was no evidence that the capacity of Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. In the absence of evidence it would be impermissible speculation for this Court to find that the nature of this crime itself suggests a contrary conclusion.

(R95)

The order reflects the Court had doubts about the existence of some type of mental mitigation. Given such doubts, combined with other indications of Appellant's mental imbalances contained in the record, the trial court in this case should have either found the mitigators were established or required an evaluation of Appellant prior to sentencing. He should not have outright rejected them.

A review of the record indicates Appellant had exhibited prior psychological imbalances. The Wyoming prison records reflect several hospitalizations or treatment programs for dugs and alcohol abuse. (ER18,52,92) The Wyoming charges were committed -- as was an Ohio offense -- while Appellant was under the influence. (ER64, 82)

The record also reflects Appellant received an honorable discharge from the army due to mental problems. (ER72-79) While in

the service, Appellant was referred to a Division Social Worker due to continuous anxiety, depression, and suicidal ideation. (ER73) Appellant was deemed a serious suicide threat and discharge was recommended on December 6, 1993. (ER74) Appellant had received prior counseling during the summer of 1992 and fall of 1993 at the Community Mental Health Activity in Fort Knox, Kentucky. (ER76-79)

During 1986, Appellant underwent some psychological testing by a "psychological specialist." (ER89-90) Appellant was described as a "case of adult antisocial behavior." This type of person "discharges hostile, rebellious feelings in indirect ways. Disassociative phenomena is not uncommon with this type of case." (ER90)

Appellant also received a head injury in a 1984 auto accident. (ER117)

A pre-trial motion also should have alerted the Court of the need for an evaluation. (R40-43) The public defender notified he Court of his attempts to investigate an insanity defense. (R41) Counsel asserted Appellant had been previously hospitalized in a psychiatric facility. (R41) The State had already retained two psychiatric experts. (R42)

Appellant himself, as the Court noted, stated he had been hospitalized at St. Charles Hospital, a mental health facility. (R182) He also indicated that his ex-wife had information relating to his mental state. (R186)

Given this background, the trial court should have ordered an examination of Appellant to determine the existence of mental mitigation. Appellant is not suggesting that this practice become a

requirement, but rather that the specific facts of this case mandated such an investigation. The record certainly established the possibility of such mitigation and the written order reflects the Court's concern as to whether statutory mitigators were present. Even if there was insufficient evidence to conclusively establish the statutory mitigators, there may have been sufficient information to establish a non-statutory mitigator. Personality disorders such as Appellant's diagnosis of antisocial disorder have been recognized as a valid non-statutory mitigating factor. See Eddings v. Oklahoma, 455 U.S. 104 (1982). Failure to consider his troubled childhood and antisocial personality disorder violated the Eighth Amendment.

In Eddings, the U.S. Supreme Court in referring to Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 793, 98 S.Ct. 2954 (1978), emphasized that the capital punishment system should be "at once consistent and principled, but also humane and sensible to the uniqueness of the individual." Eddings, at 71 L. Ed. 2d 8.

This Court has required that a trial court's findings must be of "unmistakable clarity" so that this Court "can properly review them and not speculate as to what he found." Mainn v. State, 420 So. 2d 578, 581 (Fla. 1982); Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990). The only way to relieve the lingering doubt expressed in the trial court's order regarding mental mitigation was to have Appellant evaluated and the results of those evaluations communicated to the trial court. Speculation as to the status of mental mitigators or questions as to their existence do not satisfy the

obligation of the trial court to make a reasoned judgment as to the appropriate sentence. Crump v. State, 622 So. 2d 963, 973 (Fla. 1993)(sentencing order reflecting defendant "may have possibly" committed offense under extreme mental or emotional disturbance or "may have been" substantially impaired is insufficient discharge of court's duties regarding mitigation.)

The findings regarding mental mitigation lack the unmistakable clarity required by this Court. Remand is necessary with appropriate directions to determine the existence or not of mental mitigating factors.

ISSUE X

THE TRIAL COURT ERRED IN FINDING THE INSTANT HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED FASHION.

