P6-001

IN THE SUPREME COURT
STATE OF GEORGIA

S95P0108

SAMUEL DAVID CROWE,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

NOV 14 1994

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

On the eve of his capital trial, unbeknownst to his attorneys, the Appellant, Samuel "David" Crowe, talked to Douglas County Superior Court Judge Robert James on the telephone on two separate occasions. The first call occurred Monday, March 27, 1989. The following day Judge James presided over a Unified Appeals hearing where the District Attorney, Defense Counsel and Appellant were present yet Judge James did not disclose that he had spoken to appellant the night before. Two days later, the day before a scheduled hearing,[1] Judge James accepted another phone call from Appellant. The next day, March 31, 1989, four days after the first phone call between Judge James and David Crowe, David Crowe fired his attorneys and advised the court of his desire to plead guilty to the charges.

On May 5, 1989, David Crowe entered a pro se plea of guilty to malice murder and immediately asked the Court to sentence him to life. (R.8 5/18/90; EMFNT 57; 87).[2] Mr. Crowe also entered a pro

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[1]This hearing was scheduled because "after the hearing Tuesday, [the court] received a letter from the District Attorney indicating" that Appellant had confessed a third time to Sheriff Lee and had complaints about his legal representation. (3/31/89 PT at 2).

[2] Transcripts of pretrial proceedings are separately paginated in the record on appeal and therefore are referred to by "PT" and the date of the hearing followed by page numbers. "EMFNT. _____ " denotes references to Appellant's Extraordinary Motion for New Trial conducted on March 3, 1994. Exhibits are referred to by volume, date and number. Appellant's affidavit (Exhibit A of Appellant's Extraordinary Motion for New Trial is referred to as "AFF." followed by the paragraph number referenced. "R. _____" followed by a date denotes a reference to a document contained in one of three separate records maintained by the Douglas County Clerk on appeal in this case.

se guilty plea to the charge of Armed Robbery pursuant to North Carolina v. Alford, 400 U.S. 25, 39, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). (R.8 5/18/90). The trial court accepted the pleas and after a sentencing hearing beginning on November 8 and ending on November 18, 1989, a Douglas County jury sentenced Samuel David Crowe to death by electrocution on the malice murder charge.

Appellant filed his Notice of Appeal in the Supreme Court of Georgia on December 8, 1989. (R.1 5/3/90). On April 16, 1990, Appellant filed an Extraordinary Motion For New Trial[3] and a Motion to Recuse. (R.4 5/3/90). The trial court refused to hold a hearing on the extraordinary motion for new trial. During that time, this Court heard oral argument on the direct appeal issues.

On May 18, 1990, Appellant filed a Notice of Appeal from the trial court's denial of the Extraordinary Motion for New Trial and the Motion to Recuse. The Georgia Supreme Court remanded the case to the trial court on July 5, 1990, retaining jurisdiction, pursuant to Rule 4(B)(1) of the Unified Appeal Procedure, and ordered a hearing solely on the issues Appellant attempted to raise in his extraordinary motion for new trial. (R.3 5/17/94).

In the interim between the filing of the extraordinary motion for new trial and the scheduled evidentiary hearing, trial counsel Michael Bergin, on behalf of Appellant, sued the executor of the estate of Hazel Crowe, Appellant's mother, for his legal fees.

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[3] Procedurally, pursuant to this Court's October 5, 1994 order that dismissed S94P1322 and re-docketed both S90P0734 and S94P1322 as one case, the extraordinary motion for new trial is now a part of the direct appeal.

(EMFNT 19-27; 145-148).

The Trial Court entered an Order declaring Appellant indigent for purposes of the extraordinary motion for new trial proceedings on March 3, 1994, after a lengthy evidentiary hearing regarding Appellant's financial status. (EMFNT 27).

An evidentiary hearing was held on March 3, 1994, in which Appellant presented evidence in support of his extraordinary motion for new trial.[4] The trial court denied Appellant's extraordinary motion for new trial on May 13, 1994, (R.65 5/17/94), and the record was immediately transmitted back to the Georgia Supreme Court pursuant to rule 4(B)(1) of the Unified Appeal Procedure. Appellant filed a brief and enumeration of errors on the issues raised in Appellant's extraordinary motion for new trial. On September 29, 1994, this Court asked Appellant for copies of the Appellant's brief on the direct appeal issues. On October 4, 1994, Appellant filed a Motion For Clarification Of Issues Presently Before The Court. On October 5, 1994, this Court dismissed S94P1322 and S90P0734 and consolidated both cases for purposes of direct appeal under number S95P0108.

This brief, consolidating the direct appeal issues and the extraordinary motion for new trial issues, follows.

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[4]Judge Robert J. James recused himself from the hearing on the extraordinary motion for new trial and Judge David T. Emerson heard evidence. (EMFNT 11; 14-16).

STATEMENT OF FACTS

THE DOUGLAS COUNTY INVESTIGATION

Joe Pala's body was discovered at Wickes Lumber Company in Douglasville, Georgia, on the morning of March 3, 1988. The Douglas County Sheriff's Office (hereinafter DCSO) began their investigation and determined Joe Pala was killed the night before, sometime after 6:30 p.m. (PT 7/21/88 at 113). Employees of Wickes Lumber were questioned and the DCSO soon focused their investigation on Wanda Crowe, Appellant's wife, whose car was seen the night of the murder at Wickes Lumber Company. (7/22/88 PT at 253). In fact, paint appearing to match paint found at the scene and on the victim's body was discovered in Wanda Crowe's automobile. (7/22/88 PT at 253). DCSO towed this automobile to their offices with neither Wanda Crowe's consent nor a search warrant. (7/21/88 PT at 130; 7/22/88 PT at 253).

During questioning by DCSO, Wanda Crowe advised police that David Crowe had driven her car the night in question and had used her car keys that included her keys to Wickes Lumber. (9/7,8/88 PT at 90-91; 7/22/88 PT at 257-260; 262).

Wanda Crowe was detained and interrogated from 9:00 a.m. until 7:00 p.m. on March 3, 1988, without being advised: (1) of her *Miranda* rights; (2) that her husband was a suspect in a murder investigation; (3) her spousal privilege; or (4) that she was a suspect in a murder investigation. (9/7,8/88 PT at 50-53; 69).

Sheriff Earl Lee purportedly obtained her "consent"[5] to search her home around 3:30 p.m. and "escorted"[6] Wanda to her home stopping only briefly at Wickes Lumber Company while en route. (9/7,8/88 PT at 60;64). While transporting Wanda Crowe to her home, Earl Lee was advised by radio that David Crowe had picked up his daughter and both were at home. (9/7,8/88 PT at 64; 7/22/88 PT at 286).

While Earl Lee continued to interrogate Wanda Crowe, he sent Major Phil Miller to the Crowe home with orders to keep it under surveillance and to prevent David Crowe from entering. (7/22/88 PT at 229; 238; 244). Major Phil Miller and his deputies went to Captain Price's house, directly across the street from the Crowe residence, to watch it as per the Sheriff's orders. (7/21/88 PT at 114-116).

As soon as David Crowe arrived home with his daughter, however, several deputies surrounded the home (7/21/88 PT at 158; 7/22/88 PT at 377; 9/7,8/88 PT at 123-124), went directly inside the home[7], took David's daughter away from him in a patrol car despite her obvious terror and his protest that she be allowed to go to her friend Sarah's house (9/7,8/88 PT at 124-125) and began

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[5] She believed and testified that she had no other choice but to sign the consent form. (9/7,8/88 PT at 60).

[6] Wanda testified that she was not allowed out of the sheriff's patrol car at any time and that she learned for the first time that her husband was a suspect in Joe Pala's murder when she heard it over the police radio while en route to her home. (9/7,8/88 PT at 62; 64; (7/22/88 PT at 286).

[7] Stopping only to ask the eight year old her permission to enter. (7/21/88 PT at 117-118).

(9/7,8/88 PT at 136). When David's mother-in-law called the home to find out where her daughter and grandchild were, David told her that DCSO would not give him any information about his wife, that he had been hand-cuffed and that he was "fixing" to call his attorney. (7/22/88 PT at 192; 9/7,8/88 PT at 136). Sheriff Lee took the phone from David Crowe (9/7,8/88 PT at 137), and refused to give him any information about Wanda "until this mess [was] straightened out." (9/7,8/88 PT at 138).

THE COERCION

Earl Lee again told David that his wife Wanda was in serious trouble and that David needed to tell Lee everything he knew immediately in order to help her, completely aware that David Crowe had requested to speak with an attorney. (9/7,8/88 PT at 136). David Crowe told Sheriff Lee that Wanda could not have killed Joe Pala, he did it. (9/7,8/88 PT at 139). David gave a tape recorded confession, signed a consent to search the home and signed a consent to search the car. (7/22/88 PT at 198; 268; 9/7,8/88 PT at 16; 140-141; 145). This second search of the home produced the alleged murder weapon. (7/22/88 PT at 272; 9/7,8/88 PT at 142). After the Sheriff searched the car, David Crowe again asked to speak with an attorney and his request was refused. (9/7,8/88 PT at 144; 146). As David was being taken from his home to the DCSO, he saw his wife Wanda in the back of the patrol car and thought she was charged with murder as well. (9/7,8/88 PT at 147-148).

MORE COERCION

David Crowe was not permitted to call an attorney while at

DCSO despite his requests. Rather, he was held in a holding cell for 30 to 40 minutes because Sheriff Lee wanted to talk to him. (9/7,8/88 PT at 148-149). David requested that he, at least, be allowed to call to his mother to tell her where he was and so that she could get him an attorney. Earl Lee agreed to this call, but first, David was required to give a second statement: the tape recorder had "messed-up" the first statement and Lee needed another statement. (7/22/88 PT at 368; 9/7,8/88 PT at 150).

David Crowe was not re-advised of his Miranda rights before making this second statement and neither consented to nor waived any rights either in writing or on tape. Moreover, this second statement, more detailed than the first, did not contain the entire conversation between Earl Lee and David Crowe. (7/22/88 PT at 199; 273; 342-345; 9/7,8/88 PT at 151).

David Crowe testified at the suppression hearing that he only confessed to get his wife out of jail (9/7,8/88 PT at 155), that he had no control over when the tape recorder was turned on (9/7,8/88 PT at 277) and only consented to the searches and Miranda waivers because:

> Well like I said, I figured that they had already looked in it. They had already went upstairs and I had signed nothing for them to go upstairs.

(9/7,8/88 PT at 146).

> Q. At the time you confessed to Sheriff Lee and gave him this statement, did you think you would ever get access to an attorney?
>
> A. It didn't seem like it.

(9/7,8/88 PT at 141).

THE INTERFERENCE

After being returned to the holding cell for another 45 minutes, David was brought into Sheriff Lee's office where for the first time he was allowed to speak to his wife and his mother, in Sheriff Lee's presence. (7/22/88 PT at 316-317; 9/7,8/88 PT at 152). When David's mother said she would get him the best attorney she could, Earl Lee replied:

> I know you've got a little land and a little money -- no need spending everything on no high falootin' attorney -- I'll see to it the boy gets a good attorney and is taken care of.

(9/7,8/88 PT at 153).

MORE INTERFERENCE

After the prosecution began the pretrial phase of David Crowe's death penalty trial, Sheriff Lee began meeting with David Crowe to discuss the status of his case, the effectiveness of his attorneys and the effect the proceedings were having on David's family. (EMFNT 228; 229; 242-244; 250-251; AFF. ¶¶ 26; 31-35; 41-50; 61-66; 71). The Sheriff never disclosed to Mr. Crowe's attorneys that he was having communications with Appellant because he "didn't think [he] had that burden." (EMFNT 239; 258).

At some point, Earl Lee convinced David Crowe to plead guilty to the charges with assurances that Judge James would sentence him to life. Sheriff Lee expected David Crowe to follow through with that plea, and expressed disappointment when David did not enter this plea right away. (AFF. ¶¶ 47, 62-69):

Sheriff Lee was so intent on David entering this guilty plea

that he even arranged for David Crowe to place two telephone calls[8] to Judge Robert J. James so that David could apprise the Judge of his plan to plead guilty and get the Judge on board. Judge James answered the phone each time.[9] As a result of his deception, Earl Lee was able to secure a third, videotaped statement with Appellant believing that there would never be a trial.

STILL MORE INTERFERENCE

David Crowe talked to Douglas County Superior Court Judge Robert James on the telephone at least twice to discuss his case within days of his capital trial. The Judge made the conscious

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[8] Earl Lee later denied arranging the calls and claimed he did not believe that David Crowe had even talked to the Judge. When confronted with a transcript of Judge James' previous testimony, Lee equivocated:

> [w]ell, it sort of surprises me. I wouldn't think a judge would talk to an inmate...[y]eah, Judge James evidently says he talked to Mr. Crowe twice on the telephone. I don't know what about. I didn't know that until just now...[t]hat would be --uh my --it would still be my testimony that it would be highly unusual for a Superior Court Judge to take a call from an inmate.

(EMFNT 233) (emphasis supplied).

[9] Lee testified that neither David Crowe nor any other inmate was extended unlimited telephone privileges, although he might arrange for them to have a phone call at times:

> I might accommodate them [the inmates] at least one time. ...I wouldn't do it consistently and not with the same inmate...if he asked me to and it was something unusual and -- I would have done that one time.

(EMFNT 231-232).

decision not to disclose these calls to David Crowe's attorneys. These telephone calls occurred on Monday, March 27, 1988, and Thursday, March 30, 1988.

The calls were not disclosed to the Appellant's attorneys until the prosecutor sent a letter to the Judge, copied to trial counsel, that David Crowe made a third confession to Sheriff Earl Lee and that he was dissatisfied with counsel.

The disclosure by the Judge of the phone calls was one sentence and made in open court, buried within a jaw-dropping array of other shocking disclosures:

> On Tuesday of this week, we held a hearing to determine whether or not there would be a pretrial appeal of certain matters in this case. Prior to that hearing, I received a phone call from Mr. Crowe from the jail and he expressed certain concerns to me, and I instructed him to discuss them with his lawyer and he could go ahead and proceed with the hearings that were scheduled for Tuesday, and based on his discussions and conversations with his lawyer, he could determine what if anything he needed to do. (3/31/89 PT at 2).
>
> Then after the hearing Tuesday, I received a letter from the District Attorney indicating that there had been some conversation between Mr. Crowe and the Sheriff concerning matters of his representation that might have been a concern to him. And then yesterday, Mr. Crowe called to confirm or to question me about a hearing, and I told him we had the hearing set today.

(3/31/89 PT at 2).

When confronted with the information about the telephone calls, the conversations with Sheriff Earl Lee and the third confession, trial counsel was stunned. (3/31/89 PT at 11). Trial counsel immediately requested that his client be moved to another

jail and psychologically evaluated. (3/31/89 PT at 13-18). Each request was denied by Judge James. (3/31/89 PT at 14-1).

IMMEDIATE DISCLOSURE WAS REQUIRED

Judge James maintains to this day that disclosure was not necessary because David Crowe was not really dissatisfied with counsel, there just seemed to be some problem.

> ...[t]he essence of the conversation was that his lawyer wasn't doing everything he wanted him to do and this was causing some problems with his family, a lot of stress on his family, that -- so many times judges get calls that they want to fire their lawyer. 'Judge, he's not doing his job.' But he said no, overall he was satisfied, there was just this problem...

(EMFNT 176);

> ...so, I said to myself he's got some problems but I don't know what they are and he won't say, other than it was adversely affecting his family. He was very, very concerned about what -- and his mother was in very poor health. I understood that and that this was great pressure on his family. That seemed to be his central thing, to me, the Monday call, that his problems revolved around that with his lawyer, not his lawyer's general representation and what he'd been doing for him."

(EMFNT 199).

More egregious than failing to immediately disclose that the calls occurred is the fact that Judge James failed to disclose to defense counsel the substance of his conversation with David Crowe. Judge James testified later that he made the decision not to disclose the communications with Appellant because he "...thought it may be better that the attorney not know he'd called [him]

because you get personal feelings involved in this."[10] (EMFNT 180).

TIMING WAS CRITICAL

On Tuesday, March 28, 1989, the day after Judge James' first phone call with a capital defendant awaiting trial, Judge James held the final hearing in Appellant's case pursuant to the Unified Appeal. (PT 3/28/89). At that hearing, the Judge certified the issues regarding Appellant's motion to suppress the first two statements and his motion to suppress evidence seized as a result of an illegal search, for interim appellate review. (PT. 3/28/89 at 6-9; 14).

That previous Saturday, however, months after the suppression hearings, Earl Lee had secured a third confession significantly different from the two previous statements made by Appellant and certified for interim appeal: this one was videotaped, tape recorded and "Mirandized." (EMFNT 248).[11]

On March 29, 1989, the Court and Appellant's attorneys received a letter dated March 28, 1989,[12] from Frank Winn, the

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[10] Appellant was instructed by Judge James not to mention it at the hearing, which is completely consistent with Judge James belief that counsel should not know about Appellant's complaints with their representation. (AFF. ¶ 54; EMFNT 179-180).

[11] It was ultimately used against him at the sentencing phase of his death penalty trial by Sheriff Earl Lee and provided the factual basis for the trial court's acceptance of Appellant's guilty plea. (EMFNT 31-32; 40).

[12] The timing of the State's letter is critical. Based on the uncontroverted testimony and evidence, this Court is being asked to believe that Sheriff Lee obtained a third, video taped confession on March 25, 1988, without informing the District Attorney about it until <u>three days after</u> the Unified Appeals hearing was held before

Douglas County District Attorney, notifying the Court that Sheriff Lee reported to him that David Crowe made a third confession and was "dissatisfied" with counsel. (EMFNT 56; Defendant's ex.1).[13]

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the trial court. The entire sequence of events should lead this Court to seriously question the actions of the State in this case.

1. July 21, 1988 - Appellant recants his confession to the murder of Joseph Pala. During the suppression hearing serious questions are raised about Sheriff Lee's conduct and about the validity of the arrest, search and seizure of Appellant. Given the merits of Appellant's constitutional claims the trial court certified the issues for interim appellate review. (3/28/89 PT at 15).

2. March 25, 1989 - Sheriff Earl Lee obtains a third, video taped confession from Appellant disavowing his prior recantation.

3. March 27, 1989 - David Crowe, while being confined in the Douglas County Jail, places a phone call to Judge James. Judge James accepts the call and purportedly discusses Appellant's discontent with trial counsel.

4. March 28, 1989 - The Court conducts a Unified Appeals hearing where Judge James fails to disclose the fact that he has had ex parte communications with Appellant. The District Attorney, also present, does not disclose the fact that Sheriff Lee has obtained a third confession.

5. March 29, 1989 - Defense counsel receives a letter from the District Attorney dated March 28, 1989, revealing that Sheriff Lee has obtained a video taped confession from Appellant and that Appellant is dissatisfied with his counsel.

6. March 30, 1989, Judge James accepts another phone call from Appellant, discussing his desire to plead guilty and fire his attorneys.

7. March 31, 1989 - Judge James finally discloses to defense counsel that he has spoken to Appellant on two different occasions. Appellant expresses his desire to plead guilty to all charges and dismiss his attorneys.

[13] Lee later testified at the extraordinary motion for new trial that normally he would have "made sure" a defendant's lawyer knew his client was about to give still another statement and things of that nature. (EMFNT 250-251). Yet, he did not "make

Still, the Court did not call Appellant's attorneys to discuss the call from Appellant. Counsel were summoned by the Court for a hearing on March 31, 1989, to address this letter from the District Attorney.

By the time the calls were disclosed in open court on March 31, 1989, the attorney-client relationship was destroyed and all communications between counsel and Appellant had broken down. Counsel was trying to have his client psychologically evaluated and Judge James refused to order an evaluation sua sponte.

On May 5, 1989, David Crowe discharged his attorneys and withdrew his motion for interim appellate review.[14] David Crowe entered his pleas of guilty over the objections of his counsel and asked to be sentenced that day by Judge James.[15] (PT 5/5/89 at 10; 12-18; 29). Trial counsel advised Appellant against entering this plea of guilty to both charges at the May 5, 1989, hearing and again tried to have his client evaluated. (PT 5/5/89 at 2; 12-15;

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sure" of anything in this case, other than that the batteries were fresh in his tape recorder. Further, he disclosed Appellant's desire to confess to no on until after the deal was signed sealed and delivered.

[14]Appellant's dismissal of counsel came completely out of the blue. Before the court engaged in ex parte communications with Appellant, there was no hint of discontent. In fact, Appellant repeatedly expressed his satisfaction with the job counsel was doing. (see, e.g., 3/25/88 PT at 12; 4/22/88 PT at 7; 7/21/88 PT at 318).

[15] An issue was raised at Appellant's extraordinary motion for new trial by the prosecutor about whether Appellant ever specifically asked Judge James to sentence him to life in prison. (EMFNT 210). It would be preposterous for anyone to assume David Crowe intended to be sentenced to death by Judge James on May 5, 1989. (See AFF. 63; 70).

29). But David Crowe would not work with his own attorneys, at one point even attempting to have them excluded from the courtroom to stop them from interfering. (PT 5/5/89 at 15-16).

After David Crowe's unsuccessful attempt to remove trial counsel from the courtroom and after several recesses for trial counsel to explain things to him, David Crowe again urged the court to allow him to proceed pro se with his guilty plea. The trial court allowed him to do this without making any Faretta determination.

Later in the proceedings, when David Crowe discovered for the first time that the Court was not going to sentence him but, rather, was going to proceed with a sentencing jury trial, David Crowe responded "well, if we're going to proceed that way I'd like for Mr. Bergin to continue for the mitigation phase." (PT 5/5/89 at 19-20). This request for assistance indicates Appellant's expectations that his deal with Sheriff Lee would result in a life sentence imposed by the court.

EFFECT OF PLEA ON TRIAL COUNSEL'S ABILITY TO PREPARE FOR TRIAL

Trial counsel could not adequately prepare for a sentencing hearing after his client had been convinced by Earl Lee that he could only save his life by pleading guilty. Trial counsel testified, for example, that:

> [N]o, I never did get a chance to pursue them [connections between David Crowe's wife, the Douglasville Police Department and the murder weapon] because it really wouldn't have mattered at sentencing whether the wife was involved or not because he's already convicted at that juncture and the jury can't argue for the determination of life or death. It

> mattered that I be allowed to pursue those in an accurate manner in a pretrial evidentiary fashion and also at a trial on guilt or innocence where a jury could determine that in fact David was not in fact guilty, he was covering for his wife. But after that, it's all academic...

(EMFNT 129).

THE ASSISTANT DISTRICT ATTORNEY'S INTEREST IN THE OUTCOME

William H. McClain, an Assistant District Attorney for Douglas County, actively participated in the prosecution of State of Georgia v. Samuel David Crowe in 1989 as co-counsel to the (then) District Attorney Frank Winn on behalf of the State. (EMFNT 39).

In the time between the prosecution of that case and the hearing on Appellant's extraordinary motion for new trial, Mr. McClain's status changed to "Senior Assistant District Attorney" and he is now the prosecutor of Appellant's case. (EMFNT).

Prior to the hearing on the extraordinary motion for new trial, Appellant filed a Motion To Disqualify Assistant District Attorney William H. McClain From Further Participation In The Prosecution Of This Case (5/17/94 R.19).

Mr. McClain stated *in his place* at the hearing on Appellant's extraordinary motion for new trial: "I am intending to write a book about Sheriff Lee" (EMFNT 29); "one never knows and that's my hope that we do and are successful in that undertaking" (EMFNT 30); "I can *virtually guarantee* at this point this case will not be in it" (EMFNT 30); that he has interviewed Lee on numerous occasions, interviewed other people, written outlines and rough notes, transcribed interviews and considered a theme (EMFNT 29); "*we have*

a mutual understanding between ourselves as friends that if we are fortunate enough that it makes any money that he and I are going to share in it some way" (EMFNT 32); "I intend to write about some of the criticism that Sheriff Lee has received from various quarters (EMFNT 33); "I am proud to call Earl Lee my friend. I trust Earl Lee. I believe he's a good man. That makes me partial I suppose, whether I am writing a book about him or not" (EMFNT 37-38). Appellant's motion to disqualify was denied without making any findings of fact. (EMFNT 42).

STATEMENT OF ISSUES

David Crowe's fundamental right to counsel was thoroughly undermined by the State's deliberate interference. When Douglas County Sheriff Earl Lee improperly communicated with Appellant during the critical stages of his capital trial, on notice that Appellant was represented by an attorney, and when Sheriff Earl Lee convinced David Crowe to fire his attorneys and plead guilty in order to save his life, any and all communications between Appellant and counsel were destroyed.

Further, the actions Douglas County Superior Court Judge Robert James, not only failed to protect Appellant's rights, they deliberately contributed to abridging them. Judge James should not have conferred with Appellant. However, once communication had taken place, he had an absolute duty to disclose the fact that the communications happened and the substance of the communication immediately. However, Judge James failed to disclose anything until four days and two scheduled hearings later. Moreover, when

Appellant, on March 28, 1989, indicated that he had no objections with counsel's performance (3/28/89 PT at 15), the trial court had an absolute duty to correct the trial record and announce that he had information to the contrary. A prompt and full disclosure of the communication to Appellant's trial attorneys would have prevented the guilty plea and may have prevented a death sentence in this case.

The trial court erroneously refused to disqualify Assistant District Attorney William H. McClain from the prosecution of Appellant's case once it learned that Mr. McClain had a financial and personal interest in its outcome.

ARGUMENT[16]

CLAIM 1

ERROR I

THE TRIAL COURT IMPERMISSIBLY INTERFERED WITH THE ATTORNEY CLIENT RELATIONSHIP IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 14, 16, AND 17 OF THE GEORGIA CONSTITUTION

The trial judge had an absolute duty to disclose, at the earliest possible time, any ex parte communications he had with Appellant. Judge James' failure to make this disclosure either when the first communication occurred, the next day at the Unified Appeal hearing or at any time during that week before the next hearing is a per se violation of Appellant's state and federal constitutional rights, warranting nullification of his guilty plea and subsequent sentence of death.

The Judicial Code expressly forbids unauthorized ex parte communications between the trial judge and either party to an action pending before the court.

> [J]udges should accord to every person who is legally interested in a proceeding, or his or her lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceedings...

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[16] Mr. Crowe explicitly predicates each and every claim in this brief on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Section I, Paragraphs 1, 2, 11, 12, 13, 14, 16, and 17 of the Georgia Constitution; O.C.G.A. §§ 17-10-2, 17-10-30, and 17-10-31; and other specific authorities relied on below in support of each claim.

Code of Judicial Conduct[17] Canon 3 (4);

> A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify as a character witness.

Georgia Code of Judicial Conduct Canon 2 (emphasis supplied).

Not only did Judge James have two unauthorized ex parte communications with Appellant, he also made a conscious decision not to disclose the communications until his hand was forced by a letter from the District Attorney.

Ex parte communications between the court and a party to a proceeding before it are forbidden for good reason. Should ex parte communications be tolerated, one side may gain unfair advantage in the course of litigation based on evidence the other party has no opportunity to refute. The confines of the eighth amendment prohibit this in capital cases, Gardner v. Florida, 430

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[17] The Georgia Code of Judicial Conduct was adopted by the Supreme Court of Georgia on January 1, 1974. It is published in 202 S.E.2d at XXXIII, 231 Ga. A-2.

U.S. 349 (1977), as does the due process clause by necessary implication. Matthews v. Eldridge, 424 U.S. 319 (1976) (the right to be heard in a meaningful manner by an impartial decision maker.)

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

United States v. Callahan, 588 F.2d. 1078, 1088 n.3 (5th Cir. 1979), cert. denied, 444 U.S. 826 (1979).

The trial court's decision, first to accept the phone calls from Appellant,[18] and second to remain silent about them[19] in order to, allegedly, "encourage" communications between Appellant and his trial counsel actually worked to destroy the attorney/client relationship that existed.

Appellant, believing that Sheriff Earl Lee had spoken to Judge James and arranged a life sentence in exchange for his guilty plea, placed two separate calls directly to the Judge, who was in chambers and available to accept the calls each time. Appellant

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[18]The State asserts that the Judge mistakenly accepted the calls because he has a relative named David Crowe. While this might excuse him accepting the first call on March 27, 1989, it provides no excuse for his accepting the March 30, 1989 call or his failure to disclose the March 27 call at the hearing on March 28, 1989.

[19]As a result of the trial court's failure to disclose the calls at the appropriate time and in the appropriate fashion, the Appellant presented evidence at the extraordinary motion for new trial of only two phone calls, and was forced to rely on the memory of a trial judge who kept absolutely no notes of the calls, four years after they occurred.

consulted with the court about decisions he had made relating to his case. The Judge not only accepted those calls and gave Appellant substantive advise, he failed to disclose them and their contents to Appellant's attorneys.

Up to the time Appellant placed his calls to Judge James, there was a healthy relationship between him and his counsel. Indeed, at virtually every hearing prior to the March 31, 1989 hearing, Appellant unequivocally stated that he was happy with counsel's performance (3/28/89 PT. at 15; 3/25/88 PT at 12; 4/22/88 PT at 7; 7/21/88 PT at 318). Counsel was absolutely stunned when he learned that Appellant was dissatisfied with his representation and wished. He asked that Appellant be moved to another jail and/or be evaluated by a mental health expert:

> I know that we have to have some serious meetings now; not that we haven't had many, many serious meetings over the course of the last year. . . I don't think he's thinking with a clear head here, Your Honor,
>
> * * *
>
> I don't know which way to turn at this juncture. . . I would ask the court if we could possibly -- and I know this seems farfetched, but I don't want to damage this case from the Defense point more so than we have -- if we could have Mr. Crowe moved to a different jail so that there could be no more emotional outbursts and confessions[20] that might be termed voluntary in nature under the mental duress that he's been under

[20]Counsel, although having no hard evidence to support it at the time, knew that Sheriff Lee was exerting tremendous pressure on Appellant at the Douglas County Jail. Counsel's "hunch" has proved correct as evidenced by the testimony and evidence submitted at Appellant's Extraordinary Motion for New Trial.

* * *

> Your Honor, I think I could state in my place without violating the attorney/client privilege that what appears momentarily to be a rational decision on the surface, during the course of just this case during the last twelve (12) months, is clearly not rational.

(3/31/89 PT 12 - 18). Counsel also described how, although Appellant may have offered and asked them to pursue different theories, each of the theories was diametrically opposed to pleading guilty and throwing himself on the mercy of the court. Id. at 18-19.

The actions of the court were untenable and warrant reversal of their own accord. However, when considered in light of Sheriff Lee's misconduct, there can be no doubt but that Appellant is entitled to a new trial.

The trial court's failure to disclose the ex parte communications rendered trial counsel incapable of salvaging the attorney-client relationship. After the communications, there was not enough of a relationship left to enable Appellant to proceed to trial with an effective defense. If the communications had been disclosed, counsel would have been able to convince the Appellant not to enter a guilty plea. Further, he would have been able to factually develop the issues that were unknown to him at that time -- i.e. Sheriff Lee "negotiating" a life sentence deal -- in order to make a record of everything for review by this Court.

Sheriff Earl Lee's conduct in preying on this capital defendant while awaiting trial in his jail is reprehensible and must be condemned. However, the trial judge should be governed by

a much higher standard. The deliberate undermining of Appellant's constitutional right to counsel must not be tolerated, lest the courts themselves become the unwitting instrumentality through which government agents may interfere with basic constitutional rights. United States v. Morrison, 602 F.2d 529, 533 (3rd Cir. 1979).

In addition to his deliberate concealment of ex parte communications with Appellant, Judge James failed to correct the record on something he knew was false. At the March 28, 1989 hearing, Judge James had already spoken to Appellant once. The content of that communication, at least in part, was Appellant voicing his displeasure with the manner in which counsel was preparing his case. Yet, when Appellant appeared before the court at the March 28 hearing, he stated on the record, in response to the court's question, that he was pleased with counsel's representation. (3/28/89 PT at 15). Judge James knew this representation to be false -- or at least had reason to question it -- yet he took no steps to correct it. As an officer of the court, Judge James had an absolute duty to bring to light any testimony he knew to be false.

The trial court in any capital prosecution has an obligation to follow the Unified Appeal Procedure. The purpose of the Unified Appeal proceedings is

> 1. Insuring that all legal issues which ought to be raised on behalf of the defendant have been considered by the defendant and his attorney and asserted in a timely and correct manner.
>
> 2. Minimizing the occurrence of error and correcting as

promptly as possible any error that nonetheless may occur.

3. Making certain that the record and transcripts of the proceedings are complete for unified review by the sentencing court and by the Supreme Court.

Unified Appeal Procedure § I(A)(1),(2),(3)(emphasis added).

As an officer of the court and as a Superior Court Judge presiding over a death penalty case under the Unified Appeals Procedure, Judge James had an absolute duty to correct testimony he knew to be false. Judge James deliberately abridged his duty. As a result of the deliberate actions taken by the trial court, the attorney/client relationship in this case was utterly destroyed and Appellant was constructively denied his right to counsel for his guilty plea. This Court should vacate Appellant's plea and subsequent sentence of death.

CLAIM 2

THE COURT ERRONEOUSLY ACCEPTED APPELLANT'S GUILTY PLEAS IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 13, 14, 16, AND 17 OF THE GEORGIA CONSTITUTION

ERROR II

THE COURT FAILED TO CONDUCT A SEARCHING INQUIRY TO DETERMINE IF APPELLANT WAS AWARE OF THE CONSEQUENCES OF PROCEEDING PRO SE IN ENTERING GUILTY PLEAS IN VIOLATION OF FARETTA V. CALIFORNIA, 422 U.S. 806 (1975).

ERROR III

APPELLANT'S PLEA OF GUILTY TO ARMED ROBBERY UNDER NORTH CAROLINA V. ALFORD, 400 U.S. 25 (1970) IS CONSTITUTIONALLY INFIRM.

On May 5, 1989, acting in a pro se capacity, Appellant tendered a waiver of counsel, as well as a plea of guilty to the charge of murder and an Alford plea to the charge of armed robbery to the trial court. The trial court accepted the pleas. See, North Carolina v. Alford, 400 U.S. 25, 39, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970); (R-8; PT 55-89).

Subsequently, on November 14, 1989, trial counsel for Appellant filed a motion for mistrial based upon the trial court's acceptance of Appellant's waiver of counsel, guilty and Alford pleas, (R-327, T. 768).

A. The Trial Court Failed To Make A Valid Inquiry Under Faretta v. California, 422 U.S. 806 (1975), Before Allowing Appellant To Proceed Pro Se In Entering His Guilty Pleas.

Prior to the acceptance of any plea from the Appellant, the trial court was mandated to determine that a valid waiver of counsel was actually being tendered and to make an appropriate Faretta inquiry.

"The Sixth Amendment as made applicable to the States by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so." Taylor v. Ricketts, 239 Ga. 501, 238 S.E.2d 52, 53 (1977). However, "[b]efore a court permits a defendant to represent himself at the trial, the defendant must clearly and unequivocally assert the right of self-representation." Fitzpatrick v. Wainwright, 800 F.2d 1057, 164 (11th Cir. 1986).

Once a criminal defendant has made an unequivocal request to proceed pro se, "the trial judge has the responsibility of determining whether the accused has intelligently waived his right to counsel." Clarke v. Zant, 247 Ga. 194, 275 S.E.2d 49, 51 (1981). Further, "[t]his protecting duty imposes a serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 465 (1937). Whether an accused has made a knowing and intelligent waiver of his right to counsel "depends on the particular facts and circumstances of each case, including the background, experience and conduct of the accused." Fitzpatrick v. Wainwright, 800 F.2d at 1065.

In the instant case, the trial court made no inquiry into Appellant's desire to waive his right to counsel and proceed pro se. Instead, after conducting a hearing where it was revealed for the first time that Appellant had made a third confession to

Sheriff Lee while being held at the Douglas County Jail, that the Judge had received two calls from Appellant wherein Mr. Crowe expressed his desire to waive counsel, trial counsel for the first time was made aware that Appellant actually intended to waive counsel. Trial counsel immediately requested that the trial court have his client moved to another jail because of "mental duress, acting in a manner termed voluntarily when it is against his better interest." (3-31-89 PT at 14).

The trial court adjourned and eventually conducted a hearing on May 5, 1989, where he accepted Appellant's request to withdraw his interlocutory appeal (5/5/89 PT at 20), accepted his guilty plea to malice murder and *Alford* plea to armed robbery (5/5/89 PT at 27), informed Appellant that a jury would determine sentence (5/5/89 PT at 20) and re-appointed counsel to handle the sentencing trial (5/5/89 PT at 44).

1. Appellant made an unequivocal request to proceed pro se.

At the hearing of May 5, 1989, Appellant unequivocally expressed his desire to waive counsel and proceed pro se at least five (5) times.

> Your Honor, if I might, may I indulge the Court at this time to allow me to waive my Constitutional right to counsel

5/5/89 PT at 10;

> Your Honor, if I may, for the purposes of the record and the Court, I would like to at this time ask if I may waive my right, my Constitutional right to counsel and proceed pro se?

at 12;

> I've directed my counsel that I would like to proceed on my own.

at 13;

> I feel that I am aware of the consequences on both sides of the issue. And if the Court indulge me, I would please ask that I could go on ahead and proceed by myself.
>
> * * *
>
> I would prefer to do it myself, Your Honor.[21]

at 15.

At this point, the Court of its own accord recessed and ordered Appellant and counsel to confer. However, upon returning to the courtroom, Appellant's mind had not been swayed, and counsel informed the court of Appellant's desires: to withdraw his interlocutory appeal; to enter pro se pleas to malice murder and armed robbery; and to waive a jury trial for sentencing.[22] After

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[21]Appellant was so set on proceeding pro se, he asked the court to remove counsel from the courtroom while he tendered his plea.

> At the onset of this hearing, you told me that I had the -- that I have the right of exclusion and may I ask if I still retain that right. . . I would ask that all persons be excluded from this hearing except Your Honor, and the court stenographer, myself, Mr. Winn and Mr. Lee and, of course, my wife and her sister. . .

Id. at 15. Note that Mr. Bergin and Ms. Siegel were not included in those people Appellant asked to remain.

[22]Counsel's representations to the court at that time are of particular note and clearly indicate that he and Appellant believed the pleas were entered pro se.

> As I believe my -- mine and Ms. Siegel's last official act, he would like us to withdraw our motion upon which the Court granted the

conducting an inquiry into whether Appellant made a knowing and intelligent waiver of his right to trial,[23] the trial court accepted his pro se guilty pleas to malice murder and armed robbery (5/5/89 PT at 27). As Appellant signed the indictment indicating that he was pleading guilty to the charges, the District Attorney "[wrote] on here [the indictment], Your Honor, also that he waives an attorney at this point" and instructed Appellant to "initial right beside" the waiver notation. (5/5/89 Pt at 29).[24] Thus, while the court was advised of his desire to proceed pro se, Appellant was never advised by the court of the consequences of his decision.

2. The trial court failed to insure that Appellant's waiver was knowing and voluntary.

Although the trial court had "the serious and weighty responsibility" to assure Appellant knew the ramifications of

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interlocutory appeal.

* * *

Subsequent to that, he would like to tender a Plea of Guilty on a pro se basis to Count one of the indictment.

(5/5/89 PT at 18)(emphasis added).

[23]The Court made no inquiry into, and counsel never advised him on his right to waive counsel and the subsequent pitfalls.

[24]At the May 5, 1989 plea hearing the prosecutor conceded that Appellant had waived counsel for purposes of entering the plea. However, during closing argument, when it was no longer to his advantage, the prosecutor argued that Appellant was playing "lawyer games," that he had been represented by counsel during the plea, and any insinuation to the opposite was just an outright lie. The State cannot have it both ways. In either instance, this Court must reverse Appellant's death sentence.

proceeding pro se, it eventually accepted Appellant's pro se guilty pleas without ever making the proper *Faretta* inquiry. The trial court's failure to ensure Appellant made a knowing and intelligent waiver of his right to counsel warrants per se reversal. As consistently held by the Eleventh Circuit:

> Because assertion of the right of self-representation constitutes a waiver of the right to counsel, as well as a relinquishment of the important benefits associated with that right, the trial judge must conduct a hearing to ensure that the accused understands the dangers and disadvantages of proceeding *pro se*. *Hance v. Zant*, 696 F.2d 940, 949 (11th Cir. 1983). The trial judge must determine that the defendant "knows what he is doing and [that] his choice is made with open eyes." *Faretta, supra*, 422 U.S. at 835, 95 S.Ct. at 2541, *quoting Adams v. United States ex rel. McCann* 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942)

United States v. Edwards, 716 F.2d 822, 824 (11th Cir. 1983).

Further, a valid waiver cannot be presumed from a silent record. Burgett v. Texas, 389 U.S. 109 (1967). The court must assure that:

> the record should reflect a finding on the part of the trial court that the defendant has validly chosen to proceed pro se. The record should also show that this choice was made after the defendant was made aware of his rights to counsel and the dangers of proceeding without counsel.

Clarke v. Zant, 275 S.E.2d at 52.[25]

This Court should vacate Appellant's guilty plea and

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[25]Although this Court found no reversible error in Clarke, it mandated that from that date forward (Feb. 24, 1981), the trial court must conduct a valid *Faretta* inquiry when a defendant makes an unequivocal request to proceed pro se.

subsequent sentence of death as the record clearly reflects that Appellant entered the pleas pro se, and the court failed to ensure that Appellant made a knowing and intelligent waiver of his right to counsel. Faretta v. California, 422 U.S. 806 (1975). However, even if this Court were to ignore the record and find that Appellant was represented by counsel, reversal is warranted because the trial court abridged Appellant's constitutional right to self-representation. Faretta v. California, 422 U.S. 806 (1975).

B. Appellant's Alford Plea To Armed Robbery Is Constitutionally Infirm.

There are three separate aspects of David Crowe's pro se action that are germane to this issue:

> (1) the trial court failed to adequately warn Appellant of the consequences of his actions in entering an un-counselled Alford plea to the charge of armed robbery, in effect admitting the existence of the aggravating circumstance of armed robbery as a matter of law, thereby eliminating the State's burden of proving it beyond a reasonable doubt to the jury;
>
> (2) the trial court failed to adequately resolve the conflict created by Appellant's third statement denying any intent to commit armed robbery and the conviction resulting from the Alford plea (T. 768), again, alleviating the State's burden of proving, beyond a reasonable doubt, the essential element of intent (T. 770, 771); and
>
> (3) the trial court failed to exercise its discretion to reject defendant's plea, in light of the unresolved conflict and the objection of Appellant's trial counsel (T. 21, 769).

Mr. Crowe's own testimony put the court on notice that he fundamentally misunderstood the ramifications of the *Alford* plea.

In tendering the plea, Mr. Crowe defined it as:

> the Defendant can plead guilty without really admitting guilt to a particular charge.

(5/5/89 PT at 27).

Appearing to agree with Appellant's understanding, the district attorney informed the trial court that Appellant's third statement, indeed, reflected that the incident began with a disagreement between him and the deceased, escalated into a fight and resulted in the death of Joe Pala, "and that he took the money to make this appear to be an armed robbery." (5-5-89 PT at 39, 40, 41).

The trial court stated unequivocally that Appellant's Alford plea would still allow the sentencing jury the option to find he did not intend to commit armed robbery. (T. 771). This fact is critical as intent is a material element of the (b(2) aggravating circumstance the State had to prove in order to impose a sentence of death. Yet, over defense objection, the court later erroneously refused to properly charge[26] the jury on the law regarding an Alford plea. Moreover, the trial court's refusal to properly charge the law regarding the tendering of an Alford plea perfects Appellant's claim of error herein (T. 1887).

1. Appellant was not aware of the outer limits of the consequences of pleading guilty to armed robbery.

A guilty plea must be an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.

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[26]The proper charge should have informed the jury that such a plea allowed Appellant to maintain his innocence to the charge of armed robbery.

Total ignorance of the exact application of the Alford plea to the aggravating circumstance of armed robbery should render that plea invalid under the due process clause. The outer limits must be precisely, and not just substantially known. United States v. Perwo, 433 F.2d 1301, 1302 (5th Cir. 1970).[27]

It was obvious that David Crowe failed to understand the "outer limits" of this Alford plea. He denied any intent to commit the crime of armed robbery and stated that he took the money to make the crime scene appear as if an armed robbery had occurred only after the victim was dead.

In Minchey v. State, 155 Ga. App. 632, 633, 271 S.E.2d 885 (1980) the Court of Appeals held that the trial court failed to adequately resolve the conflict between defendant's statement and his guilty plea. In that case, the trial court did not inquire into or seek to resolve the conflict between the waiver of trial and the claim of innocence.

The colloquy in David Crowe's case is analogous to that of Minchey, supra, in that the trial court herein also failed to address the conflict between David Crowe's guilty plea to armed robbery and his claim of innocence contained in his third statement made in contemplation of tendering that plea.