The aggravating factor of cold, calculated, and premeditated (CCP) requires the State to establish a "heightened" premeditation substantially greater than that necessary to sustain a conviction for premeditated murder. Holton v. State, 573 So. 2d 284 (Fla. 1990). Heightened premeditation is premeditation which is "cold, calculated, and without any pretense of legal or moral justification."

Cold, calculated, and premeditated requires the State to demonstrate that the defendant had a "careful plan or prearranged design to kill." Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L. Ed. 2d 681 (1988).

A finding of CCP requires cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a first-degree murder conviction. Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987). Quoting from Preston v. State, 444 So. 2d 939, 946-47 (Fla. 1984), the Nibert court noted that CCP is found when the facts show a "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Id. The instant record fails to provide sufficient facts upon which to base this aggravating factor.

The limited evidence available established that Jennifer Colhouer was strangled and stabbed in her home. The knife and towel used to commit the crime came from the house; they were not brought in by Appellant. There was no testimony presented which indicated Appellant knew Jennifer previously or had any careful prearranged plan to kill her. One can only speculate as to how Appellant entered the home or what occurred leading up to the death.

The instant case is much like Gore v. State, 599 So. 2d 978 (Fla.), cert.denied, __U.S.__, 113 S.Ct. 610, 121 L. Ed. 2d 545 (1992). Gore kidnapped his female victim, took her to a remote area and killed her. There was no evidence of the circumstances surrounding the murder itself. Therefore, this Court found it possible that the murder resulted from a "robbery or sexual assault that got out of hand." 599 So. 2d at 987. Because there was no evidence of "a calculated plan to kill" the victim, the Gore court struck down the cold, calculated, and premeditated aggravating circumstance. 599 So. 2d at 987.

The instant case, like Gore, suggests that this case also involved a sexual assault gone wrong. The body was undressed and there was evidence of resistance. Quite likely, Appellant attempted initially to engage in sexual activity and Ms. Colhouer was killed in this process.

The State must prove beyond a reasonable doubt that the murder was planned or prearranged before the crime began. Hamblen v. State, 527 So. 2d 800 (Fla. 1988); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L. Ed.

2d 681 (1988). The State failed to carry their burden in the instant case. The evidence established Appellant did not enter the home with weapons or by force. There was nothing presented to establish that the murder was carefully preplanned as opposed to being a tragic consequence of an equally tragic sexual battery.

The State will most likely argue that the Williams rule evidence relating to the Indiana homicide established the existence of the heightened premeditation required for a finding of CCP. Such evidence does not supply the proof requisite of this aggravator. This Court in Crump v. State, 622 So. 2d 963 (Fla. 1993), rejected a finding of CCP in circumstances similar to the instant case. Crump was convicted of strangling Lavinia Clark, a Tampa prostitute, and leaving her body in a Tampa cemetery. As Williams rule evidence, the State introduced Crump's confession that he had subsequently killed Areba Smith, a Tampa prostitute, who was also found adjacent to a cemetery. Both women had been manually strangled and had ligature marks on their wrists consistent with being bound. A restraining device was found in Crump's truck. This Court found that the heightened premeditation necessary for a finding of CCP was not proven by the State, even though Crump had committed two similar murders. Because Appellant committed a homicide previously does not mean that the instant homicide had the heightened premeditation necessary for CCP. Appellant's situation is more compelling than Crump. In this case, Appellant did not take with him the items used to bind or kill Ms. Colhouer. Crump,

on the other hand, carried ligatures in his truck, where the killings occurred.

Because the State failed to prove that the CCP factor applied to the instant case, this aggravator must be stricken. In light of all the other errors in Appellant's case, a new penalty phase is required.

ISSUE XI

THE TRIAL COURT IMPROPERLY REVIEWED AND CONSIDERED INFORMATION NOT CONTAINED IN THE RECORD PRIOR TO SENTENCING APPELLANT.

The written sentencing order prepared by the Court in Appellant's case states:

> H. Defendant presented no evidence of any kind, and an explanation of his conduct can only be gleaned from interviews he has given to newspaper reporters outside Court. None of this information so gleaned mitigates in his favor.