David Crowe was not entitled to enter a guilty plea as a matter of right. See, Burkett v. State, 131 Ga. App. 177, 178, 205 S.E.2d 496 (1974) ("It should also be remembered that 'Defendants

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[27]In Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as precedent, decisions of the former Fifth Circuit rendered before October 1, 1981.

had no absolute right to have their pleas [of guilty] accepted.'"); Shearer v. State, 218 Ga. 809 (2), 198 S.E.2d 369 (1973)("... course of action in refusing to accept the proffered pleas was correct. Defendants had no absolute right to have their guilty pleas accepted."); and, North Carolina v. Alford, 400 U.S. 25, 39, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970) (Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes to so plead. n. 11). Rather, it was within the discretion of the Court to accept or reject David Crowe's guilty plea. See, United States v. Crosby, 739 F.2d 1542 (11th Cir. 1984).

Because of the importance of protecting the innocent and of insuring that guilty pleas are the product of free and intelligent choice, pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. (Emphasis supplied). See, Willett v. Georgia, 608 F.2d 538, 540 (5th Cir. 1979), quoted with approval in Minchey v. State, supra; Wallace v. Turner, 695 F.2d 545 (11th Cir. 1983).

Appellant cited Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989), a case distressingly similar to the instant case, to the trial court during argument on his motion for mistrial. In Harding, the Eleventh Circuit reversed, finding that the trial court had failed to warn the pro se defendant of the consequences of his actions.

In the case at bar, the trial court failed to advise Appellant that his plea to armed robbery was a conviction and would be used against him as such by relieving the State of its burden to prove that statutory aggravating circumstance beyond a reasonable doubt to the sentencing jury. Additionally, the trial court did not explain to David Crowe that the element of intent is essential to the crime of armed robbery. As in Harding, the trial court failed to adequately apprise and warn Appellant of the consequences of his actions.

CLAIM 3

VARIOUS FORMS OF PROSECUTORIAL MISCONDUCT VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 14, AND 17 OF THE GEORGIA CONSTITUTION

ERROR IV

THE PROSECUTOR DELIBERATELY MISREPRESENTED FACTS TO THE JURY AND DELIBERATELY ARGUED FACTS NOT IN EVIDENCE

ERROR V

THE TRIAL COURT ERRONEOUSLY REFUSED TO ALLOW THE ORIGINAL INDICTMENT TO GO OUT WITH THE JURORS KNOWING THE RECORD TO BE FALSE

ERROR VI

THE PROSECUTOR IMPROPERLY COMMENTED ON APPELLANT'S FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION WHEN APPELLANT ELECTED NOT TO TESTIFY AT HIS SENTENCING TRIAL.

ERROR VII

THE PROSECUTOR MISINFORMED THE JURY REGARDING FUNDAMENTAL RIGHTS GUARANTEED BY THE CONSTITUTION

ERROR VIII

THE PROSECUTOR IMPERMISSIBLY INJECTED RELIGION INTO THE SENTENCING DETERMINATION

ERROR IX

THE TRIAL COURT ERRED BY BOLSTERING THE PROSECUTOR'S IMPROPER ARGUMENT

ERROR X

THE PROSECUTOR IMPROPERLY INTRODUCED ILLEGALLY OBTAINED STATEMENTS TO IMPEACH APPELLANT WHEN APPELLANT DID NOT TESTIFY.

ERROR XI

THE PROSECUTOR IMPROPERLY INTERJECTED VICTIM IMPACT EVIDENCE INTO APPELLANT'S SENTENCING TRIAL.

ERROR XII

THE TRIAL COURT ERRONEOUSLY ALLOWED THE PROSECUTOR TO IMPEACH APPELLANT WITH HIS TESTIMONY FROM THE SUPPRESSION HEARING THROUGH THIRD PARTY WITNESSES WHEN APPELLANT DID NOT TESTIFY DURING THE SENTENCING TRIAL

A. The Prosecutor Deliberately Misled Jury And Argued Facts Not In Evidence When He Told Them That Appellant Was Represented By Counsel When He Plead Guilty

Although it is incontrovertible that on May 5, 1989, David Crowe waived counsel and entered two pro se guilty pleas (see Claim II), the district attorney deliberately mislead the sentencing jury by arguing that said pleas occurred while David Crowe was represented by his trial counsel knowing that statement to be false. (e.g., T. 1415, 1417, 1435, 1440). The prosecutor's deliberate misstatements totally destroyed Appellant's credibility and counsel's integrity in the eyes of the jury. This Court should not countenance deliberately improper and intentionally misleading prosecutorial argument to a capital sentencing jury.

At the May 5, 1989 hearing before the trial court, Appellant entered pro se pleas of guilty to malice murder and armed robbery. (5/5/89 PT at 27). The prosecutor noted on the original indictment that Appellant entered these pleas after waiving his right to counsel and had Appellant initial his notation. (5/5/89 PT at 29). (See Claim I).

During the early stages of the sentencing trial, the trial court gave Appellant every indication that the original indictment (CR88-322) or an identical copy thereof with number CR88-1092 pasted over CR88-322 would be going to the jury (T.

753-754). Ultimately the jury received CR88-1092, a completely different indictment (R-5). The court and prosecutor, acting in concert, deprived Appellant his rights when the Prosecution affirmatively misled the jury into believing that Appellant lied about proceeding pro se in entering his guilty plea and when the court sent out a "doctored" indictment which omitted evidence that Appellant was in fact acting pro se in entering his pleas.

The Prosecutor's affirmative deception[28] completely undermined the credibility of Appellant, his counsel and every mitigation witness presented at the capital sentencing trial. This error was further exacerbated when the trial court refused to send out the original indictment -- the indictment which would have firmly established that Appellant had indeed "waived counsel" for purposes of entering his pleas. In addition, because the jury was deprived of crucial information to the contrary the prosecutor's closing argument that David Crowe lied to them about his pleas was reinforced. The prosecutor's actions

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[28]If there was any doubt that the prosecutor's actions were deliberate, those doubts were removed (or waived) when he stated:

> I want you to listen to my closing argument, but I want you to listen just as carefully to Mr. Bergin's. If I say something wrong about these facts, if I misstate anything, hold it against me, that's okay. . . let's just assume, if I make a mistake in my closing argument, I'm doing it on purpose because I ain't supposed to do that. And when you hear Mr. Bergin relate facts to you, you hold him to exactly the same standard.

(T. 1799).

alone warrant reversal of Appellant's death sentence. However, when combined with the actions of the trial court, there is little doubt but that Appellant did not receive a fair sentencing trial.

The state carries a double burden when prosecuting a trial. First, the prosecutor owes an obligation to the State to prosecute zealously. Secondly, as a representative of the State, the prosecutor owes an obligation to the people to be fair. In Appellant's case, the prosecutor's zeal overbore his duty to be fair when he deliberately misstated the facts in order to procure a death sentence.

1. The Prosecutor deliberately misstated material facts to the jury.

Knowing that Appellant had entered pleas to malice murder and armed robbery while proceeding pro se, the prosecutor structured his closing argument to completely deceive the jury on this crucial point. Initially, the prosecutor referred to Appellant as a "liar" that "doesn't have the guts to come in here and tell you the truth. [Who]'s done nothing but give you lies." (T. 1792). He went on to instruct the jury just how important the "facts" were in this case and that "[t]his is a case where you need to understand the facts, and you need to understand some of the things that went on in the process of how these facts get to you." (T. 1794). Finally, in a viscous attack on the credibility of Appellant, counsel and each mitigation witness, the prosecutor first defined "lawyer games" as nothing but lies and then charged Appellant and counsel with playing them in order

to deceive the jury into believing he waived counsel when entering his guilty pleas.

> When we were listening to opening statements, Mr. Bergin told you that David Crowe didn't want to play lawyer games. He wanted to fire his lawyer. You know, ladies and gentlemen, lawyer games are when an attorney brings up things that are not in evidence. Tell me one person that has taken this stand and said that that man fired his lawyer? Who is sitting right here at this table. Has that man passed the bar? I assume he has. I assume that he is his lawyer; but he gets up here in the opening statement and says that man has fired his lawyer.

(T. 1798, 1799) (emphasis added);

> When [Mr. Bergin] talks to Kelly Fite on the witness stand and says -- he's trying to put thoughts in your head that aren't true; they're lies. He says to Kelly Fite, did you know Byron Dawson wouldn't let me come to the Crime Lab? Why didn't he ask Byron Dawson that question? Kelly Fite has no way of knowing that. I'll bet you money he planned, if I hadn't have said this, to argue to you that the Crime Lab wouldn't let me bring stuff here. But, it ain't in evidence; just like it's not in evidence that that man fired his lawyer. When we're talking about lawyer games, that's exactly what David Crowe is doing. We have no idea whether that lawyer's been fired or not. There haven't been any documents or anything introduced to prove that.[29]
>
> Well, lets talk about contrived stories and let's talk about what we can do. What if the evidence is so strong that the State has

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[29]Of course, had the original indictment -- the indictment containing the prosecutor's notation that Appellant waived counsel -- gone out with the jury, there would have been a document that clearly supported the truth -- that Appellant was proceeding pro se when he entered his guilty pleas. The District Attorney's affirmative steps to keep the jury unaware coupled with his subsequent deliberate misstatements denied Appellant a fundamentally fair trial.

proven beyond all doubt that four (4) aggravating circumstances exist. How do we get out of this? How do we get out of this? How do we do whatever it takes to save a life?

(T. 1800);

Nobody said he fired his lawyer. He argued in opening statements that he did, but he's sitting there at the table. Nobody has ever said that this man has ever done anything along the lines of coming into this court and telling this Court anything but a bunch of lies.

(T. 1800);

Do you also realize, in lawyer games, that if a motion to suppress a confession is kept out of evidence, that we might turn a guilty person loose? But when you're playing lawyer games, when you're playing defense attorney games, you don't care about justice. You don't care about fairness. You care about winning the game. That's what lawyer games . . . are all about.

Mr. Bergin told you David Crowe didn't want to play lawyer games. That's all he's doing.

(T. 1802-03);

He wants to play lawyer games with you. That's what lawyer games are all about; how I am beat on innocence or guilt. They're going to find me guilty and if I fight that, it's going to irritate this jury. So, why don't I give the appearance of dropping on my hands and knees and begging for forgiveness . . .

(T. 1804);

It's a lie from the very beginning. You don't need to know that the evidence locks it down. All you need to know is that from the very beginning, he's lied.

(T. 1805);

I hope this jury has forgotten that two (2) hours earlier I asked this question. What

> does this -- this fired lawyer do? This lawyer that came in here playing lawyer games. . . I've got to do whatever I can to get this man off; and that's what you have right here, ladies and gentlemen. You have a story that's just a lawyer game.

(T. 1816).

The prosecutor's message was unmistakable. He asked the jury to believe that David Crowe and his attorney, Michael Bergin, had been lying to them from the very beginning when Appellant plead guilty. They lied when they claimed he had done so against the advise of counsel. And they lied when they claimed he did so pro se. The prosecutor sent the jury this message even though he knew it was absolutely false, even though he knew that when it benefitted him, he admitted that Appellant "waived counsel" for purposes of entering the plea.

2. Counsel objected to the Prosecutor's improper argument and the court's decision to send out a "cleansed" indictment.

At the close of the prosecutor's argument[30] counsel repeatedly objected to both the argument and the court's decision to send out a "cleansed" indictment rather that the *original* wherein the prosecutor noted that appellant had "waived counsel" for purposes of entering his guilty pleas.

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[30]There was no need to object during the argument as counsel had been led to believe the *original* indictment, complete with the prosecutor's notation -- "waived counsel" -- was going to be sent out with the jury. As soon as the grounds for an objection were apparent, counsel vehemently objected. Hudson v. State, 250 Ga. 479, 299 S.E.2d 531, 536 (1983)(error cannot be raised on appeal "unless the court's attention is called to such improper argument and a ruling invoked upon the trial.")

Bergin: We're going to send a blank indictment out, Your Honor, when the man plead guilty?

(T. 1824);

Winn: Then, it doesn't need to go out; it's not evidence. Just send the one out that's been cleansed.

(T. 1824);

Court: Well, I have the order finding him guilty.

(T. 1824);

Court: Well, the order that goes out says that, "The Court finds that the Defendant's attorneys, Michael Bergin and Randie Siegel, have provided the Defendant with all services requested, have diligently assisted the Defendant in his decisions and have thoroughly explained all the rights which he's entitled to."

(T. 1825-26);

Bergin: Well, Your Honor, I think this is intentionally misleading the jury here as to a material fact if you don't let the jury have the indictment. Frank said earlier, and I agreed with him during the trial, the record speaks for itself. The indictment goes out with every case, but the -- and now we want to put out a blank indictment? That's distorting this to the jury.

(T. 1824-25);

Bergin: That has nothing to do with resting. It's part of the -- part of the case. You're going to send out a blank indictment one unsigned, where the jury can infer - like Frank was saying, if we're playing lawyer games, this is a travesty of justice, Your Honor, with a man's life on the line.

(T. 1825);

Bergin: Your Honor, that is not an accurate portrayal of the facts. Now, Frank told this

> jury to hold him to it, and if he walked through a cow pasture and stepped in it, it's his problem.

(T. 1826);

> Bergin: You're basing it on distorting the facts to this jury, Your Honor.

(T. 1826);

> Bergin: Your Honor, if you don't send this indictment out, it is a monumental distortion with a man's life at stake, and I think you should declare a mistrial. I think we're leading the jury on. This is not even -- this is fundamental fairness in the case, Your Honor. When I started to read from the guilty plea during the trial, Frank jumped up and said, "It's part of the record" and I agreed. Yes, it is part of the record; and it will go out with them; and now we're going to send out a blank indictment that is not part of the record?

(T. 1827).

Ultimately, the trial court sent out a cleansed version -- one omitting the district attorney's notation that Appellant was proceeding pro se when he entered his guilty pleas -- and counsel once again asked for a mistrial. (T. 1830-1831).

3. The standard of review.

Improper prosecutorial argument that is objected to at trial warrants reversal if "it might have contributed to the verdict." Tharpe v. State, 262 Ga. 110, 416 S.E.2d 78, 82 (1992); Todd v. State, 261 Ga. 766, 410 S.E.2d 725, 728 (1991). Argument that is not objected to at trial and is raised for the first time on appeal is reviewed for plain error. Lynd v. State, 262 Ga. 58, 414 S.E.2d 5, 8 (1992)(Adopting the identical federal standard as announced in United States v. Young, 470 U.S. 14 (1985)).

Federal Courts entertaining a collateral attack on a state conviction will apply yet a third standard -- whether a prosecutor's argument is "so egregious as to create a reasonable probability that the outcome was changed. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Davis v. Zant, No. 92-9245, Slip Opinion at 20-21 (11th Cir. October 21, 1994)(attached hereto as Appendix A).[31]

Because counsel objected at the close of the prosecutor's argument, the question is whether the complained of argument may have contributed to the verdict. Tharpe v. State, 262 Ga. 110, 416 S.E.2d 78, 82 (1992); Todd v. State, 261 Ga. 766, 410 S.E.2d 725, 728 (1991).

4. Under any standard, the improper argument employed by the Prosecutor warrants reversal.

Regardless of which of the above standards is applied to this case, reversal is warranted. In Davis v. Zant, supra, the Eleventh Circuit examined, on collateral review, a prosecutorial argument that went un-objected to at a state trial. There the court found that the complained of argument was sufficiently egregious to warrant reversal using the most narrow of standards. The instant case provides a much starker example prosecutorial misconduct.

In Davis, the court found that the prosecutor violated his

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[31]The Davis court noted that the standard on federal collateral review is narrower than the "plain error" employed on direct appeal which is narrower still than the "might have contributed" standard applied on appeal when an objection has been made. Davis v. Zant, Slip Op. at 21 n. 10.

duty to seek justice and denied the defendant a fundamentally fair trial when he deliberately misstated a single fact to the jury. Davis and a co-defendant had been arrested for murder. Prior to trial, the co-defendant confessed in the presence of Davis and his attorneys to being solely responsible for the murder. Davis unsuccessfully attempted to introduce the confession. When he called the co-defendant to the stand, "she refused to testify at trial by invoking the Fifth Amendment." Davis v. Zant, at 5. When Davis was testifying he attempted to bring out the fact that his co-defendant had confessed. The prosecutor objected, and in front of the jury argued, "That's not evidence. That's not true and it's not evidence." Davis v. Zant, at 23-24.

During his closing argument, the prosecutor made five oblique references to Davis' assertion that the co-defendant had confessed as a lie.

> [I]f he gets one of you or twelve of you to believe in this hogwash that he's got up on that witness stand and told you. . .
>
> That is last minute stuff that they have come up with to try to save him . . .
>
> [The defense Attorney] didn't get up and tell you [in his opening] anything about the [co-defendant] doing this, [the co-defendant doing that] and about Gary Lofton lying. . .
>
> [H]e is guilty because everything he said in this courtroom yesterday made him guilty except his statement given for the first time that [the co-defendant] did it. . .
>
> I don't think you're going to buy this first time defense yesterday that we heard.

Davis v. Zant, at 25-28.

First the court noted that prosecutors owe the public a special duty:

> We have noted before that prosecutors have a special duty of integrity in their argument. See Brooks, 762 F.2d at 1399-1400. It is a fundamental tenet of law that attorney's (sic) may not make material misstatements of fact in summation. . .
>
> Moreover, Georgia law, although it gives wide latitude to prosecutors in their jury arguments, see, e.g., Brooks, 762 F.2d at 1399, recognizes the duty of the prosecutor is "alone to sub serve public justice." Scott v. State 53 Ga. App. 61, 185 S.E. 131 (1936, affirmed, 184 Ga. 164, 190 S.E. 582 (1937). Furthermore, Georgia statutory law proscribes the very conduct at issue in this case. Ga. Stat. § 15-19-4 states in relevant part:
>
> It is the duty of attorneys at law:
>
> (1) To maintain the respect due to courts of justice and judicial officers;
>
> (2) To employ, for the purpose of maintaining the causes conceded to them, such means only as are consistent with truth and never seek to mislead the judges or juries by any artifice or false statement of the law.

Davis v. Zant, No. 92-9245, Slip Op. at 29-30 n.15 (citation omitted). The court went on to find that "[l]ittle time and no discussion [wa]s necessary to conclude that it is improper for a prosecutor to use misstatements and falsehoods." Davis v. Zant, at 29 (footnote omitted). Further, the court found that although the prosecutor's objection was proper and it was possible for him to have slipped when, in support of his objection, he claimed the defendant had lied, there could be no doubt but that his closing

argument was a deliberate attempt to mislead the jury through false representations. Davis v. Zant, at 30-32.

The court concluded that the repeated and deliberate misstatements made to the jury by the prosecutor undermined the credibility of the defendant and the defense and denied him a fundamentally fair trial.

The prosecutor's conduct in the instant case is far more egregious. Here, not only did the prosecutor know Appellant had entered his guilty pleas pro se, he deliberately misrepresented the opposite to the jury and then took affirmative steps to ensure that Appellant would have no opportunity to refute his misstatement.

At a time it appeared as though the court would send out the original indictment, including the prosecutor's notation "waived counsel," the Prosecutor vehemently objected and claimed a right to re-argue his closing.

> Winn: (Interposing) Judge, I object, because you tell the jury in your charge that it is not evidence and if it's going to be evidence, I think I have the right to re-argue this, because you've always said it is not evidence and I object to that going out.

(T. 1823-24). The only for seeking to re-argue his closing was that he knew once the *original* indictment went out with the jury, his distortion of the facts would be exposed.

The Appellant cannot speculate about whether Frank Winn disapproved of the foregoing principles of law and the principles governing attorney conduct or if he simply considered himself outside the scope of them. In either event, his comments at

trial were calculated to directly place before the jury a lie and should not have been permitted at all. Because the prosecutor made a deliberate choice to mislead the jury, this Court should sanction his actions and vacate Appellant's death sentence.

5. The fact that counsel was present when Appellant entered his pro se guilty pleas does not change the analysis.

The case of Potts v. State, 259 Ga. 812, 388 S.E.2d 678 (1990), was remanded after an interim appellate review by this Court for a proper Faretta inquiry as to counsel's role in that case. Relying on McKaskle v. Wiggins, supra, this Court held that to impose counsel upon a defendant who has raised his right to represent himself, would amount to a Faretta violation. This is the very argument advanced by Appellant herein.

The analogy drawn by Potts, McKaskle, and Faretta to the instant case is that if standby or co-counsel's participation cannot be allowed to destroy the jury's perception that a defendant is, in fact, exercising his Sixth Amendment right to proceed pro se, then the State cannot use facts not in evidence, twist, distort and even lie to a sentencing jury regarding the same, unsolicited interjection by standby counsel in order to not only destroy the jury's perception that this defendant desires to represent himself but also to destroy this man's one chance of remaining alive - the mercy of his sentencing jury.

6. The Trial Court Failed To Correct The Error And Even Exacerbated It.

The trial court had an absolute obligation to either allow the original indictment into the jury room, to have prevented the

district attorney from misleading the jury during his arguments, to have given the jury a cautionary instruction to disregard all of the district attorney's comments in closing argument that were misleading or to have granted Appellant's motion for a mistrial. The court failed to uphold its obligation to correct prejudicial and knowingly false representations by the prosecution. Failure on the part of the trial court denied Appellant a fundamentally fair trial and this Court should step in to correct the injustice.

Assuming arguendo, that Appellant statements were illegally obtained, (see, Claim E, infra), then this Court is presented with the issue of whether the use of the statements to impeach Appellant's testimony when Appellant did not testify is reversible error.

The two statements in question were made by Appellant to Sheriff Lee on March 3, 1988; (1) the first was made at the Crowe residence, admitted into evidence, and is known as State's Exhibit Number "S-77" (T. 1243); (2) the second was made at the Douglas County Sheriff's Department, admitted into evidence, and is known as State's Exhibit Number "S-83" (T. 1411).

The trial court granted Appellant a continuing objection to the use of S-77 and S-83 by the State (T. 824). Appellant, who did not testify during his sentencing phase, challenges the use of said statements on the ground that they were illegally obtained statements used by the State as direct impeachment evidence of him through his defense witnesses. (T. 1480-81, 1502-

03, 1681-85, 1690-93, 1704-06, 1709).

Appellant urges this Court to rule on this issue in the event of a reversal and remand for a new trial, so the error will not be repeated.

B. Comment on Failure to Testify

In a criminal case, the prosecutor has an obligation to seek justice, not just to convict. ABA Standards for Criminal Justice, 3-1.1(c). As a result, he or she must "refrain from improper methods calculated to produce a wrongful conviction ...." United States v. Berger, 295 U.S. 78, 88 (1935). Part of this obligation is to make closing arguments which are not "calculated to inflame the passions or prejudices of the jury." ABA Standards for Criminal Justice, 3-5.8(c).

In addition to the outright lies regarding Mr. Crowe's pro se guilty plea, the District Attorney's closing argument at the sentencing phase contained an array of improper, prejudicial, and unconstitutional statements. Throughout the argument, the Prosecutor repeatedly commented on Mr. Crowe's invocation of his constitutional rights, including his right not to testify, his right to counsel, and his right to put on evidence in mitigation, through counsel. The prosecutor also impermissibly argued that jurors had a duty to give David Crowe the death penalty, and that in fact the Bible demanded that Mr. Crowe receive the death penalty for taking another life. These arguments both individually and cumulatively changed the outcome of the sentencing phase and resulted in the Appellant being sentenced to

death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution. Mr. Crowe had the right not to testify on his own behalf and also not to have any comment made on his failure to testify. O.C.G.A. §24-9-20, Russell v. State, 184 Ga. App. 657, 362 S.E.2d 392 (1987). The prosecutor violated this right when he stated point-blank: "He doesn't have the guts to come in here and tell you the truth." (T. 1792).

In Ranger v. State, 249 Ga. 315, 319(3), 290 S.E.2d 63 (1982), this Court adopted the standard set forth by the Fifth Circuit in United States v. Rochan, 563 F.2d 1246 (1977). In order to reverse for improper comment, the reviewing court must find one of two things: "'the prosecutor's manifest intention was to comment upon the accused's failure to testify' or that the remark was 'of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" Rochan at 1249.

The statement that Mr. Crowe didn't "have the guts to come in here and tell you the truth" (emphasis supplied) clearly demonstrates a manifest intention to comment on his failure to testify. Not having the guts "to come in here" can refer to nothing but coming into the courtroom. And that "the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify" is evident from the reaction to defense counsel's objection.

Mr. Bergin interrupted to point out that Mr. Crowe had not

testified. (T. 1792). The Court then attempted to rehabilitate the prosecutor's remarks, stating, "[t]here are statements Mr. Crowe -- I assume he's relating to the statements that have been introduced. The Defendant does not have to testify in the case." (emphasis added). (T. 1792). The prosecutor took the cue, repeating:

> Sure, he doesn't have to testify, just like he said, and we're talking about what he did do . . . He doesn't have the guts to tell you the truth . . . He doesn't have the guts to tell the Sheriff or you the truth.

(T. 1792).

However, the trial court's explanation, adopted by the prosecutor, is implausible in explaining the comment. "To come in here" cannot be read to have any meaning other than coming into the courtroom. It strains credulity to read "to come in here" as being a comment regarding some previous statement. O.C.G.A. §24-9-20 prohibits such comment, and the trial court's action in not only overruling counsel's objection but providing an excuse for the prosecutor, violated Mr. Crowe's rights under the Fifth, Sixth and Eighth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution.

C. Misinformation Regarding Fundamental Rights Guaranteed By the Fourth, Fifth and Sixth Amendments and Suggestion Mr. Crowe Was Not Entitled To Those Rights

Along with his comments regarding Mr. Crowe's failure to testify, the prosecutor stated that Mr. Crowe was somehow undeserving of the his Fifth and Sixth Amendment rights to have a

trial and to be represented by counsel, and that Mr. Crowe was wrong to exercise these constitutional rights.

Insidiously, the prosecutor began by cloaking some of these comments in the guise of comparing Mr. Crowe's rights to those the victim did not have.

> Joe Pala can't be here today. You can't find out anything about Joe Pala. He doesn't have a right to be here. . . . Our law says that the only thing you shall consider is David Crowe.

(T. 1790).

He went on to note the constitutional protections Mr. Crowe evoked, stating that Mr. Crow was someone who

> [B]elieves in the death penalty, who believes in the execution of human beings <u>without a jury trial, without Miranda warnings, without a tape recorder</u>, without looking them in the eye.

(T. 1822) (emphasis supplied).

Invocation of one's constitutional rights dos not aggravate the crime or pertain in any way to the character and background of the accused. Thus, it is completely irrelevant to any sentencing issue. <u>Doyle v. Ohio</u>, 426 U.S. 610, (1976), <u>Davis v. State</u>, 255 Ga. 598, 340 S.E.2d 869 (1986). "Arguments of this nature are especially egregious in the context of death penalty proceedings because they violate the Eighth as well as the Fifth Amendment." <u>State v. Hawkins</u>, 357 S.E.2d 10, 13 (S.C. 1987). <u>See also Griffin v. State</u>, 557 So.2d 542 Miss. 1990). As a result, this type of argument is "outrageous" and plainly improper. <u>Cunningham v. Zant</u>, 928 F.2d 1006, 1019 (11th Cir.

1991) (prosecutor's comments improperly implied that defendant had abused legal system in some way by exercising his Sixth Amendment right to a jury trial; prosecutor sought to misinform jury as to the role that certain fundamental rights guaranteed by the Sixth Amendment play in our legal system).

Equally egregious as his attack on Mr. Crowe's trial rights were the prosecutor's characterization of the entire defense as "lawyer games," a code word he repeatedly invoked to intimate that not only Mr. Crowe, but Mr. Bergin, was lying.

The prosecutor explained that Mr. Bergin had stated that Mr. Crowe "didn't want to play lawyer games" and wanted to fire his lawyer, and that "lawyer games are when an attorney brings up things that are not in evidence." He then argued what he knew to be untrue, that Mr. Crowe had not fired Mr. Bergin (See Claim III § A). He continued to use the phrase "lawyer games" to accuse the defense of deception throughout the remainder of his argument, using the phrase more than twenty times before he finished.

The prosecutor did not just impermissibly intimate that Mr. Bergin was lying, he stated it several times, about issues other than the fact that Mr. Crowe had fired Mr. Bergin. "He's trying to put thoughts in your head that aren't true; they're lies." (T. 1799). And

> Well, let's talk about contrived stories and let's talk about what can we do . . . How do we get out of this? How do we do whatever it takes to save a life? And don't get me wrong, I'm not saying Mr. Bergin is involved in this process. I'm saying there's no

> evidence to point one way or the other. You take the facts, you draw your inferences from them. If you conclude that he's involved in contriving this story, that's the facts. . . . Nobody said he fired his lawyer. He argued in opening statements that he did, but he's sitting there at the table.

(T. 1800).

Despite his protestations that he was only allowing the jury to "draw inferences" from facts, the prosecutor was plainly telling the jury that anyone who would argue he'd been fired, then remain at counsel table, was lying.

Mr. Winn's unprofessional and highly prejudicial word games continued. He told the jury

> Do you also realizee, in lawyer games, that if a motion to suppress a confession is kept out of evidence, that we might turn a guilty person loose? But when you're playing lawyer games, when you're playing defense attorney games, you don't care about justice. You don't care about fairness. You care about winning the game. That's what lawyer games and motions to suppress are all about.

(T. 1803).

This comment on Mr. Crowe's exercise of his Fourth Amendment rights is absolutely improper, and completely and prejudicially misled the jury as to the function of the motion to suppress. Through this argument, Mr. Crowe was condemned in the eyes of the jury for exercising his Fourth Amendment rights. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968). Moreover, such comments served to let the jury know that the statements they were later charged with assessing for voluntariness (T. 1866-70) had already been reviewed by the trial court in a

suppression hearing and found to be voluntary, thereby impermissibily lessening any responsibility in assessing this evidence. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). Mr. Crowe's Sixth Amendment rights were clearly violated by this impermissible comment on the role of defense attorneys in general and the right to move to suppress illegally-obtained evidence.

The prosecutor suggested to the jury that Mr. Crowe had fabricated a story regarding the crime because Mr. Bergin had told him what the law was regarding aggravating circumstances, and stated:

> I wonder if he pulled the book out, didn't tell his lawyer that I'm going to study these aggravating circumstances. I guess you hire lawyers to tell you the law. That's probably a fact we can infer from the evidence in this case.

(T. 1811).

He went on to derisively refer to Mr. Bergin as the "fired lawyer," stating

> What does this -- this fired lawyer do? This lawyer that came in here playing games . . .

(T. 1816).

Mr. Winn also complained to the jury regarding Mr. Crowe's right to present evidence in mitigation, noting that he could "put up anything you want to about your character or your evidence" and that "the law says that even though we have proved beyond all doubt that aggravating circumstances exist, y'all can go back there and -- and do what these people want." These

remarks are plainly improper. It was within Mr. Crowe's rights to put on any evidence relevant to his character at sentencing, Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954 (1978), and the suggestion that allowing evidence of mitigation is an unfair burden on the State was impermissible and prejudicial. A new sentencing is required.

D. The Prosecutor Improperly Injected Religion Into The Sentencing Determination

A fundamental requirement of a capital sentencing procedure is that the individual characteristics of the defendant must form the basis of the sentence. Woodson v. North Carolina, 428 U.S. 280 (1976). The Supreme Court has written that in a death penalty sentencing proceeding "[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Barclay v. Florida, 463 U.S. 939, 958 (1983) (quoting Zant v. Stephens, 462 U.S. 862, 79 (1983) (emphasis in original).

The prosecutor in Mr. Crowe's case argued to the jury that the Bible said Mr. Crowe should be executed. Such argument in essence states that sentencing should be done not on the basis of the individual defendant's characteristics, but according to the prosecutor and jury's religious beliefs. This argument is highly improper.

Mr. Winn stated:

> [T]o take a human life is sacrilege; it's against the law of God and it's against the law of man. . . . [T]he Bible says that you shall be put to death if you kill somebody, and when Jesus came along, he never changed

> that. He says that -- and I think it was Mr. Bennett again, that said, "Render unto Caesar that which is Caesar's." (sic). And, the State of Georgia has the death penalty.

(T. 1821) (emphasis supplied).

This is exactly the type of argument found "outrageous" by the Eleventh Circuit in Cunningham v. Zant, 928 F.2d 1006 (1991). The Cunningham court condemned the prosecutor's "numerous appeals to religious symbols and beliefs" as improper appeals to the jury's passions and prejudices. Id. at 1020. "A prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law." Id. Mr. Winn did exactly this, in violation of Mr. Crowe's rights under the Fifth, Sixth, and Eighth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution. A new sentencing is required.

E. The Trial Court Erred When, By Bolstering the Prosecutor's Improper Argument, It Told The Jury Past Statements of the Defendant Were Already Evidence And Thereby Lessened the Responsibility of The Jury To Make A Finding of Whether Such Statements Were Voluntarily Made

By his prejudicial ranting regarding the role of suppression hearings as "games" played by "defense attorneys" who "don't care about justice" or fairness, but about winning (T. 1803), the prosecutor repeatedly informed the jury that a suppression hearing had already been held, and that the trial court had already heard and rejected the argument that Mr. Crowe's statements were involuntary. Yet it was the responsibility of the jury to assess the voluntariness of those

statements. The trial court was fully recognizant of this, as evidenced by its instructions to the jury on voluntariness. (T. 1867).

Defense counsel objected when Mr. Winn improperly commented regarding Mr. Crowe's failure to testify. The Court then stated:

> There are statements Mr. Crowe -- I assume he's relating to the statements that have been introduced. (T. 1792).

This "assumption" by the trial court was pure speculation. It served the dual purpose of bolstering the prosecutor's argument by giving him a handy explanation for his improper comment, and also telling the jury that the statements were in evidence.

O.C.G.A. §17-8-57 holds it is reversible error for a judge to "express or intimate his opinion s to what has or has not been proved or as to the guilt of the accused." It is error to violate even the spirit of this section. Crawford v. State, 139 Ga. App. 347, 228 S.E.2d 371 (1976).

The trial's court's error, in conjunction with the blatant prosecutorial misconduct in this case, violated Mr. Crowe's rights under the Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution. The sentence must be set aside.

F. The Prosecutor Improperly Introduced Illegally Obtained Statements

The issues contained within this enumeration of error arose from the erroneous admission at the sentencing hearing of David Crowe's testimony from a pretrial suppression hearing. David

Crowe did not testify at trial, invoking his Fifth Amendment privilege against self-incrimination. Statements from pretrial suppression hearings cannot be used against a defendant who elects not to testify at trial. Simmons v. United States, 88 S.Ct. 967, (1968). Mr. Crowe's statements from the suppression hearing were improperly introduced through a third-party witness, and permitted over objection. Compounding the harm, the prosecutor used these statements to impeach the testimony of Mr. Crowe's defense mitigation witnesses. Coupled with the trial court's instruction on impeachment, the jury was unable to give any consideration to mitigating circumstances in this case, in violation of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982) and their progeny.

David Crowe testified during a pretrial motion to suppress but did not take the witness stand and testify in his own behalf during the sentencing phase of his jury trial (T. 1709-1711). The prosecution anticipated that David Crowe would not testify at his trial, and therefore prepared to introduce and to make use of this inadmissible testimony through other witnesses during David Crowe's sentencing trial. (T. 172), though the trial court clearly intimated that the only transcript the District Attorney would be using was that of David Crowe's plea (T. 172).

On November 14, 1989, the Appellant, anticipating the state's tactic, filed a motion in limine in open court to preclude the state's use of pretrial motion hearing transcripts

during the sentencing phase of Appellant's death penalty trial (R-350; T. 757,758,759). Appellant relied upon Simmons v. United States, supra, as cited in Culpepper v. State, 132 Ga. App. 733, 209 S.E.2d 18 (1974), for the premise that a defendant has a right to testify at a suppression motion without fear that such testimony will be used against him at trial.

In Simmons, by testifying at a suppression hearing with the risk his statements would be used against him at trial, the defendant was compelled to either give up valid Fourth Amendment claims, or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. The United States Supreme Court found it intolerable that one constitutional right should be surrendered in order to assert another; and therefore held that when a defendant testifies to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

The prosecutor herein ultimately introduced David Crowe's suppression testimony into evidence by distorting a question asked by Appellant on cross-examination of Sheriff Lee. Appellant's question to Sheriff Earl Lee on cross examination was,

> BERGIN: And don't you think David has a lot to live with here; pleading guilty to this and telling you from day one that he's the one that did it?

(T. 1444)(emphasis supplied).

The prosecutor, ignoring the clear reference to

conversations between Sheriff Lee and Mr. Crowe, elicited on redirect examination of Sheriff Lee that Mr. Crowe, at the suppression hearing, denied the killing.[32]

Defense counsel asked for a mistrial and pointed out to the court that his question regarded conversations between Sheriff Lee and Mr. Crowe.

> He might be able to do this if David takes the stand and testifies, but this is not the proper tool for impeachment, to try to impeach with a transcript another witness who didn't say anything and can't explain why he did say anything or not, which maybe David can do later in the case. I think at this time, if this goes forward, I have no choice but to ask for a mistrial after all the time that we've put in and I think the Court really has to seriously consider granting it. There's no cautionary instruction that can cure this -- this error with this jury. And I would urge the Court, in the abundance of caution, and if Frank wants to use that for cross-examination, we could argue that later or if David testifies, but I cannot see it coming in through a third party witness.

(T. 1447).

The trial court confused the rule of Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, (1968) with that of Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, (1971), which held a confession obtained in violation of Miranda may be introduced at trial for impeachment purposes. This exception has now been

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[32] Of course, if the State had been forced to follow the rule of sequestration as was the defense, Sheriff Lee would not have been present at the suppression hearing and could not have offered this highly prejudicial testimony at the sentencing trial. The Court's refusal to sequester Sheriff Lee, as requested by the defense, violated Mr. Crowe's rights under the Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution.

curtailed to impeachment of only the defendant's trial testimony. James v. Illinois, 493 U.S. ___, 110 S.Ct. _, 107 L.Ed.2d 676 (1990). Such conclusion by the trial court was incorrect in light of New Jersey v. Portash, 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979), which held testimony given after a grant of use immunity cannot be admitted even for impeachment purposes because such testimony "is the essence of coerced testimony" in that it was compelled under threat of contempt.

Appellant contends that his testimony at the suppression hearing was likewise "compelled" since in order to pursue his Fourth Amendment claims, he would have to surrender his Fifth Amendment guarantee against self-incrimination, and that requirement is "intolerable" under the rule of Simmons, supra.

The district attorney herein argued the authority of United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), in essence asserting that "the protective shield of Simmons is not to be controverted into a license for false representation."

However, the holding in Salvucci specifically refers to use, for impeachment purposes, of false testimony given at a pretrial hearing to establish defendant's eligibility for appointed counsel.

> We are not dealing, as was the case in Simmons, with what was 'believed' by the claimant to be a 'valid' constitutional claim. Respondent was not, therefore, faced with the type of intolerable choice Simmons sought to relieve.

United States v. Kahan, 415 U.S. 239, 94 S.Ct. 1179 (1974).

Not content to simply introduce the prejudicial suppression hearing testimony, the prosecutor took the opportunity during his closing argument to use the fact there even was a suppression hearing to tell the jury that Mr. Crowe and defense counsel were actively trying to mislead the jury, and that the purpose of a suppression hearing was for a guilty defendant to try and pull a fast one over on a jury.

> We talked about the motion to suppress and what all went on at the motion to suppress. At the motion to suppress, there's evidence that the Defendant testified, "I lied." . . . At the motion to suppress, which has all been introduced into evidence now, although you haven't heard or read through it, Mr. Crowe admits that he knows the purpose of a motion to suppress. After consulting with his lawyer, he knows the purpose of a motion to suppress. It's to keep evidence out -- to keep a crowbar out; to keep a .44 Bulldog Special revolver out.

(T. 1801) (emphasis supplied);

> Of course, you realize that after those hearings, the final result of those hearings after David Crowe testified, that all of this has been introduced into evidence. And Mr. Bergin is going to probably get up here and read to you all kinds of things that Mr. Crowe said at that hearing, but just remember, they were all in the context of that man (indicating) knowing he's trying to keep these things out of evidence.

(T. 1802);

> Do you also realize, in lawyer games, that if a motion to suppress a confession is kept out of evidence, that we might turn a guilty person loose? But when you're playing lawyer games, when you're playing defense attorney games, you don't care about justice. You don't care about fairness. You care about winning the game. That's what lawyer games and motions to suppress are all about

(T. 1802-03);

The prosecutor told defense witness Thelma Morris:

> Okay. This was a hearing in which he was trying to keep a jury from hearing his statements; do you remember that?[33]

(T. 1704).

Defense counsel again moved for mistrial after Ms. Morris' testimony. (T. 1709).

Additionally, the prosecutor used the improper suppression hearing testimony to impeach Mr. Crowe's mitigation witnesses. The trial court's charge to the jury regarding impeachment instructed the jury to disregard these witnesses' testimony. The result was that the testimony of witnesses Chaplain Buddy Bell (T. 1464-1470), Martha Lawhorn Keating (T. 1480-82), Betty Catherine Crowe (T. 1681-93) was rendered unusable by the sentencing jury, in violation of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). The trial court twice denied motions for mistrial pursuant to O.C.G.A. 17-8-75. (T. 1688-90).

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition of cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is appropriate punishment' in any capital case." Johnson v. Mississippi, 108 S.Ct. 1981, 1986 (1988) (quoting Gardner v.

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[33] This comment alone warrants reversal. A prosecutor cannot be allowed to use the fact that a defendant exercised his constitutional rights against that defendant. Doyle v. Ohio, 426 U.S. 610, 618 (1976).

Florida, 430 U.S. 349, 363-364 (1977) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (White, J., concurring in judgment))). In order to ensure this heightened standard of reliability, the Court has made it clear that capital sentencing decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 884-885, 887, n.24 (1983); accord Turner v. Murray, 476 U.S. 28 (1986).

Through his cross-examination the District Attorney improperly presented prejudicial material for which he had no evidentiary basis and which violated Appellant's Fifth Amendment privilege against self-incrimination and right to due process, Appellant's Sixth Amendment right to a fair trial. He used his closing argument to compound the error, thereby diminishing the jury's role in sentencing and resulting in the sentence of death being imposed under the influence of passion, prejudice, and the arbitrary factor of "impeachment," thereby violating both the Eighth and Fourteenth Amendments.

In view of the foregoing, Appellant's death sentence should be reversed.

G. The Prosecutor Impermissibly Introduced Victim Impact Evidence At Appellant's Capital Sentencing Trial.

At the time of Appellant's trial, evidence regarding a victim's character and characteristics was forbidden as irrelevant to any material issue in a capital case. Booth v. Maryland, 482 U.S. 483 (1987), rev'd in part Payne v. Tennessee,

__ U.S. __, 111 S.Ct. 2597 (1991). It was simply unconstitutional for the state to introduce evidence and argument of the worth and character of the victim. The prosecutor in this case was well aware of the law. However, this did not stop him from arguing the personal qualities of the victim, while at the same time directly commenting on Appellant's failure to take the witness stand. These improprieties so infected Appellant's trial with unfairness that the death sentence was a violation of due process.

The district attorney began to elicit testimony about personal qualities of the victim in his direct examination of Benjamin H. Covington. Defense counsel objected, citing Booth. The objection was overruled. (T. 829-30).

At the time of Appellant's trial, the Eighth Amendment to the United States Constitution, Article I, § 1, ¶ 17 of the Georgia Constitution and OCGA § 17-10-2, all prohibited the prosecution from introducing, as non-statutory aggravation, victim impact evidence. Booth v. Maryland, supra,; South Carolina v. Gathers, 490 U.S. 638; Muckle v. State, 233 Ga. 337, 211 S.E.2d 361 (1974).

However, the district attorney continued with his direct examination of Mr. Covington:

> Q. I'm sorry; I didn't hear your answer. Did you ever see Joe Pala interfere in someone's personal affairs in any way?
>
> A. No, I did not.
>
> Q. How did he treat people?

(T. 830).

Again the Appellant objected and the district attorney responded that he was bringing it before the jury to determine a personal trait of the victim. The trial court allowed the question (T. 831). The witness testified that

> Joe Pala was a pleasure to work with. He was, of all the employees up there, easiest to get along with. It's an intense situation in the retail business, but he handled it well, and I enjoyed working with Joe Pala.

(T.831).

The State continued to elicit victim impact evidence in its direct examination of witness Huey Moss. Appellant objected to this testimony on the grounds of hearsay and relevance, but the objection was overruled by the trial court (T. 866, 867).