(R95)

No where does the trial court amplify on the substance of what he read. The articles or interviews appear nowhere in the record. It is, at this juncture, impossible to determine what information the trial court was privy to, and if his ruling that it was of no mitigating value was correct.

The United States Supreme Court decision in Gardner v. State, 430 U.S. 349, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977) is directly on point. Gardner was convicted of first degree murder. At his sentencing, the Court reviewed a Presentence Investigation Report which contained information that was not made available to the defendant or counsel. Neither was the confidential portion presented to this Court on review. The U.S. Supreme Court held that a sentence of death could not be imposed where there was a denial of due process resulting in information being utilized which a defendant has no opportunity to deny or explain. Further, the Court reasoned, without inclusion in the record on appeal of all

factors considered by the trial court, constitutionally sound review is not possible. The Court also noted that a lack of objection would not constitute a waiver of the issue. The Court then ordered Gardner's case be returned for full hearing to the trial court. Relying on Gardner, this Court in Porter v. State, 400 so. 2d 5 (Fla. 1981), reversed the defendant's sentence of death because the trial court based the sentence on testimony which was not presented at trial.

Appellant, like Gardner, had no opportunity to deny or explain the information contained in the news articles. The trial court did not inform Appellant prior to issuing his formal oral pronouncement of sentence that he had read the articles.

Even though Appellant gave interviews, that does not mean that what was reported was an accurate summation of his statements. It goes without saying that often what is said ends up very different in print. The record also indicates by the use of the plural "reporters" that more than one article appeared. There is no way to tell how many articles appeared and of those how many the trial court considered.

This Court cannot fulfill its obligations to review the propriety of the sentence imposed without all the information utilized by the trial court before it. The use of extraneous information by the trial court has precluded effective appellate review. The instant case must be reversed and further proceedings conducted which satisfy the Gardner mandate.

ISSUE XII

THIS COURT SHOULD RECEDE FROM HAMBLEN V. STATE, 527 So. 2d 800 (Fla. 1988) AND ITS PROGENY AND ESTABLISH A PROCEDURE THAT REQUIRES THAT WHEN A DEFENDANT REQUESTS A DEATH SENTENCE THAT SPECIAL COUNSEL BE APPOINTED TO PRESENT THE CASE IN MITIGATION.

When the United States Supreme Court paved the way for the reintroduction of capital punishment in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S.Ct. 2726 (1972), it cautioned that any death penalty statute must necessarily serve both the goals of measured consistent application and fairness to the accused. In subsequent cases, the United States Supreme Court has determined that in order for constitutional application of the death penalty that the "jury must consider the characteristics of the person who committed the crime." Gregg v. Georgia, 428 U.S. 153, 197, 49 L. Ed. 2d 859, 96 S.Ct. 2909 (1976), and that "justice requires . . . that . . . there be taken into account the circumstance of the offense together with the character and propensities of the offender." Pennsylvania v. Ashe, 302 U.S. 51, 55, 82 L.Ed. 43, 58 S.Ct. 59 (1937). In fact, Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 793, 98 S.Ct. 2954 (1978) recognized that constitutional consistency is only possible where individual differences and any relevant mitigating factors are considered by the court in imposing sentence.

The State Legislature, in order to assure the constitutionality of Florida's death penalty statute, has expressed its intent

that the death penalty is to be reversed for only the most aggravated and least mitigated of first degree murders. State v. Dixon, 283 So. 2d 1, 7-8 (Fla. 1973); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); Songer v. State, 544 So. 2d 1010 (Fla. 1989).

As stated in Fitzpatrick:

> In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L. Ed. 2d 346 (1972), Justice Stewart began his concurring opinion with an instructive admonition:
>
> > The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.
>
> 408 U.S. at 306, 92 S.Ct. at 2760 (Steward, J., concurring)(quoted in Hamblen v. State, 527 So. 2d 800 (Fla. 1988)(Barkett, J., dissenting).
>
> It is with this background that we must examine the proportionality and appropriateness of each sentence of death issued in this state. A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly.