When the prosecutor questioned Laton Earl Duncan as to what the victim in the case was thinking, Appellant again moved for a mistrial pursuant to Booth v. Maryland, supra. (T. 1657-62). Speculation on a victim's thoughts was specifically condemned by the United States Supreme Court, which remanded for reconsideration in light of South Carolina v. Gathers, 490 U.S. 638 (1989), an Eighth Circuit case which relied on such argument. Pursuant to the remand the Eighth Circuit reversed the sentence of death, finding that the use of victim impact testimony was indeed improper. Hayes v. Lockhart, 881 F.2d 1451 (8th Cir. 1989), cert. denied, 110 S.Ct. 1154 (1990).

In the instant case the district attorney also turned to describing the crime from the victim's perspective:

... When he's standing there at the counter and that man turns his back on him to do something, we'll never know what the last act Joe Pala was doing. We'll know some of the things he was doing, but we won't know what he was doing, why he was trusting David Crowe to turn his back on the man...

(T. 1798).

He also noted:

Joe Pala can't be here today. You can't find out anything about Joe Pala. He doesn't have a right to be here. This is what you know about Joe Pala in this case. You can tell by looking at the billfold, it used to be a lot thicker. The only thing you're going find out about Joe is what relates to the facts of this case. Our law says the only thing you shall consider is David Crowe.

That's the only thing you're concerned about. And, therefore, you're not told anything about Joe Pala

(T. 1790).

You're going to go back there and you're going to look at photographs of Joe Pala. You're going to see his signature on a document; you're going to look at the photographs; and you've got to realize that this case is as much about Joseph Victor Pala as it is David Crowe and why David Crowe deserves the death penalty.

(T. 1791-92).

A man that has paint -- ladies and gentlemen, you need to come and look at the floor. We're talking about a man on the floor with paint on his face. We're not talking about some damn photograph. He can't be here today and you've got to look at him. ...

(T. 1796).

* * *

You heard Ben Covington tell you about Joe Pala. He lived from day to day, never did have any money. This is what I call a T-24

withdrawal. He took out fifteen dollars ($15).

(T. 1804).

At the time of Appellant's capital sentencing trial, victim impact evidence was prohibited by state and federal constitutional law as well as state statutory law. A prosecutor of Mr. Winn's experience knew very well the state of the law in death cases, yet he chose[34] to ignore the law and impermissibly interject irrelevant and highly prejudicial testimony into Appellant's case solely to obtain a death sentence.

Because the Prosecutor deliberately interjected testimony designed to incite the passions and prejudices of Appellant's capital sentencing jury, testimony he knew was improper and unconstitutional under the law, this Court should vacate Appellant's death sentence.

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[34]Appellant anticipated the Prosecutor's underhanded tactic and objected earlier in the trial to the introduction of the victim's wallet as irrelevant, and pursuant to Booth v. Maryland, supra. (T. 1226). Obviously, the prosecutor was aware of the law of Booth.

CLAIM 4

THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS THE EVIDENCE SEIZED AND STATEMENTS TAKEN FROM APPELLANT IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 13, 14, 16, AND 17 OF THE GEORGIA CONSTITUTION

ERROR XIII

THE TRIAL COURT ERRONEOUSLY REFUSED TO SUPPRESS APPELLANT'S FIRST TWO STATEMENTS MADE TO SHERIFF EARL LEE WHERE EACH WAS OBTAINED IN VIOLATION OF THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

ERROR XIV

THE STATE DELIBERATELY INTERFERED WITH APPELLANT'S RIGHT TO COUNSEL AND SECURED A VIDEOTAPED, THIRD CONFESSION.

ERROR XV

THE TRIAL COURT ERRONEOUSLY REFUSED TO SUPPRESS EVIDENCE SEIZED FROM APPELLANT'S RESIDENCE WHERE THE SEARCH AND SEIZURE WERE INCIDENT TO AN ILLEGAL ARREST.

ERROR XVI

THE TRIAL COURT ERRONEOUSLY REFUSED TO DIRECT A VERDICT FOR APPELLANT ON THE AGGRAVATING CIRCUMSTANCES BASED ON ILLEGALLY OBTAINED STATEMENTS AND OTHER ILLEGALLY OBTAINED, "CORROBORATING" EVIDENCE.

From the moment the Douglas County Sheriff Department officers entered David Crowe's home, David Crowe was detained, and not free to leave. (7/21/88 PT at 126, 1608).

Mr. Crowe's stepdaughter was immediately physically removed from his home by the detaining police officer (7/21/88 PT at 118; 9/7,8/88 PT at 124,125) against his wishes. (9/7,8/88 PT at 124, 125). The detaining officers entered David Crowe's home without an arrest warrant, nor a search warrant. (7/21/88 PT at 155). According to the arresting officer, Appellant was not formally

told he was under arrest (7/21/88 PT at 126), but Major Miller considered David Crowe arrested. (7/21/88 PT at 160),

Miller admits he went to the home to talk to David Crowe (7/21/88 PT at 155), and to confront him in a law enforcement capacity (7/21/88 PT at 158, 7-21-88). During the time Mr. Crowe was detained, he repeatedly requested information about his wife (9/7,8/88 PT at 127, 131). David Crowe was told she was "in a good bit of trouble" (9/7,8/88 PT at 127). At the same time, other officers entered the house, and dispersed, searching for evidence. (7/21/88 PT at 123; 9/7,8/88 PT at 126).

Appellant was not given his Miranda rights upon Major Miller's entry into his home to arrest him. Rather, in Miller's own words, he and Detective Howard gained entry to Appellant's home (7/21/88 PT at 120), informed him he was a suspect in the murder and that they wished to question him (7/21/88 PT at 121).

Once inside Appellant's house, Miller dispatched his officers[35] through the house (7/21/88 PT at 123), with some officers going upstairs and some to the garage (9/7/88 PT at 126). Appellant had not given consent to search his house or garage. (9/7/88 PT at 126). When one of Miller's officers revealed that he had found some evidence upstairs, Appellant was placed against the refrigerator, patted down and officially

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[35]Miller testified that officers Roberts, Howard and Price were present when Appellant was *Mirandized* (7/21/88 PT at 123), yet he claims that only he and Howard went to the home. (7/21/88 PT at 116).

Mirandized. (9/7/88 PT at 129).[36] Prior to having been read Miranda, Appellant was interrogated about the crime, (7/21/88 PT at 158; 9/7,8/88 PT at 128, 129), was told he was a suspect (9/7,8/88 PT at 128), but not told that anything he said could be used against him. (9/7,8/88 PT at 128). From the time of the deputies entry to the house (9/7,8/88 PT at 127, 128), at the minimum, seven (7) to eight (8) minutes had elapsed before Miranda was read to Appellant, (7/21/88 PT at 158), all the while Appellant was being questioned.

Once read his Miranda rights, Appellant requested permission to call his attorney (9/7,8/88 PT at 130, 131) that was responded to by the officers' inquiring who his attorney was. (7/22/88 PT at 194; 9/7,8/88 PT at 130). This information i.e. -- name and telephone number of the attorney, was written on a card and placed on the table. (9/7,8/88 PT at 130). However, Appellant was not allowed to place the call and could not do it himself because he was already hand-cuffed. (9/7,8/88 PT at 131, 135).

Approximately ten (10) to thirty (30) minutes later, the Sheriff arrived at the Appellant's home -- also without an arrest or search warrant.[37] (7/21/88 PT at 137, 167; 9/7,8/88 PT at 132). Thereafter, Appellant was asked if Miranda was read to

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[36]Major Miller admitted that Appellant was already under arrest as far as he was concerned and even went so far as to handcuff Appellant while his officers searched the house. (9/22/88 PT 222)

[37]Sheriff Lee testified that there would have been little inconvenience in obtaining warrants. He had to drive right past the courthouse en route to Appellant's house. (7/22/88 PT at 301).

him, and David responded that it had been (7/22/88 PT at 271; 9/7,8/88 PT at 135). Sheriff Lee re-warned (7/22/88 PT at 268), and Appellant requested permission to call his attorney, (9/7,8/88 PT at 135, 136) and the request was not responded to. The Sheriff immediately attempted to procure Appellant's consent to search his house even though he purportedly had a valid waiver from Appellant's wife. (T. 1972). Sheriff Lee claims to have gotten a "valid"[38] waiver from Appellant at 4:15 p.m., approximately one hour after arriving at Appellant's home.

David Crowe then asked where his wife was (9/7,8/88 PT at 135, 136). He was advised that she either knew, or had something to do with the murder and she was in serious trouble, (9/7,8/88 PT at 136) to which he responded that was "impossible because [he'd] done it" (9/7,8/88 PT at 138). Appellant again asked about his wife and asked if she was going to be charged and the Sheriff responded that it was, as yet, undetermined. (7/22/88 PT at 200). The phone rang in Appellant's house; his mother-in-law was calling. (7/22/88 PT at 192). David told his mother-in-law, Mrs. Worthan, what was occurring, that he had been arrested, and was seeking to call an attorney. (9/7,8/88 PT at 9, 137). Mrs. Worthan observed from her conversation with David that he sounded upset. (9/7,8/88 PT at 19, 23).

Sheriff Lee asked David Crowe to show him where the gun was, (9/7,8/88 PT at 272) and other officers began to bring forth the

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[38]Appellant signed the waiver because the police had already searched the home without a warrant. (9/7/88 PT at 143-44).

evidence they had discovered on their first search. (9/7,8/88 PT at 142, 143). The Sheriff had entered the house with a tape recorder and papers in his hands. (9/7,8/88 PT at 133). Conversation began immediately upon Sheriff Lee's arrival into the home, (9/7,8/88 PT at 139) and, eventually, the tape recorder was turned on by the Sheriff.

Major Miller (7/22/88 PT at 198, 199), admits Appellant's first recorded statement taken at Appellant's home did not contain all the conversation between himself and Appellant, nor between the Sheriff and Appellant. Rather, the tape recorder was not turned on until approximately thirty (30) minutes after the Sheriff's arrival and after the second search of the house. (7/22/88 PT at 197).

1. Appellant made an unequivocal request for counsel.

Upon the invocation of the right to an attorney, a Defendant may not be questioned further, Smith v. Illinois, 469 U.S. 91 (1984); Edwards v. Arizona, 451 U.S. 477 (1981), and the police must "scrupulously honor" this invocation, Michigan v. Mosley, 423 U.S. 96 (1975), unless the suspect initiates further communication with the police. Edwards v. Arizona, supra.

Appellant denies having initiated further communication with the Douglas County Sheriff Earl Lee, or his deputies. Because from the moment the law enforcement officials entered Appellant's home, Appellant was continuously under interrogation, with the added emotional pressure of his child having been removed from the house, the threats of his wife being suspected of this crime,

and his requests for legal counsel being denied, the voluntariness of Appellant's statements must be questioned. Subtle psychological coercion suffices ... at times more effectively, to overbear "a rational intellect and a free will." As the Supreme Court noted in Malloy v. Hogan, 378 U.S. 1, 7 (1964),

> [w]e have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. Id at 7.

Likewise, courts of this State have

> held previously that '[a] prisoner in a police custody by reason of an illegal arrest is in no position to refuse to comply with the demands of the officer in whose custody he is placed whether such demand is couched in the language of a polite request or a direct order.

Raif v. State, 109 Ga. App. 354, 136 S.E.2d 169, 173 (1964). Accord, Holtzendorf v. State, 125 Ga. App. 747, 751, 188 S.E.2d 879 (1972); Hunt v. State, 133 Ga.App. 444, 211 S.E.2d 399 (1974). Applying this rule to the circumstances of the instant case, David Crowe was indirectly forced to comply with the request. United States v. Tingle, 658 F.2d 1332 (1981) at 1335.

The United States Supreme Court held with regard to voluntariness of an accused's statement:

> "[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advise, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism."

Michigan v. Mosley, 423 U.S. 96 at 110 n.2 (1975). Justifying an

arrest by an illegal search, and at the same time, the search by the arrest just will not do. Johnson v. United States, 333 U.S. 10, at 16-17 (1948). It is axiomatic therefore, that a home search may not precede an arrest and serve as its justification. It follows equally, that the warrantless detention, warrantless search of the home, followed by the arrest, and invocation of right to counsel does not justify refusal of permission to call counsel until after a statement is obtained by coercive means or by emotional susceptibility, as occurred in this case.

It is well established that the Sixth Amendment's purpose is to control the interrogation of an accused:

> [I]f the interrogation continues without the presence of an attorney, and a statement is taken, a heavy burden rests on the government to demonstrate that the Defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda v. Arizona, 384 U.S. at 475, quoting Escobar v. Illinois, 378 U.S. 478, 490, n.14. In Edwards v. Arizona, 451 U.S. 477 at 494 (1981), the Court established the "bright-line rule" that all questioning must cease after an accused requests counsel. (Emphasis in original).

Here, the authorities violated Defendant's right to counsel by interrogating him after he had requested counsel. Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988). Under both the federal and state constitutions,

> if an accused in custody asserts his right to the assistance of counsel, that is if he "expresses his desire to deal with the police only through counsel, [then he] is not

> subject to further interrogation by the authorities unless counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police."

Allen v. State, 250 Ga. 63, 377 S.E.2d 150 (1989), Edwards v. Arizona, 451 U.S. 477 (1981).

The State contends Appellant either consented to the continued interrogation, or waived it by signing the waiver. The consent -- i.e., when Miller was questioning David Crowe prior to being advised of Miranda -- was unconstitutional because, by Miller's own admission, David was under arrest in his eyes he just had not told Appellant yet. The first time Appellant requested counsel, Miller should not have only looked up the number for Appellant (as Appellant was hand-cuffed), but dialed the number, too. Once the Appellant has asserted the right to counsel, any further questioning of Appellant, even if minor, is found to be continued police questioning. Smith v. Illinois, 469 U.S. 91 (1984).

The State's argument that Appellant consented to further questioning by signing the waiver produced by the Sheriff cannot stand. The burden of proof is on the State to prove the validity of the consent. Dunaway v. New York, 442 U.S. 200 (1979). It must show the consent or waiver to be more than mere submission to legal authority. Pursuant to Bumper v. North Carolina, 391 U.S. 543 (1968), there must be a showing that Appellant not only was aware of his rights, but there existed no undue police pressure.

Reviewing the question of the waiver this Court is not bound by the ruling of the trial court. To review the validity of Appellant's waiver we must address two separate aspects:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.
>
> The ultimate question of the validity of a suspect's waiver of his Miranda rights is 'a legal question requiring an independent federal determination,' Lindsey v. Smith, 820 F.2d 1137, 1150 (11th Cir. 1987)(quoting Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 450, 88 L.Ed.2d 405 (1985), not an issue of fact on which a presumption of correctness would apply to a determination by a state court. ...

Smith v. Zant, 855 F.2d 712, 716 (11th Cir. 1988).

David Crowe therefore requests that this Court inquire into the correctness of the trial court's legal conclusions (R-305 and 308), in view of the factors of deception, intimidation and coercion surrounding his warrantless arrest and denial of access to an attorney after invocation of his right to counsel all set forth herein.

Police undue influence has many faces. In United States v. Mayes, 552 F.2d 729 (6th Cir. 1977), it was held that the number of authorities confronting the defendant may itself be coercive. The authorities statements to Appellant about his wife being "in a good bit of trouble" (9/7,8/88 PT at 127), and his daughter being forcibly taken from him, exploited Appellant's emotional

susceptibility, (see Brewer v. Williams, 430 U.S. 387 (1977), which is coercive by its very nature. United States v. McShane, 462 F.2d 5, 7 (9th Cir. 1972),

> ...we can readily imagine that the psychological coercion generated by concern for a loved one could impair a suspect's capacity for self control, making his confession involuntary.

Additionally, the Sheriff testified at trial that "[Appellant] was under anxiety or stress ... when responding to his interrogation." (T. 1231). "A confession is involuntary whether coerced by physical intimidation or psychological pressure." Townsend v. Sain, 372 U.S. 293, 307 being cited in United States v. Tingle, 658 F.2d. 1332 (1982) at 1335.

2. Appellant's second statement

The second recorded statement taken at the Sheriff's Department, after Appellant was "formally" arrested, in his home, without an arrest warrant, and subsequent to the warrantless search of his home, was also in violation of Appellant's right to counsel. This statement was not sufficiently attenuated in time to remove the taint of Appellant's original requests for an attorney. In addition, the interrogation was initiated by Sheriff Lee not Appellant. Edwards v. Arizona, 451 U.S. 477 (1981). In addition, other aspects surrounding Appellant's detention and subsequent "waiver," "consent" and statement must be considered. A consideration of the "totality of the circumstances," should necessitate a finding that Appellant's consent was not effective. Smith v. Zant, 855 F.2d at 716. (See

also, United States v. Mayes, 552 F.2d 729 (6th Cir. 1977); United States v. Tingle, 658 F.2d 1332 (1982)).

B. The Statements Were Obtained As A Result Of An Unconstitutional Arrest.

In Ryals v. State, 186 Ga. App. 457, 367 S.E. 2d 309 (1988), where the Defendant signed a written waiver of his Miranda rights and lengthy interrogation ensued, the trial court admitted defendant's confession over objection. The Georgia Court of Appeals held the defendant's Fourth and Fifth Amendment due process rights were violated, and the confession extracted therein was inadmissible because

> ...[i]t is apparent that appellant's statement was obtained as the product of an arrest made without probable cause.
>
> * * *
>
> ... defendant's due process rights were violated by just such an in custody interrogation conducted pursuant to an unlawful arrest, notwithstanding the defendant's purportedly voluntary waiver of his Miranda rights following the arrest.

Id., at 311 (emphasis supplied).

Before the pretrial statements of an accused can be admitted against him, Jackson v. Denno, 378 U.S. 554 (1964), there must be a finding regarding whether the statements, admissions or confessions were voluntarily. A determining factor in deciding voluntariness is whether the defendant's statements were made while "in custody" of police. The State has already conceded that Appellant was in custody and under arrest at the time the statement was made. (7/21/88 PT at 160, 161). In order for a

confession, statement or admission to be admissible as evidence, "it must have been made voluntarily, without being induced by ... remotest of fear of injury." OCGA § 24-3-50. The State has the burden of proving the confession was voluntary. See Lego v. Twoney, 404 U.S. 477; Jones v. State, 245 Ga. 592, 598, 266 S.E. 2d 201 (1980); State v. Osborne, 174 Ga. App. 521, 330 S.E. 2d 447 (1985).

Major Miller testified that he believed he had plenty of probable cause to arrest Appellant. An examination of Major Miller's criteria reveals that he was sadly mistaken.

> A. To detain him, what did I know? Are you asking me what probable cause I had to --
>
> Q. (By Mr. Bergin): Basically; yes, sir.
>
> A. I knew that Wanda Crowe worked at Wickes Lumber Company. I knew that Joseph Pala had been murdered. I knew that David Crowe had been a forme employee there. I knew that Wanda's -- Wanda Crowe's car had been seen or a car matching the description of Wanda Crowe's car -- would be more fair to say -- had been seen about seven (7:00) p.m. the night before by another employee. I knew that Mr. Crowe had attempted to borrow what I'd consider a large amount of money from an employee at Wickes. I knew that there was paint or what looked to be paint on Wanda Crowe's car, on the outside and on the inside, and I knew there was paint poured over Joseph Pala. And I knew that those paint -- both of the pains were similar in color. I also knew that the gun used, according to Mr. Kelly Fite at the Crime Lab, was a forty-four (.44) Bulldog Special, which I knew to be a Charter Arms. And I also had learned that Wanda Crowe owned a forty-four (.44) Bulldog Special, Charter Arms brand.

(7/21/88 Pt at 126-27). No where in Major Miller's rendition of information known to him at the time he admittedly arrested

Appellant gave him probable cause to suspect Appellant had committed the murder. In fact, the information relied on by Major Miller pointed to Wanda Crowe not to Appellant at all. Thus,

> In the present case, as in Dunaway, supra, there was clearly no probable cause for the appellant's arrest, and '[n]o intervening events broke the connection between [his] illegal detention and his confession. To admit (appellant's] confession in such a case would allow 'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards of the Fifth.''" Dunaway, supra, at 219, citing Comment, 25 Emory LJ. 227, 238 (1976). The fact that a confession may be voluntary for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis. Dunaway, supra, at 225. Accordingly, even assuming arguendo that the evidence would otherwise support a conclusion that the appellant's confession was voluntary, we conclude that it should have been excluded from evidence as the fruit of the unlawful arrest.

Ryals v. State, 186 Ga. App. 457, 367 S.E.2d 309, 311 (1988).

The admission of unconstitutionally obtained confessions -- numbers one and two -- can not be considered harmless,

> since these statements were made only after defendant had been confronted with the illegally seized items. Thus, defendant's admissions were fruit of the prior illegality.

LaRue v. State, 137 Ga. App. 762, 224 S.E. 2d 837 (1976), citing Fahy v. Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

C. The Findings Of The Court Below Are Clearly Erroneous

The trial court's order on Appellant's motion (R-305), made

findings of fact regarding David Crowe's education, his marital status, that he was not known to nor appearing to suffer from any mental disability, his intellect, and his Church related activities. It further found that, based upon the examinations during the hearings on this motion, his above average ability to understand and use the English language to be apparent, that he kept his composure when confronted with statements made to the law enforcement officials at the time of his arrest, and that his ability to reason was demonstrated to the court.

1. Pre-Miranda statements

In its order (R-305), the trial court made findings that David Crowe made no statements to the law enforcement officials investigating the murder prior to having been advised of his rights under Miranda. This is directly contrary to the testimony and evidence elicited at the hearing, as described in great detail above. In People v. Harris, 532 N.E.2d 1229 (N.Y. 1988), where a defendant was detained in his home without a warrant, made a statement, was arrested and read Miranda, then taken to the police station, re-given Miranda, and then further questioned, the court found the first statement to be illegally obtained but admitted the second. However, the appellate court found the second statement was

> ...no less a product of the Fourth Amendment violation than was the statement Defendant made in his apartment ...
>
> ...reading the Defendant his Miranda rights again may have cured the Fifth Amendment violation but, as Brown v. Illinois, supra, held, standing alone it could not attenuate

> the link between the Fourth Amendment violation and the statement." "...Having just given a statement in his apartment which inculpated him in the crime, defendant had already committed himself and 'there was little incentive to withhold a repetition of it."' (United States v. Johnson, 626 F.2d 753, 759 (9th Cir.), aff'd., 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202).

Id., at 1233.

2. The timing of Miranda warnings.

The trial court also found that David Crowe understood the Miranda warnings. There is no evidence to dispute that David Crowe understood his rights. However, what is in dispute is when the warnings required under Miranda were given, and under what circumstances. There is no conflicting testimony that Appellant was seized upon the deputies' entry into his home without a warrant, and that his house was being searched prior to being Mirandized. The re-reading of Miranda by the Sheriff upon his arrest at the house will not remove the taint from the unconstitutional search and seizure of the first arresting officer.

3. Post-Miranda Statements

The trial court's finding that any statements made by David Crowe post-Miranda were not the product of any police coercion or threat of force is directly controverted, not only by the David Crowe, but by much of the testimony of the officers involved. The Sheriff's own testimony regarding David's anxiety and stress at the time of confession, his mental state upon having his child removed from him without his consent, the fear and threat of his

wife being held and interrogated, and him being told she was in a good deal of trouble, were totally ignored by the trial court. The Sheriff did not have to force Appellant to say anything. The factually inaccurate[39] psychological pressure exerted by Sheriff Lee was enough to force Appellant, in his weakened emotional and mental state, to confess. Whatever David Crowe said at the time of detention or arrest was heavily influenced by what had already transpired in his home. See Raif, supra. The sanctity of his home was violated by the entry without warrant, the search without consent or warrant, and the forcible removal of his daughter. What more did David Crowe have to do to withstand police coercion? Silence may not have been an option available to a person whose family was pulled apart by the police, with no choice but to stand by and watch. "A confession is involuntary whether coerced by physical intimidation or psychological pressure." Townsend v. Sain, 372 U.S. 293, 307, cited in United States v. Tingle, 658 F.2d 1332 (1981) at 1335.

4. Request for counsel

Regarding David Crowe's request for counsel, the trial court found the subsequent interrogation was limited and focused to determine the nature of his request (emphasis supplied). That the trial court found Appellant was not denied or prohibited from contacting an attorney is directly contradicted by testimony, not only of David Crowe but that of Major Miller. The number for the

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[39]As Sheriff Lee testified, Wanda Crowe was never really a suspect, no less in "real trouble" in the eyes of law enforcement.

attorney was looked up for David Crowe, as his hands were already cuffed, but without someone dialing for him, how could he make the call? Upon the Sheriff's arrival, and the removal of the cuffs, the indignities previously heaped upon him by the warrantless search and seizure, and denial of contact with counsel, had already violated the Appellant's rights. What difference did it make at that time? Unfortunately, the answer is none. He asked the Sheriff for permission to use the phone to call, but his request was virtually ignored. Heavily distracted by concern for his wife, he eventually caved in and confessed to protect her. Subtle psychological coercion suffices... at times more effectively, to overbear a rational intellect and a free will.

A confession can be

> held inadmissible even [when] secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed.

Malloy v. Hogan, 378 U.S. at 7. There is no credible evidence before this court that shows David Crowe declined to contact his attorney. In fact, the only evidence is to the contrary. His mother-in-law's call to the house, his explanation to her of the events occurring, that he was going to call the attorney, and that he was interrupted from doing so by the Sheriff do not imply he declined an opportunity to contact his attorney. To the contrary, his assertion that his requests were ignored is corroborated by the facts adduced. The trial court erred in finding Appellant's second statement to be voluntarily initiated

and recommenced by Appellant. There is absolutely no evidence to support this finding. In fact, the Sheriff admitted that he initiated the interrogation before Appellant's second statement because the tape containing the first statement not being audible. (7/22/88 PT at 368).

5. When examined under a "totality of the circumstances standard," Appellant's statements were unconstitutionally obtained.

The trial court's application of the "totality of the circumstances" test was error, in that Appellant had made an invocation of his Fifth Amendment right to counsel that was unequivocal. See Allen, supra; Owens v. Alabama, 849 F.2d 536, 539 (11th Cir. 1988). However, the trial court's finding, even under this analysis, is clearly erroneous. The trial court totally disregarded all of the sheriff's department's illegal activities - Major Miller's entry into Appellant's home without an arrest warrant for the sole purposes of effecting the Appellant's arrest, the denial of access to counsel to Appellant, despite repeated requests for same, the immediate taking away of Appellant's daughter by the deputies, the psychological coercion regarding Appellant's wife employed by Major Miller and Sheriff Lee, Sheriff Lee's own admission as to the state of mind of Appellant at the time in question, and the number of deputies running through and around Appellant's home.

The mere fact that Appellant was eventually read his Miranda rights does not negate the illegalities previously committed by the police. See Brewer, supra; Allen, supra; United States v.

Tingle, supra; People v. New York, supra; Smith v. Illinois, supra.

Rather, the trial court's findings were totally one-sided, in favor of the State, with total disregard for the direct testimony of the state's own witnesses, and absolutely no credence given to anything the defense postulated. Nowhere is credibility more an issue than here. If the Court of Appeals of Georgia found that Sheriff Lee's tactics were less than acceptable in Kennard v. State, 182 Ga. App. 552, 349 S.E. 2d 470 (1986)(terrifying a state's witness as an experiment to determine if she was truthful), then this Court must see that his tactics here were no more constitutionally acceptable. The only discernable difference is that Sheriff Lee was perhaps just a bit more refined and sophisticated and applied in a more subtle psychological fashion in hopes of escaping the critical review that found his actions intolerable in Kennard.

D. Sheriff Lee Deliberately Interfered With Appellant's Right To Counsel In Obtaining Appellant's Third Confession.

> "[T]he Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that '[i]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.' The 'vital' need for a lawyer's advice and aid during the pretrial phase was recognized by the Court nearly 50 years ago in Powell v. Alabama, 287 U.S. 45, 57, 71, 53 S.Ct. 55, 60, 65, 77 L.Ed. 2158 (1932). Since then, we have held that the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer 'at or after the time that adversary judicial proceedings have been initiated against him...whether by way of formal charge, preliminary hearing,

> indictment, information or arraignment.'" Kirby v. Illinois, 406 U.S. 682, 688-689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972); (plurality opinion); Moore v. Illinois, 434 U.S. 220, 226-229, 98 S.Ct. 458, 463-465, 54 L.Ed.2d 424 (1977)...".

Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). A defendant's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments, unfortunately, has an entirely different meaning in Douglas County, Georgia.

Despite trial counsel's notice to all concerned parties in the prosecution of the Appellant that his attorneys were to be contacted prior to any attempted communications with Appellant, Douglas County Sheriff, Earl Lee, met with Appellant on several occasions to discuss his case, the effectiveness of his attorneys, and ultimately his plea, without the permission or knowledge of his attorneys.

Sheriff Lee would have this Court believe that he always "makes sure" trial counsel are aware if their client is about to make another confession. However, he took no steps to inform counsel of Appellant's purported desire to confess. The only thing Sheriff Lee was sure of was that the tape was rolling when Appellant confessed for the third time.[40]

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[40]The importance of this third confession cannot be minimized. At the time it was obtained, the trial court had certified the suppression issues surrounding the first two statements for interlocutory appeal. There was serious question whether those confessions would stand. Without those confessions, the State's case would have been destroyed. In light of the circumstances at the time, Sheriff Lee had ample motive to obtain a third confession.

It is uncontroverted that Sheriff Lee suggested to Appellant, that it would be in his best interest to plead guilty to the charges and to give a third confession. It is likewise uncontroverted that this all took place after indictment -- a critical stage -- and after Appellant had been represented by counsel for over one year in violation of his Sixth and Fourteenth Amendment. It is a well settled principle that the defendant has a right to have counsel present once adversarial proceedings have begun against him. Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); Brewer v. Williams, 430 U.S. 387, 401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

Here, there can be little assertion but that Appellant could not validly waive his Sixth Amendment right to counsel when that waiver was induced by Sheriff Lee's deceitful promises that his life would be spared.

Not only did the actions of Sheriff Lee lead to an unconstitutionally obtained third statement, they deliberately undermined the relationship between Appellant and counsel by falsely representing to Appellant that negotiated a plea bargain for Appellant's life. Appellant made the third confession because of this belief. David Crowe thought the statement would never be used against him, as any trial would be unnecessary once he entered his plea and was sentenced to life in prison. It was only then and with this expectation that David Crowe made a statement to Earl Lee. His attorneys, if notified, would not

have allowed Appellant to make a third confession, would have prevented the subsequent plea and might have saved his life.

The statement made without a valid waiver right to counsel as well as his subsequent plea and sentence of death obtained with coercion and subterfuge must be set aside.

In United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978) (en banc), cert. denied, 439 U.S. 1130 (1979), the United States Court of Appeals for the Fifth Circuit established a two step analysis which focuses on the defendant's subjective expectation that plea negotiations were taking place when he made the statements sought to be admitted against him: whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances.

Further, any deliberate attempt actually to sever or otherwise to interfere with the attorney-client relationship may constitute a recognizable violation of the Sixth and Fourteenth Amendment right to effective assistance of counsel and due process when there is a deliberate, wrongly motivated intrusion and demonstrable prejudice to defendant's case. Weatherford v. Bursey[41], 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30

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[41] Although it declined to adopt the Court of Appeals per se rule that any intrusion into the attorney-client relationship constitutes a Sixth Amendment violation of the right to counsel, the United States Supreme Court distinguished the situation of an invited, albeit uncommunicated intrusion from this situation in Appellant's case where the agent deliberately intruded on the lawyer-client relationship, learned what he could about the

(1977)(Intruder communicates information to the prosecution to the detriment of defendant); United States v. Morrison, 602 F.2d 529 (3d Cir. 1979), reh'g denied, 450 U.S. 960 (1981)(D.E.A. agents, knowing that defendant was represented by counsel, attacked the dedication and competence of her lawyer and attempted to raise doubts in her mind about his effectiveness and represented that they had influence with the prosecution as a means of coercing defendant into abandoning her counsel and her defense; Indictment dismissed with prejudice); Hoffa v. United States, 385 U.S. 293 (1966).

It is not only appropriate but necessary to consider the purpose and propriety of the agent's conduct and its effect on the defendant's rights and the attorney-client relationship in order to fashion an appropriate remedy, Morrison at 532.

In Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942), the United States Supreme Court held that the "right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Yet, there can be no greater prejudice to a defendant in any case than the harm that occurred in this case as a direct result of Sheriff Earl Lee's interference into the attorney-client relationship. Because this is a death penalty case and death is qualitatively different from all other punishments, "there is a corresponding difference in the need for reliability

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defendant's case and acted accordingly. Id. at 557.

in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

In Gallarelli v. United States, 441 F.2d 1402, 1405 (3d Cir. 1971), the Court found that guidance of counsel during a plea bargaining is so critical that a counsel-less bargain could not be accepted and vacated the conviction, "a plea entered without such guidance must be set aside without inquiry whether demonstrable harm resulted in the case in question." See also, Via v. Cliff, 470 F.2d 271 (3d Cir. 1972). In United States v. Levy, 577 F.2d 200 (3d Cir. 1978), however, the Court refused to speculate on what prejudice was caused to the defendant by the government's improper conduct, (D.E.A. informer sitting in on meetings between defendant and counsel and disclosing defense strategy to the prosecution), found a Sixth Amendment violation and dismissed the indictment. Further, the government's conduct toward the defendant may be so egregious as to offend due process. See, Trotter v. United States, 359 F.2d 419, 420 (2d Cir. 1966)(flagrant trickery); United States ex rel. Wissenfield Wilkins, 281 F.2d 707, 712 (2d Cir. 1960)(promises in bad faith).

The Sheriff positively should not have communicated with Appellant during the pretrial stages of his death penalty case. Those communications, i.e. promises, assurances, hope of benefit and criticism of counsel, destroyed with the attorney-client relationship. Because Appellant believed the Sheriff was helping him, he effectively terminated any communication with trial

counsel. When Sheriff Lee advised Appellant that he should plead guilty in order to save his life, Appellant believed he had negotiating a life sentence for his plea.

After the communications with Earl Lee, David Crowe made a third statement and failed to tell his attorneys about the statement. After he talked with the Judge and the Judge did not disclose that to his attorneys, David Crowe withheld from his attorneys the fact that he had talked with the Judge, he withdrew his motion for interim appellate review that had been granted by the court, he dismissed his lawyers, he tried to have them removed from the courtroom, he plead guilty to malice murder and armed robbery, over the objections of his dismissed attorneys, and then asked that he be sentenced by the court.

The same factual predicate is applicable to the items seized from Appellant's home as a result of the illegal search and arrest. These items illegally seized and the illegal arrest should have been suppressed. Because they were used against Appellant at his capital sentencing trial his death sentence should be reversed.

E. The State Unconstitutionally Seized Evidence From Appellant

1. The State should have obtained a warrant

In order for a search and seizure to be constitutional,

> law enforcement agents must secure and use search warrants wherever reasonably practicable. This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be security against

> unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.

Trupiano v. United States, 334 U.S. 699 (1948);

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.
>
> * * *
>
> And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. United States, 335 U.S. 451, 455-456 (1948) (Emphasis supplied).

There has been absolutely no showing or intimation by the prosecution herein that any exigency existed that prevented law enforcement officials from requesting and obtaining search and arrest warrants. It is elementary that these law enforcement officials may not enter a home without a warrant merely because they plan to obtain one subsequently. See, e.g., United States v.

Griffin, 502 F.2d 959 (6th Cir. 1974); Griffith v. State, 172 Ga.App. 255, 322 S.E.2d 921 (1984).

A search warrant be obtained is not to be dispensed with lightly, and

> the burden is on those seeking [an] exemption [from the requirement] to show the need for it

United States v. Jeffers, 432 U.S. 48, 51 (1977).

2. Appellant's consent was not voluntary

That David Crowe purportedly "consented" to the Sheriff's search, after the initial search, does not mean the subsequent search is valid. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968). A prisoner in custody by reason of an illegal arrest is in no position to refuse to comply with the demands, orders or even polite requests of an officer, as he is forced to comply. See Holtzendorf v. State, 125 Ga. App. 747, 188 S.E.2d 879 (1972; Raif v. State, 109 Ga. App. 354, 136 S.E.2d 169.

The burden of proving a consent valid is on the government, Dunaway v. New York, 442 U.S. 200, and it must show more than mere submission to lawful authority. The State must establish that the consenting party was not only aware of his rights, but that there existed no undue police pressure, and that he knew he had a right not to surrender his rights. Bumper, supra. This is a heavy burden and in considering all the circumstances, a burden the State cannot meat.

Several officers confronted David Crowe during the Douglas

County investigation. Sheriff Lee was "mad as hell when [he] got to the Crowe residence" as his officers had not followed his orders (T. 1423). Simply the number of officials confronting the defendant may themselves be coercive. United States v. Mayes, 552 F.2d 729 (6th Cir. 1977).

In addition to the number of officers (and their temperament), David Crowe's step-daughter had been forcibly removed from the home over her objection and his; his wife was being held and questioned at the Sheriff's department; he was deceived into believing that she too was a suspect to murder; and he was extremely distraught over these events.[42] "Custody, when coupled with other coercive factors, will normally necessitate the conclusion that the consent is not effective. Overzealous efforts by the officers to obviate the need to obtain a search warrant exposed [wife and defendant] to impermissibly coercive pressure. Commonwealth v. Smith, 368 A.2d 272, 277 (1977).

Appellant's purported consent to search was granted -- if at all- in submission to authority rather than with an understanding and intentional waiver of constitutional right it is inadmissible. Johnson v. United States, 333 U.S. 10, 13 (1948).

3. Any consent by Wanda Crowe, Appellant's wife, was

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[42]Sheriff Lee himself provided substantial testimony regarding David Crowe's mental state at the time of the arrest and search of his home, in that David's concern from the beginning was for his wife Wanda (T. 1429), and "[David Crowe] was under anxiety or stress..." (T. 1231).

likewise not voluntary

In addition, even though David Crowe's wife also consented to a search, obtained earlier than David's consent, her consent was likewise invalid where Wanda Crowe remained in the Sheriff's company until she gave it and, not believing herself free to leave (9/7,8/88 PT at 50, 54), she too, was unlawfully detained. See Schneckloth, supra, and Bumper, supra.

4. The search was not incident to a lawful arrest

Because the arrest and detention of Appellant was unconstitutional, the search conducted subsequent to it cannot stand constitutional muster.

> Evidence obtained under a void warrant [or an illegal arrest] is evidence illegally obtained and has been settled once and for all that the taint of illegal procurement forbids its use as evidence.

Powell v. State, 163 Ga. App. 352, 295 S.E. 560 (1982).

5. The trial court's finding that Appellant consented to the search is not supported by the record.

The trial court found that David Crowe consented to the officers' entry into the home; a finding contrary to Major Miller's testimony that Appellant was under arrest from the moment Miller entered the house (T. 951). Additionally, consent to the entry into a person's home is not the equivalent of consent to a warrantless arrest in the home nor consent to a warrantless search. David Crowe's "consent" to the officers' entry, based on the evidence presented at the suppression hearing, was at best a submission to legal authority rather than a consent to the warrantless arrest.

> A prisoner in police custody by reason of an illegal arrest (or any other form of detention, overt or subtle) is in no position to refuse to comply with the demands of the officer in whose custody he is placed whether such demand is couched in the language of a polite request or a direct order. If a command the prisoner is directly forced to comply and if a request he is indirectly forced to comply.

Raif v. State, 109 Ga.App. 354, 358, 136 S.E.2d 169, 173, and see Gomez v. Wilson, D.C., 323 F.Supp. 87, 91.

Still, the trial court's findings fail to account for what the Court in Raif, supra, regarded as a valid lack of position by a defendant to refuse the police's demands. The trial court also failed to reconcile the fact that David Crowe's step-daughter answered the door when the deputies rang the bell and that she was immediately removed from the home against her wishes and his.

The trial court went on to find probable cause existed to arrest Appellant. These findings are clearly erroneous. There is positively no evidence of exigent circumstances that would justify a warrantless arrest and none was advanced by the state. Indeed, there was sufficient time to obtain a warrant given the fact that David Crowe was considered a suspect as early as 1:30 p.m. that day.

Consent to enter, as addressed above, does not alone validate the warrantless arrest and as the "plain view" doctrine was inapplicable and no exigent circumstances were articulated, the arrest was in complete defiance and disregard of constitutional safeguards, as expressed in the United States and Georgia Constitutions. See Phillips v. State, 167 Ga. App. 260,

305 S.E.2d 918 (1983).

When pondering the legality of the searches conducted in Appellant's home, the trial court concluded that it must apply the totality of the circumstances test. Apparently, the trial court did not use that test. For example, the trial court failed to consider the exploitation of Appellant's emotional susceptibility, Brewer v. Williams, 430 U.S. 387 (1977), and Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Berry, 670 F.2d 583, 598 (5th Cir. 1982); Raif v. State, 109 Ga. App. 354, 358, 136 S.E.2d 169, 173; Johnson v. United States, 333 U.S. at 13.

Further, the trial court went into great detail about the personal qualities of the Appellant as seen in Court, but attributes nothing to the circumstances at the time of the purported consent and search. When psychological coercion produces [consent], it is held to be not the product of a rational intellect and a free will but, involuntary. United States v. Tingle, 658 F.2d 1332 (9th Cir. 1981) at 1337. Although significant facts existed here, the trial court did not consider them.

6. Appellant did not consent to the second search of his home.

The trial court's findings regarding Appellant's consent to the second search, conducted after Sheriff Lee purportedly procured a waiver are not supported by the record. Considering the totality of the circumstances, including the number of officers, Appellant's emotional and mental state at the time, and

the deceitful actions of the police -- including the fact that he was not allowed to call his attorney after making repeated requests -- there can be no conclusion but any consent allegedly given was involuntary.

Additionally, the causal chain between the warrantless arrest, warrantless first search and the "consented to" second search, was not addressed by the trial court. That 'causal chain' is significant because the law is clear that simply re-advising of Miranda does not remove the taint; therefore, the state also failed to carry its burden of proving the consent to the second search was freely given. See, People v. Johnson, supra; Wong Sun v. United States, supra; Bumper v. North Carolina, supra; Scheckloth v. Bustamonte, supra; Dunaway, supra; Raif, supra; Brewer, supra; Mayes, supra.

The trial court also found that David Crowe "freely and voluntarily consented to two (2) searches of his residence; one being oral and the other being written." Yet, Dunaway v. New York, 442 U.S. 200 (1979) specifically states that if the police illegally detain a defendant, and then advise him of his rights, the administration of the warnings does not cleanse the taint of the illegal seizure. While the state may argue that the first search was made pursuant to consent of David Crowe, there is absolutely no evidence to support it. See Raif, supra.

7. The error cannot be harmless.

In LaRue v. State, 137 Ga. App. 762, 224 S.E.2d 837 (1976), the Court held, a judicial determination of "harmless error can

only be made on a case by case basis....", Id. at 839. Before a federal constitutional error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt and that the burden for showing this rests with the prosecution. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, reh. denied, 386 U.S. 987 (1967)

The introduction of evidence seized as a result of an illegal arrest and invalid consent, cannot be considered harmless. If the evidence seized, and the statements obtained had not been admitted against Appellant, the State would have had absolutely no case. In addition, the charges of armed robbery and burglary could not have been proven beyond a reasonable doubt so a death sentence could not have been procured. Because the court admitted illegally seized items and unconstitutionally obtained statements against Appellant, his guilty pleas and sentence of death should be vacated.

CLAIM 5

ERROR XVII

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S CHALLENGE FOR CAUSE TO JURORS LEO, LEVENS, TONEY, CHANDLER BONE AND HARTLEY IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR TRIAL, TO DUE PROCESS AND TO A FAIR AND RELIABLE SENTENCING DETERMINATION GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 14, 16, AND 17 OF THE GEORGIA CONSTITUTION.

ERROR XVIII

THE TRIAL COURT ERRONEOUSLY EXCUSED FOR CAUSE JURORS TEATE, GATTIS, GRANT AND TUMLIN IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR TRIAL, TO DUE PROCESS AND TO A FAIR AND RELIABLE SENTENCING DETERMINATION GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 14, 16, AND 17 OF THE GEORGIA CONSTITUTION.

The standard employed to determine who is or who is not excusable for cause from the venire of a jury originated in Witherspoon v. Illinois, 391 U.S. 510, at 510, n. 21, that stated:

> jurors may be excluded for cause if they make it "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."

Later, the United States Supreme Court dispensed with Witherspoon's reference to "automatic" decision-making, and held the proper standard for determining when a prospective juror may be excluded for cause because of his views on the death penalty is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams v. Texas, 448 U.S. 38,

at 45. This standard does not require that bias on the part of the juror be proved with "unmistakable clarity."

The standard, as determined in Adams, supra, also applies to jurors who are so death penalty prone that their attitudes would prevent or substantially impair the performance of their duties in accordance with the court's instructions and their oaths. Morgan v. Illinois, 112 S.Ct. 2222 (1992).