This Court has held that a defendant may waive mitigation, but the State will not become a vehicle for a defendant to commit suicide. See, Hamblen v. State, 527 So. 2d 800 (Fla. 1988); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Pettit v. State, 591 So. 2d 618, 620 (Fla. 1992); Farr v. State, 621 So. 2d 1368 (Fla. 1993). In Hamblen, this Court chose not to require the presentation of mitigating evidence by independent counsel where the defendant

demands or requests a death sentence. Premised on the Court's majority opinion that a competent defendant can control his own destiny Hamblen states:

> . . . This does not mean that courts of this state can administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law.

527 So. 2d at 804.

However, the majority went on to hold that, since the trial judge in Hamblen "carefully analyzed the possible statutory and nonstatutory mitigating evidence":

> . . . there was no error in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence. The trial judge adequately fulfilled that function on his own, thereby protecting society's interest.

In the instant case, the trial court did not fulfill its independent function as required in Hamblen. Cases such as Appellant's continue to demonstrate that it is impossible for a trial judge to fulfill that function absent independent counsel. An adversary appeal as demanded by this Court -- irrespective of the defendant's wishes -- which ensures the reliability and proportionality of the death sentences imposed in this state cannot be achieved under Hamblen. There can be no meaningful appellate review without evidence. There can be no proportionality analysis without the presentation of mitigating evidence. There can be no constitutionally

consistent application of the death penalty absent a thorough review of the relevant mitigating circumstances of the individual. A comparison of a case in which independent or special counsel representing the public interest was appointed to present mitigating evidence, Klokoc v. State, 589 So. 2d 219 (Fla. 1991), with Appellant's, illustrates this conclusion.

In Klokoc, the defendant refused to permit mitigation to be presented. After counsel's motion to withdraw was denied, the court appointed "special counsel" to "represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding." 589 So. 2d at 220. Special counsel presented evidence relating to Klokoc's mental apprehension, his bipolar disorder, and a pathologist, who stated that victim died instantly.

The court found one aggravating factor and imposed the death penalty, finding it outweighed the mitigator. Mr. Klokoc then sought to dismiss his appeal, and this Court sated:

> . . . counsel for appellant is hereby advised that in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence.
>
> Accordingly, counsel for appellant is directed to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests. The foregoing rulings are made without prejudice to the right of appellant to request leave to file a pro se supplemental brief setting both his personal positions and interests in the subject matter of this appeal.

(R221)

Ultimately, this Court reversed the sentence of death and ordered Kockoc sentenced to life. This Court found the mitigation presented by special counsel outweighed the aggravator.

Had special counsel not been appointed, the reversible mitigating factors would not have been evidenced in the appellant's record, despite their existence. Absent such evidence, this Court's opinion would have either been an unjustified reversal or an unlikely, speculative, reversal. The capital sentencing procedure demands more.

The instant record contains glimpses of relevant mitigation, arguably the tip of the iceberg. Without independent counsel to develop and present this to the trial court, the required guarantees of reliability, consistency, and proportionality are markedly absent in this case.

Adversarial appellate review is possible only with an adversarial penalty phase. Appellate review conducted without a meaningful record is like a house constructed without a foundation. Both must fall. This Court cannot properly fulfill its required obligation to conduct a proportionality review of every death sentence in Florida unless there is a meaningful evidentiary record which reflects both the mitigating circumstances as well as the aggravating. The Eighth Amendment demands no less. Those demands were woefully unfulfilled in Appellant's case and his sentence cannot constitutionally be carried out.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgment and sentence and remand this case to the trial court for the following relief:

Issue I, to allow Appellant the opportunity to withdraw his plea.

Issues II, III, IV, V, VI, VII, IX, and XI, a new penalty phase before a new jury.

Issues VIII, X, and XII, a new sentencing hearing to reweigh the aggravating and mitigating factors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 24th day of May, 1994.

Respectfully submitted,

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