The Georgia Uniform Superior Court Rules state in pertinent part:

> cases in which the death penalty is sought, the trial judge shall address all Witherspoon and reverse-Witherspoon questions to prospective jurors individually. Prior to ruling upon any motion to strike a juror under Witherspoon, the trial judge shall confer with counsel for the state and for the accused as to any additional inquiries.

(Rule 10.1).

First, Appellant challenges whether Uniform Rule 10.1 is even proper, since the United States Supreme Court has held Adams, supra, and Wainwright v. Witt, infra, to be the appropriate standards for determining whether a juror should be excused for cause. The use of a Witherspoon standard by Rule 10.1, therefore, is contrary to the laws of the United States, as it requires a stricter standard for determining eligibility or excludability for a potential juror than what is now effectively the standard, by virtue of Adams, supra, and Wainwright, supra.

Second, the trial court erred in refusing to exclude for cause Jurors Leo, Levens, Toney, Chandler, and Bone, for the reasons they articulated during voir dire: to wit, their

attitudes about the death penalty would prevent or substantially impair their duties in accordance with the court's instructions. Each of these jurors said they would listen to what the Court instructed, but would not put aside their personal feelings, and that it could prevent or substantially impair the performance of their duties as a juror in accordance with the court's instructions and their oaths, clearly indicated from these excerpts taken from their individual voir dire.

A. The Trial Court Erred When It Failed To Exclude Jurors Whose Views On Capital Punishment Would Substantially Impair Their Ability To Follow Their Oath

Juror Leo: (T. 72)

> Court: All right. Then I have another question I need to ask you. In a case where a Defendant has been found guilty beyond a reasonable doubt, would you automatically vote in favor of the death sentence regardless of the facts and circumstances of the case and the Court's instruction to you that you must consider the imposition of both life and the death sentence?

(T. 73)

> Juror: There would be fairly few cases in my mind where I would not vote for the death penalty. Can't think of too many, other than self-defense.

(T. 74)

> Bergin: Let me ask you; when you're talking here that you're automatically going to vote for the death penalty unless somebody shows that it was self-defense; can anything make you change your mind on that?
>
> Juror: Not -- I can't think of too many cases. I can't think of any case where somebody would murder somebody else, other

than time of war and self-defense, where I wouldn't consider it to be something punishable by death. It would have to be the most extenuating circumstances and I can't think of very many. That's my personal feelings about it.

Bergin: If the Judge charges you that you have to consider aggravating and mitigating circumstances, would you still automatically vote for the death penalty?

Juror: I mean, you know, I can consider any information anyone gives me, but it would have to fit such a very narrow channel and I have a very difficult time thinking what those channels would be, of mitigation or any other reason why anyone would kill anyone.

Bergin: Now, suppose there wasn't even any mitigation evidence put on; would you automatically vote for the death penalty then?
Juror: And I would vote for the death penalty unless there was some set of circumstances that were so beyond what my current imagination is of murder.

(T. 85-86);

Bergin: Judge, I would ask that he be excused for cause.

Court: As I determined the juror's answer, he will not really vote for the death penalty in every case, that he'll consider the law and the charge as given and there are circumstances where he would not impose it. He just can't verbalize what those would be and he doesn't know anything about the case, you know, to analyze it and we can't ask him at this point. So he will consider mitigating circumstances, and I --

Bergin: (interposing) I asked him if the defense does not put on any mitigating circumstances, Your Honor, and the law provides that, as the Court knows, that the jury does not have to, even if they find an aggravating circumstance, impose the death penalty. That's what I'm asking him; if Mr. Crowe doesn't put on, or any Defendant would

not put on any mitigation and there were aggravating circumstances proved, would he automatically vote for the death penalty.

Juror: Yes, I would.

(T. 87-88)

Bergin: I'd renew my motion, Judge.

(T. 88)

Bergin: Okay. So in other words, if the Judge charged you to consider mitigation as considered by the law, you would follow your personal opinion and still invoke the death penalty?

Juror: Absolutely.

(T. 92).

Juror Leo, likewise, stated unequivocally that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Appellant requested that he be excused for cause, and the court denied that request. At (T. 92), Juror Leo was asked, despite the Court's charge on mitigation, would he impose the death penalty, to which he responded "Absolutely." What more did this Juror have to say to convince the trial court that Adams, supra, and Wainwright v. Witt, 469 U.S. 412, required this Juror's excusal. The standard for determining excludable jurors is "...whether the juror's views 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Adams, supra, at 45, cited in Wainwright v. Witt, supra, at 857.

The Court erroneously refused to excuse Juror Leo for cause.

Leo stated he would automatically vote for the death penalty, showing he was biased in favor of the state. He met the test for exclusion under Witherspoon, supra, and Adams, supra.

> "A juror who has made up his mind prior to trial that he will not weigh evidence in mitigation is not impartial. [Such a] juror's views on capital punishment would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841, (1985). ...an inability fairly to consider a life sentence is just as disqualifying as an inability fairly to consider a death sentence." Childs v. State, supra, 257 Ga. at 249, 357 S.E.2d 48.

Skipper v. State, 257 Ga. 802, 364 S.E.2d 835, 839 (1988).

Juror Levens (T. 200):

> Court: Would -- should it be shown that the Defendant in this case committed the crime of murder, would you automatically vote for the death sentence?
>
> Juror: That's a tough one.

(T. 201);

> Bergin: What I'm trying to figure out is when you talk about favoring the death penalty what do you actually feel about the death penalty in your own mind; can you vocalize it to us?
>
> Juror: I don't know. You know, I've had two (2) experiences in my life where somebody was--a gun was pointed at them, that I knew, and it--I saw the terror that they've gone through and that bothered me a great deal and then, I read about somebody else getting killed and something happened, and I don't think it's right for somebody to put somebody through that because these people, you know, they live with it the rest of their lives.
>
> Bergin: In view of that, do you think you could be a fair and impartial juror to

anybody who's charged with a violent crime?

Juror: I'm not sure.

(T. 204-05);

Bergin: So, in view of that, do you think you could be fair to a Defendant in a case like this; down from deep down inside yourself?

Juror: Well, thank you for saying that. If it's -- if we're not determining guilt or innocence, that's one; and if we're just trying to determine sentence --

Bergin: (Interposing) Just? We're talking about life and death. That's --

Juror: (Interposing) Uh-huh (affirmative), that's the sentence. I realize that. No, it would be tough.

Bergin: Judge, I'd ask that he be excused. I don't think he can, in view of his personal experiences, be a fair juror here.

(T. 206);

Bergin: Would you want a person like yourself to sit on a jury if you were in the Defendant's spot and pled guilty to murder?

Juror: Well, selfishly, no, in his eyes .... See, my frustration would be you give somebody life imprisonment and I read in the paper--I don't know what actually happens, but ten (10) years later they're back on the streets, or fifteen (15) or twenty (20).[43] That bothers me a lot.

(T. 208)

Bergin: And to preclude that possibility, you

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[43]As soon as this juror expressed these concerns the court was obligated to instruct the jurors that the jury was not to consider possibility of parole and that they were to assume their sentence, whatever it might be, would be carried out to the fullest. The failure to so instruct the jury violated Appellants rights under Quick v. State, 256 Ga. 780, 353 S.E.2d 497 (1987); Simmons v. South Carolina, 114 S.Ct. 2187 (1994).

would vote for death?

Juror: if those were our only options.

Bergin: Thank you. I would again move for cause, Your Honor.

Court: Mr. Levens, in the Court's instruction to you at the end of the evidence, I'll give you certain instructions, and among those will be instructions upon what we call mitigating circumstances. Would you, with your bent of mind, consider those if you found them to be in the evidence in making a determination of what sentence to impose, if I told you the law says you must consider them? Would you consider them?

Juror: Yes.

Court: And would you give the Defendant the benefit of your consideration of the mitigating circumstances?

Juror: Yeah, I guess. What you classified as mitigating circumstances, I don't know.

(T. 208-09);

Bergin: (Interposing) How do you reconcile in your own mind, "Thou shalt not kill;" Vengeance is mine, saith the Lord" --

Juror:(Interposing) "An eye for an eye" I believe in an eye for and eye and a tooth for a tooth.

Bergin: And not turn the other cheek?

Juror: Sometimes you can't.

(T. 213).

Juror Levens should have been excused for cause when he stated emphatically that his personal experiences would affect his ability to be fair to David Crowe. Juror Levens admitted he did not know what could possibly be a mitigating circumstance, therefore he was not impartial to the Appellant.

" ... it is clear that the juror who stated candidly that he was not impartial, could not judge the case fairly and would be influenced by previous events in his life should have been excused for cause."

Parisie v. State, 178 Ga.App. 857, 344 S.E.2d 727, 729 (1986) .

Juror Toney (T. 214):

Winn: Did you work at the Sheriff's Department when this -- back in March of 1988?

Juror: No, sir.

(T. 216);

Winn: Did you have occasion to deal with people who were on either one of those kind of drugs back when you worked for the Sheriff's Department?

Juror: Very often.

(T. 217,218);

Winn: Do you--do you think that your feelings on the little bit of thought you may have had on the death penalty, do you think they would prevent you from coming into Court and finding someone deserves the death penalty, regardless of what the Judge tells you?

Juror: No. Like I said before, if it's by the law, I could do it.

(T. 219-20);

Bergin: Toney. Mr. Toney, you used to be with the Sheriff's Department?

Juror: Some years ago.

Bergin: How long were you with them?

Juror: For just shy of four (4) years.

Bergin: In what capacity?

Juror: A deputy sheriff, patrolman.

Bergin: Did you work for Sheriff Lee?

Juror: Yes sir.

Bergin: If Sheriff Lee was a witness in a case, would you believe him over other witnesses?

Juror: I have a lot of respect for his opinions.

Bergin: Let me ask you, in view of your law enforcement background, do you think it would change the way you felt about any Defendant in a criminal case?

Juror: No, sir.

(T. 222-23).

Juror Toney, having been a former employee of the Sheriff's Department, admittedly held the Sheriff and the Sheriff's Department's work in high regard, and that level of involvement would justify a showing of partiality. In Parks v. State, 178 Ga. App. 317, 343 S.E. 2d 134 (1986), in accord with Hutcheson v. State, 246 Ga. 13, 268 S.E. 2d 643 (1980); and King v. State, 173 Ga. App. 838, 328 S.E. 2d 740 (1985), it was error to force the Appellant to use a peremptory strike to remove the law enforcement officer from the jury. In the cases cited herein, as in the matter before this Court now, the defense was forced to exhaust its peremptory strikes during the selection process to remove Jurors who should have been excused for cause.

Juror Chandler (T. 255):

Bergin: You think you would be fair to both sides?

Juror: I don't think so.

Bergin: Who would you be unfair to?

Juror: To the gentleman in the back (indicating), since he's already pleaded guilty.

Bergin: You'd be partial to the state?

Juror: Yes, sir.

Bergin: In other words, if the Judge charged you that when you raised your right hand earlier, when you were sworn in as a juror, you took an oath to follow the law in the case. You're sworn in again if you're selected on the jury. Would you disregard that oath and let your personal feelings prejudice your viewpoint on the case?

Juror: I think it's kind of hard to separate your viewpoint from the thing.

(T. 263-64);

Bergin: And a normal jury duty consists of finding somebody guilty or innocent. In this case, that's not the case. David sitting back here has pled guilty to the crime of murder already; and the only decision this jury is going to have to make, and you yourself if you're a part of it, is should he live or die, not guilt or innocence. Can you follow the Court's direction to be fair to David as well as the State?

Juror:I don't think so.

Bergin: Thank you. I'd ask that she be excused for cause, Your Honor.

(T. 265-66);

Bergin: Ma'am, I have asked you basically the same thing twice. Now, I'm not trying to put you on the spot here. I can see it's difficult for you. No one likes to be under the spotlight, but this is a decision involving, for all of us, life and death, including yourself. Now, I want you to search your soul and tell myself and the Judge, do you really think you could be fair on this case?

Juror: Well, not murder.

> Bergin: Well, what I'm saying, ma'am, is we're not trying to force you to be on the jury, we're not trying to force you to be a fair person in life. It's not a crime if, inside yourself, you know you can't be fair--but the travesty is if you know you can't be fair and you don't tell us here while you're deciding the fate of somebody's life.
>
> Juror: I still think, you know, I could probably hear everything but I still think I would be kind of partial against--against him.

(T. 267-268).

Juror Chandler emphatically stated she would be biased against the Appellant. In Parisie v. State, supra, where the state attempted to rehabilitate a juror, who said he would not be impartial, and the Court denied excusing the juror for cause, the Georgia Court of Appeals held this to be error, Id., 729,

> "[d]espite the State's attempt to rehabilitate the juror, we cannot say that he came to the case free from even suspicion of prejudgment on the issues to be tried."

Juror Bone (T. 453)

> Court: You would not automatically vote for the death penalty?
>
> Juror: Not right away; no, sir. No, sir.

(T. 455);

> Bergin: Now, if a person was not on drugs at the time of the murder but merely had drugs in his background, would that influence your decision on imposing the death penalty?
>
> Juror: That's right, because I don't believe in drugs. I think everybody should be sentenced that's caught with drugs. I'm sorry.

Bergin: So you think that if there are drugs involved in a murder case that the person should go to the electric chair?

Juror: if they're involved in murder, yes.[44]

Bergin: Thank you. I'd ask that she be excused for cause, Your Honor.

Winn: No, Your Honor. That's not an excuse to excuse her.

Court: Okay. I will not excuse the juror.

* * *

Bergin: So, if the evidence presented in any case showed drugs and murder, regardless of what the Judge said, would you still sentence somebody to the death penalty?

Juror: Yes.

Bergin: Thank you. I'd ask to excuse her for cause.

Court: Motion denied.

(T. 460-62).

Juror Bone clearly should have been excused as her voir dire reflects that she was even more wetted to a death sentence than the challenged juror in Pope v. State, 256 Ga. 195, 345 S.E.2d 831 (1986), who also indicated that he would not consider any mitigation even though he said he would listen to all the

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[44]This juror indicated unequivocally that he would consider Appellant's drug problem -- a mitigating circumstance -- as an aggravating circumstance. Failure to impanel a jury that will give consideration to all mitigating evidence violated Appellant's rights under Eddings v. Oklahoma, 455 U.S. 104 (1982), Lockett v. Ohio, 438 U.S. 586 (1978), Penry v. Lynaugh, 492 U.S. 302 (1989), the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution.

evidence.

> A criminal defendant is entitled to an impartial jury by the Sixth Amendment to the United States Constitution. A juror who has made up his mind prior to trial that he will not weigh evidence in mitigation is not impartial.

Pope v. State, 256 Ga. 195, 345 S.E.2d 831 (1986), at 838.

Appellant was able to demonstrate, through questioning, that the juror lacked impartiality.

> "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lack impartiality." Id., supra, at 852.

The same standard is applicable to Jurors Levens, Chandler and Bone. None of these jurors was able to tell the questioning party, nor the trial court, that they would be able to put aside their personal views to perform their duties as a juror in accordance with the trial court's instructions and their oaths as a juror. Each indicated in their own way that there was partiality, or unmistakable bias against the Appellant, that denied Appellant a fair hearing before a representative cross-section of the community.

Procedures used in deciding life or death must be fundamentally fair, see Presnell v. Georgia, 439 U.S. 14 (1978) and must comport with the "evolving standards of procedural fairness." See Gardner v. Florida, 430 U.S. 349, 357 (1977). Because a jury is the conscience of a community in the penalty phase of a capital case, its role should not be either an

advocate for nor opponent of the death penalty. The jury should not be irrevocably committed to either position, but rather, flexible, so as to listen to the evidence, the court's instruction on the law and then it must apply it to the matter before it.

Juror Hartley (T. 528):

With regard to Juror Hartley, the Appellant contends the trial court erred in refusing to excuse him for cause where Mr. Hartley's business was involved in part of the state's investigation of this crime. (528-31). Through questioning, Appellant was able to discern that Juror Hartley was the owner of Abel's Package Store (T. 528) and was consulted by police during investigation of the Appellant's case id.. Juror Hartley was contacted directly by police to find out who was working the night of the crime. (T. 531). Juror Hartley indicated that should one of his employees be called upon to testify -- there were some on the state's witness list -- he would "favor an employee that [he] knew in honesty." (T. 531). In spite of the uncontroverted evidence of bias, the court failed to excuse Juror Hartley. (T. 533).

The trial court's decision not to excuse this juror resulted in Appellant being forced to exercise one of his peremptory strikes, thus causing him to eventually exhaust all strikes and settle for jurors he deemed unacceptable. The juror was questioned about his company's involvement in the investigation of the crime, and there was a recollection of that investigation

by him with an affirmative response to the questioning. The fact that he personally did not do an investigation of the events concerning his own store is not pertinent. What is relevant, is that he conceivably knew more information about the crime, and the investigation by the Sheriff's department than was let on in the questioning that not only could have been used in the jury room against David Crowe, but also to bring into the deliberations extraneous evidence not brought out in the actual trial. What he would acknowledge indicated that his business was intricately involved in the investigation, as was, at least, one of his employees. One can only speculate what the employee(s) may have disclosed to him regarding the investigation and questioning by the Sheriff's department, and that knowledge could have affected his impartiality as a juror.

B. The Court Erred In Excusing Jurors Whose Opinions On Capital Punishment Were Not So Fixed As To Interfere With Their Ability To Follow Their Oath.

The trial court erred in excusing Jurors Teate, Gattis, Grant and Tumlin. Each of the jurors was disqualified by the trial court, at times without even allowing defense counsel the appropriate opportunity to rehabilitate the juror. Moreover, the jurors did not manifest such personal views on capital punishment that would have prevented each or substantially impaired each juror's ability to follow his or her oath as a juror and the trial court's instructions.

<u>Juror Tumlin</u> (T. 401):

Court: Are you conscientiously opposed to capital punishment?

Juror: I think I might have some problem voting for capital punishment.

Court: But are you conscientiously opposed?

Juror: Not in theory.

Court: Not in theory? Would you consider all the facts and circumstances and then -- and the evidence and the law and then vote according to what you have determined in the jury room after hearing everything?

Juror: Yes.

Court: And if meant, in your mind, that the death penalty was appropriate, could you impose it?

Juror: I don't know whether I could or not.

Court: Okay. Would you totally disregard the death penalty in all cases?

Juror: No, I don't think so.

Court: Okay. So you would consider it in some cases?

Juror: Yes, I suppose I would.

(T. 402-03);

Winn: Do you think your feelings about the death penalty would interfere with your ability to apply the law and the facts?

Juror: Possibly.

Winn: We're just trying to ask questions so that -- the law also requires that we have a jury made of people that have the ability to follow every detail of the requirements the Court imposes on them, and one of those requirements is that you shall consider voting for the death penalty. Do you think your feelings would impair your ability to follow that part of the law?

Juror: I don't know. I just think it would be a terrible thing to have to do.

Winn: Do you -- are you glad Georgia has a death penalty?

Juror: I think it's appropriate in some cases. I don't want to be the one to have to sentence somebody to that.

(T. 405);

Bergin: Let me ask you, you told Mr. Winn that your thought the death penalty was appropriate in certain cases, is that correct?

Juror: As long as I don't have to vote for it.
Bergin: Can you think of a circumstance in which you would vote for it, if it was a heinous enough crime?

Juror: Well, as example, the Alday case...I think that was bad enough they deserved it.

Bergin: Okay. And would it be fair to say that you would listen to the evidence from both sides then listen to the Judge's instructions on the law and then apply the law to the case and consider the death penalty as well as life imprisonment, and just weigh it on the facts of this particular case and the law?

Juror: I think it would be terribly traumatic for me to consider the death penalty.

Bergin: Yes, but would you follow the Judge's instructions on that? There's nothing saying that you go out there and you discuss all this and you don't feel its appropriate, that you have to change your views, but would you follow the Court's ruling and if you thought it was appropriate, like you say if the evidence turned out to be Alday case, would you vote for a death penalty?

Juror: I don't know.

Winn: Your Honor, I would move to excuse her for cause based on Wainwright v. Witt.

(T. 407-09).

Ambiguous or equivocal answers are not sufficient for disqualification for cause. See Blankenship v. State, 247 Ga. 590, at 593, 277 S.E.2d 505 (1981). Merely because a Juror "leans" toward a life sentence is not enough to excuse them for cause. Jarrell v. State, 261 Ga. 880, 413 S.E.2d 710 (1992). Ms. Tumlin testified she would listen to the trial court's instructions on the law and obey her oath. Her exclusion from the jury was error.

Here, as in Jarrell, a prospective juror indicated that she believed in the death penalty in some extreme cases. When asked by the prosecution whether she could impose the death penalty, she responded that she was not sure and then responded that she was leaning toward a life sentence. The Court reasoned,

> As a general proposition, a juror who merely "leans" one way or the other before hearing any evidence is not qualified. See, e.g. Waters v. State, 248 Ga. 355 (2), 283 S.E.2d 238 (1981). This proposition applies with particular force to a juror who leans toward a life sentence before hearing any evidence, since a death penalty cannot be imposed absent evidence to support a finding of at least one statutory aggravating circumstance. O.C.G.A. § 17-10-30 (c).

Jarrell v. State, 261 Ga. 880, 413 S.E.2d 710 (1992).

Juror Teate (T. 569):

> Court: Okay. Well, are you conscientiously opposed to capital punishment?
>
> Juror: Somewhat. I couldn't say I'm totally opposed. It would be hard for me to be on a jury that -- where that sentence was imposed.

Court: Okay. Could you impose it if the right circumstances were there?

Juror: I really don't know.

Bergin: Do you believe that in certain circumstances that the death penalty should be imposed?

Juror: Probably in certain circumstances, it should be.

Bergin: And do you agree that it should be retained on the laws of Georgia to be

Juror: (Interposing) Probably so ... I'm just saying I wouldn't want to have to be on a jury that that was the verdict. Does that make sense?

Bergin: . . . will you follow your oath and follow the Judge's directions.

Juror: Certainly.

(T. 570-73);

Court: I have a question then to ask you and that will probably be the final question. Are your -- Ms. Teate, are your reservations about capital punishment such that you would refuse even to consider its imposition in the case before you, regardless of the evidence and instructions; you just would not impose it?

Juror: Well, not knowing any detail.[45] I mean, he's guilty already, but I don't know -- was he temporarily insane, did he go berserk -- I don't know anything to base--in other words, I'm just saying, personally I'm not real crazy about capital punishment. I understand that in some cases that's the

[45]Of course, the juror could not, at this stage, say if she would or would not impose a death sentence. She unequivocally said that she would need to hear the facts before making a determination and that she did not like the proposition of a death sentence. Her answers were not cause for excusal. Rather, her answers indicated that she would be a perfect potential juror -- one who would not make up her mind until all the evidence was in.

appropriate punishment and I'm not --

Court: (Interposing) Well, in those cases, could you personally vote for it?

Juror: I just don't know. I've never been on a jury, I've never

(T. 574-75);

Court: Okay, Well, then I'm going to excuse you, Ms. Teate, from your service.

Bergin: Well, I think that's taking away our chance to rehabilitate her.

(T. 576). The court excused Ms. Teate without allowing counsel an opportunity at rehabilitation. The trial court erred in dismissing Ms. Teate, as her answers did not indicate that her ability to be fair and impartial was substantially impaired. Wainwright v. Witt, 469 U.S. 412 (1985).

Juror Gattis (T. 626):

Court: Are you conscientiously opposed to capital punishment; that's the death sentence?

Juror: I have mixed feelings on it.

Court: Mixed feelings. What do you mean by mixed feelings?

Juror: I think God should be the judge.

Court: Could you impose the death penalty if it was indicated it should be?

Juror: I don't think I could.

Court: Do you feel like your reservations about capital punishment are such that you could never vote for capital punishment regardless of the facts or the law?

Juror: It would be according to the facts.

Court: Could you ever vote to impose the

death penalty?

Juror: it would be the circumstances of the case.

Court: if there were certain circumstances in the case, do you feel like you could impose the death penalty, you could be a juror that did that?

Juror: I don't know how to answer that.

Court: You don't know how to answer that. Well, do you feel like you could put aside your feelings if the Court instructed you that you've got to consider the facts and circumstances and you've got to consider the law; and in this particular case, the law authorizes a death penalty. Would you consider the facts and circumstances to see if the death penalty in your mind, is what should be done?

Juror: I don't know how I could live with myself. I've never had to deal with anything like this, so I don't know.... It's something I can't judge because I think God's the judge, and I don't know how I would handle it emotionally.

Court: Are you telling me you just couldn't vote for the death penalty, no matter what?

Juror: I don't know.

(T. 626-29);

Bergin: Just diametrically opposed?

Juror: No, I think they're going to get their judgment one day.

(T. 632).

The same argument that applied to Ms. Teate applies to Ms. Gattis. See Allen v. State, supra. It was error to exclude this juror.

Juror Grant (T. 633)

Court: Okay. Well, are you conscientiously opposed to capital punishment; that's the death sentence?

Juror: No.

Court: Okay, Now let me ask you this. If somebody was proven to you to--shown to you to be guilty of murder, would you automatically vote for the death penalty; would that be an automatic response from you as a juror?

Juror: I wouldn't vote for it.

Court: Okay. Well, would you consider all the facts and circumstances of the case, what the law is -- I'll tell you what the law is, and what the argument is and then go to the jury room and decide whether somebody should have a life sentence or a death sentence in a case; would you do that?

Juror: uh-huh (affirmative)

Court: And if it indicated to you it should be a life sentence, could you vote for that?

Juror: Yeah.

Court: If it indicated to you, the evidence and the law, it should be a death sentence, could you vote for that?

Juror: I don't believe I would.

Court: Are there any circumstances where you would impose the death sentence if something happened in a murder case, let's say?

Juror: Well, I don't know. It is according to what it was about, I guess, you know.

(T. 653)

Winn: He is guilty, and so the issue is whether or not he receives a life or death sentence. Do you think that there's any amount of evidence that could be put in this courtroom and any law that the Judge could tell you that could make you consider giving this man the death penalty? Could you ever

vote for it?

Juror: I might later but not now, I just don't, you know. Like I say, this is the first time, and I don't know that much about it.

(T. 638).

The criteria, determined by Adams, supra, and Wainwright v. Witt, supra, at 852, for determining if a juror should be excluded for cause is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Each of these jurors expressed their concern over imposing a death sentence, but each in their own way stated that they would listen to the evidence, the judge's instructions and obey their oaths. The trial court's exclusion of these jurors from the venire was inappropriate and prejudicial to David Crowe.

For the reasons stated herein, Appellant contends that the trial court's refusal to excuse for cause jurors LEO, LEVENS, TONEY, CHANDLER, BONE and HARTLEY, and in excusing for cause jurors TEATE, GATTIS, GRANT and TUMLIN, are each fatal error.

CLAIM 6

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON IMPEACHMENT IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 14, 16, AND 17 OF THE GEORGIA CONSTITUTION

ERROR XIX

THE TRIAL COURT ERRONEOUSLY CHARGED ON IMPEACHMENT AND ALLOWED THE JURY TO COMPLETELY DISREGARD EVEN UNCONTRADICTED DEFENSE TESTIMONY THEREBY DIMINISHING THE JURY'S OBLIGATION TO GIVE MEANINGFUL CONSIDERATION TO THE MITIGATING EVIDENCE DENYING APPELLANT THE RIGHT TO A FAIR AND RELIABLE SENTENCING DETERMINATION.

A. Appellant's Fifth Amendment Right Against Self-Incrimination Was Violated.

B. Appellant's Sixth Amendment Right To A Fair Trial Was Violated.

C. The Sentence Of Death Based Upon This Erroneous Charge Is In Violation Of The Eighth And Fourteenth Amendment And Requires Reversal.

The court's erroneous charge on "impeachment" (T. 1872-1874 set forth hereinbelow), given after the prosecutor's improper "impeachment" of David Crowe with suppression hearing testimony and the trial court's admission of that "impeaching evidence", (see Claim IV), presents an inescapable conclusion that instruction in question impermissibly conditioned the jury's right to believe even uncontradicted defense evidence.

Thus, David Crowe's sole defense against a death sentence: his mitigation evidence, was eliminated from consideration by the jury because of faulty instructions by the trial court. The sole function of the sentencing jury was to decide whether Appellant's

life should be spared or whether he should be sentenced to die in the electric chair. This jury's function was diminished by the court erroneous charge thereby rendering the determination of death unreliable.

"The penalty of death is qualitatively different" from any other sentence, Woodson v. North Carolina, 428 U.S. 280, 305 (1976). This qualitative difference calls for a greater degree of reliability when the death sentence is imposed. Gardner v. Florida, 430 U.S. 349 (1977); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

Under the Eighth Amendment, a jury instruction that would ordinarily satisfy appellate review may nevertheless be inadequate when a person's life is at stake. Against this backdrop Appellant argues that the trial court's haste to deny his objection to the erroneous and prejudicial instruction on "impeachment" rendered the sentencing determination unreliable. The trial court simply stated:

> You notice that I said, in the impeachment charge, I charged them there had to be a statement made by the witness on the witness stand

(T. 1887).

In Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), the Supreme Court stated that "Griffin prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." See also, Lakeside v. Oregon, 435 U.S. 333, 338, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978).

Moreover, the central purpose of a[ny] criminal trial is to decide the factual question of the defendant's guilt or innocence, [United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) ... "] Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). To this end, it is important that both defendant and prosecutor have the opportunity to meet fairly the evidence and arguments of one another.

What these holdings suggest is that the trial court's charge was improper because it mandated the jury to draw an adverse inference from a defendant's silence in direct violation David crowe's Fifth Amendment privilege against self-incrimination. Further, his right to present mitigating evidence was curtailed by the district attorney's impeachment of his mitigation witnesses because in order to consider their testimony they would have to completely disregard the trial court's charge on impeachment.

The Court charged:

> Now, the credibility or believability of a witness may be attacked by impeaching the witness. To impeach a witness means to discredit them, or to prove them unworthy of belief. A witness may be impeached by disproving the facts which they testified to which the witness testified, by proof of general bad character of a witness or by proof of contradictory statements previously made by the witness as to the matters relevant to his or her testimony and relevant to the case.
>
> If any attempt has been made in this case to impeach any witness by proof of contradictory statements previously made, you must

> determine from the evidence whether any such statements were made and whether they were contradictory to any statements the witness made on the witness stand, and whether or not it was material to the witnesses' testimony and to the case. If you find that a witness has been successfully impeached by proof of the previous contradictory statements, you may disregard that testimony, unless it is corroborated or substantiated by other credible testimony. The credit to be given to the balance of the testimony of the witness is for you, the jury, to determine.
>
> When a witness is successfully contradicted as to a material matter, his credibility as to other matters is a question for the jury. If a witness willfully and knowingly swears falsely, his testimony as to all other matters shall be disregarded entirely, unless corroborated or substantiated by circumstances or other unimpeachable evidence. The credit to be given testimony of a witness impeached for general bad character or for contradictory statements out of court is a matter for you to determine. Since credibility of a witness is a matter to be determined by the jury, if an effort is made to impeach a witness in this case, it is your duty to determine whether or not that effort has been successful

(T. 1872-1874).[46]

In the instant case, the jury was instructed to disregard all mitigation witness testimony because the witnesses were "impeached" via the State's unconstitutional impeachment of David Crowe. There was nothing to corroborate their testimony nor to substantiate it by circumstances or other unimpeachable evidence. Therefore, the defense in essence, was required to present more

[46]In particular, the portion of the court's charge whereby the jury was instructed to completely disregard a witness' testimony if they found he or she knowingly made a false statement, abridges Appellant's rights.

mitigation evidence to have their previously introduced mitigation evidence believed.

In United States v. Holland, 526 F.2d 284 (5th Cir. 1976), the Fifth Circuit held an instruction such as the one complained of herein "impermissibly conditioning the jury's right to believe even uncontradicted testimony... ." The Court reasoned that where the testimony of one witness conflicts with the testimony of another witness, such an instruction mandates that all testimony from one be received, and all testimony of the other be rejected.

Moreover, the trial court's instruction on "false swearing" mandated that the sentencing jury had to disregard even uncontradicted portions of David Crowe's third statement, because he was "impeached" through the unconstitutionally.

The challenged "false swearing" instruction cannot be reviewed in comparison with pattern instructions prepared by the Council of Superior Court Judges to find either harmless error or no reversible error, because that would necessitate overlooking the fact that David Crowe did not testify during the sentencing phase of trial. Therefore, the "pattern" instruction will not be adequately adjusted to the facts of the instant case.

Before this section may be charged, it must appear that the witness admits, during the trial, that he willfully and knowingly swore falsely. Due to the prosecutor's re-direct, cross examination and closing argument wherein he labeled David Crowe, on at least fifty occasions, as: lying or lying to Sheriff Lee;

or putting his hand on the Bible and swearing to tell the truth; or referring to the pretrial motion to suppress (T. 1451, 1452, 1464, 1469, 1480, 1481, 1681, 1682, 1683, 1684, 1685, 1686, 1691, 1692, 1693, 1704, 1705, 1706, 1801, 1802, 1803, 1805, 1806); it was improper and entirely misleading to instruct this sentencing jury as to impeachment. This jury could not have possibly reconciled this instruction with the evidence introduced in any other way but to either disregard the defense evidence completely or to disregard the charge of the court.

CLAIM 7

APPELLANT WAS DEPRIVED OF HIS RIGHTS UNDER BRADY V. MARYLAND, 373 U.S.63 (1963), THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 14, 16, AND 17 OF THE GEORGIA CONSTITUTION WHEN IMPEACHMENT EVIDENCE WAS NOT DISCLOSED

ERROR XX

THE STATE SUPPRESSED MATERIAL EXCULPATORY IMPEACHMENT EVIDENCE

ERROR XXI

THE TRIAL COURT DID NOTHING TO PREVENT THE STATE'S CONTINUED SUPPRESSION OF MATERIAL EXCULPATORY IMPEACHMENT EVIDENCE

The State cannot be heard to argue that Major Miller was a critical player in the arrest, search and seizure in this case. Major Miller's testimony provided the basis for the court's finding -- albeit erroneous -- that Appellant consented to the searches and statements.

Counsel was allowed to view the State's file in this case and discovered that numerous other officers at the scene of Appellant's arrest filed reports that contained renditions of the facts considerably different than those contained in Major Miller's report[47] and testimony.

The State would not provide Appellant copies of the reports written by the other officers involved in the arrest. The reports by the other officers were substantially different and clearly provided impeachment material. The reports are

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[47]Major Miller compiled the report he testified from the evening before the suppression hearing because his original somehow got lost in the five months since arrest.

discoverable pursuant to Brady v. Maryland, 373 U.S. 83, and due to Miller's admission that his original report was missing, Appellant requested that all reports be preserved, under seal (7/21/88 PT at 173, 175-176, 177-178), and held in evidence to avoid further "losses" of evidence, or in the alternative, that the trial court make an in camera inspection of the entire state's file and seal it for appellate review. The trial court refused to preserve this evidence under seal or to make an in camera inspection. The trial court thereby denied Appellant impeachment material, in violation of his right to confrontation.

The prosecutor has a duty to disclose exculpatory evidence to the defense. United States v. Agurs, 427 U.S. 97 (1976). This Court has stated:

> We hold that a trial court is not required to conduct an in camera inspection of the state's file in connection with a 'general' Brady motion unless, after the state has made its response to the motion, the defense makes a request for such an inspection.

Tribble v. State, 248 Ga. 274, 280 S.E.2d 352, 353 (1981) (emphasis supplied). Osborn v. State, 161 Ga. App. 132 (291 S.E.2d 22)(1980); Carpenter v. State, 252 Ga. 79 (310 S.E.2d 912)(1984).

The defense in this case specifically requested an in camera inspection, after the prosecutor responded to the initial request for production of documents, due to the "loss" of a report, requesting the other incident reports that impeached Miller's newly prepared report. The trial court refused to conduct an in camera inspection (7/21/88 PT at 174, 175, 176, 178, 183).

In Agurs, supra, the Court held,

> "if the subject matter of such a request is material, or indeed a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge"

Id. at 106. Moreover,

> [i]mpeachment evidence... as well as exculpatory evidence, falls within the Brady rule

United States v. Bagley, 473 U.S. 667, 675-676. See also, Brooks v. State, 182 Ga. App. 144 (355 S.E.2d 435)(1987).

Denial of Appellant's motion for this material constituted a violation of his Sixth Amendment right to confrontation and a fair trial, as well as fundamental fairness pursuant to the Eighth Amendment and the due process clause of the Fourteenth Amendment because Major Miller was the sole witness produced by the state to establish "probable cause" for the warrantless arrest of David Crowe inside his home and the state's entire case rested on his credibility.

CLAIM 8

ERROR XXII

THE TRIAL COURT'S INSTRUCTION TO THE JURY REGARDING AN ALFORD PLEA WAS AN INCORRECT STATEMENT OF THE LAW, WAS MISLEADING AND DENIED APPELLANT THE RIGHT TO PRESENT A DEFENSE TO ARMED ROBBERY IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 13, 14, 16, AND 17 OF THE GEORGIA CONSTITUTION

David Crowe's sentencing jury was mislead regarding his legal and fundamental right to maintain his innocence to the charge of armed robbery, by virtue of his *Alford* plea, when the trial court failed to correctly instruct the jury on the law regarding an Alford plea. As a result,David Crowe was denied a meaningful opportunity to present a complete defense to armed robbery in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution.

In Alford, supra, the appellant's guilty plea was upheld on review despite his testimony afterwards maintaining his innocence because the appellant therein negotiated with the state to waive his right to a trial on a first degree murder charge in exchange for a plea to second degree murder, thereby limiting his penalty to a maximum of thirty years.

In the instant case, Appellant received nothing in exchange for his pro se plea. Moreover, in view of the trial court's erroneous charge on Alford, the sentencing jury was specifically instructed to find the statutory aggravating circumstance of

armed robbery by virtue of David Crowe's guilty plea without giving any meaningful consideration to the fact that David Crowe maintained his innocence to that charge when he entered that Alford plea.

During the sentencing phase of David Crowe's trial the jury was given two charges pertaining to Alford: a preliminary instruction, delivered before opening arguments and another after closing arguments were concluded. (T. 790; 1863, 1864).

Appellant objected to the preliminary instruction on the ground that it was an inaccurate explanation of Alford (T. 754). In response, the trial court stated, "[b]asically, I need to explain Alford a little better." (T. 755).

The preliminary charge eventually given by the trial court was:

> As to the charge of armed robbery set forth in Count Two of the indictment, Mr. Crowe has entered what is known as an Alford plea. An Alford plea is a form of guilty plea allowed to be made by a Defendant who has voluntarily and intelligently made a choice among the various courses of action open to him. The Defendant is not required personally to fully admit guilt in tendering an Alford plea to the Court. If the Court accepts or allows an Alford plea to a charge, then Defendant is convicted of that charge under the law. In this case, Mr. Crowe's Alford plea to armed robbery has been accepted by the Court.

(T. 790).

Caldwell v. Mississippi, 472 U.S. 320 (1985), holds that the Eighth Amendment forbids misleading a jury about its responsibility in sentencing. Yet, the jury was never informed that David Crowe could maintain his innocence to each and every

element of armed robbery while tendering an Alford plea to armed robbery. Simmons v. South Carolina, 114 S.Ct. 2187 (1994)(Death sentence invalid where jury is given misinformation about defendant at sentencing trial.).

After closing argument, the second instruction was given to the jury:

> As to the charge of armed robbery set forth in Count II of the Indictment, Mr. Crowe has entered what is known as an Alford plea.
>
> An Alford plea is a form of guilty plea allowed to be made by a defendant who has voluntarily and intelligently made a choice among the various courses of action open to him. The Defendant is not required personally to fully admit guilt in tendering an Alford plea to the Court. If the Court accepts or allows an Alford plea to a charge, then the Defendant is convicted of that charge under the law. In this case, Mr. Crowe's Alford plea to armed robbery has been accepted by the Court. You are to determine what punishment will be imposed upon the Defendant for the offense of murder. The Court will determine what punishment to impose for the armed robbery charge. Both the state and the Defendant have been allowed to enter evidence in this case, and that's what you will consider in determining what the penalty shall be.

(T. 1863, 1864).

In reviewing the Alford instruction complained of, the instructions given by the trial court on "intent" and the aggravating circumstance of armed robbery must be considered.

> Intent is an essential element of any crime and must be proved by the state beyond a reasonable doubt. Intent may be shown in many ways, provided you, the jury, believe that it existed from the proven facts before you. It may be inferred from the proven circumstances or by acts and conduct; or it

> may be, in your discretion, inferred when it is the natural and necessary consequence of an act. Whether or not you draw such an inference is a matter solely within your discretion.
>
> Criminal intent does not mean an intent to violate the law or a specific penal statute, but means simply to intend to commit the act which is prohibited by statute.
>
> The Defendant will not be presumed to have acted with criminal intent as to any alleged aggravating circumstances, but you may find such intention, or the absence thereof, upon a consideration of the words, conduct, demeanor, motive and other circumstances connected with the act for which the accused is being prosecuted.

(T. 1874, 1875).

* * *

> Under the law of this State, the following may constitute statutory aggravating circumstances:
>
> (1) Where the offense of murder was committed while the Defendant was engaged in the commission of another capital felony. In this connection, I charge you that the offense of armed robbery is a capital felony under our law.
>
> Armed robbery is defined as follows: a person commits the offense of armed robbery when, with intent to commit theft, he takes the property of another from the person of another by the use of an offensive weapon, or any replica, article, or device having the appearance of such weapon.

(T. 1878).

Given the trial court's instructions with regard to an Alford plea, intent and the statutory aggravating circumstance of armed robbery, in view of the fact that the trial court refused to charge that, pursuant to the Alford plea, David Crowe could

maintain his innocence, no reasonable juror could have understood that the prosecution had to prove armed robbery beyond a reasonable doubt in the instant case. Moreover, no reasonable juror would have even considered that part of David Crowe's third statement where he maintained that he did not commit an armed robbery; rather, that the money was taken only as an afterthought subsequent to Joe Pala's death:

> ... and when I came back up the hall, that's when that I -- that's when I looked in there and saw that Joe had been doing the deposit in the computer room. The cash drawer was still out there and the two (2) deposit bags were still out there.

(T. 1382).

* * *

> And the thought that I had at that -- at that time was if I went in there and took some of the money that maybe somebody would think that someone came in and robbed the place.

(T. 1383).

* * *

> -- what was running through my mind was, you know, I hoped that somebody -- I guess I hoped that somebody would come in and think that somebody had robbed the place and that was the reason that Joe had gotten was in the shape that he was in.

(T. 1384).

Intent is an essential element of the statutory aggravating circumstance of armed robbery and it must be proved by the state beyond a reasonable doubt. Where the statement of Appellant excluded or denied any intent to commit the offense, was consistent with the physical facts proven, and where the state

has failed to prove evidence of criminal intent, it is the jury's duty to accept the Appellant's explanation and to find this aggravating circumstance not applicable to the case. (Adapted from Terry v. State, 243 Ga. 11, 12 (1979); and, Thomas v. State, 141 Ga. App. 192 (1977)).

David Crowe's sentencing jury could not have reasonably considered this principle of law because the trial court failed to adequately define Alford for them. Where a sentencing jury cannot consider valid evidence in mitigation of a death sentence, that sentence is constitutionally infirm. Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954 (1978). Here, the charge of the court effectively prevented the jury from considering his evidence in mitigation -- that he did not intend to commit the crime of armed robbery.

When reviewing the validity of a particular jury instruction the United States Supreme Court has consistently held that the question is not what it decides the meaning of the charge to be, but rather, what a reasonable juror could have understood the charge's meaning to be. Francis v. Franklin, 471 U.S. 307, 315-316 (1985).

David Crowe raised the issue at trial that his Alford plea had relieved the state of its burden of proving armed robbery beyond a reasonable doubt, (T. 770, 771), and the trial court, during discussion on the motion for mistrial based upon its acceptance of the pro se pleas, realized the problem and accepted

the responsibility of explaining Alford to the jury prior to denying the motion for mistrial (T. 775).

Yet, when David Crowe objected to the trial court's charge because it did not make clear to the jury that he could maintain his innocence to armed robbery while entering an Alford plea, and even argued what should have been charged, (T. 1887, 1888), the trial court simply replied: "Okay." (T. 1888), and continued to inquire if there were any other objections to the charge.

A person on trial for his life is entitled, under the Eighth and Fourteenth Amendments, to fundamental fairness. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). The fundamental premise upon which Eighth Amendment jurisprudence is built is that the United States Supreme Court has consistently "recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-999 (1983).

Just as a defendant must be allowed to place before his jury testimony regarding the circumstances of surrounding his confession so that he may thereby put its credibility into issue because a denial of that opportunity infringes upon both the confrontation and compulsory process clauses of the Sixth Amendment and denies defendant "a meaningful opportunity to present a complete defense;" Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); the trial court's instructions on Alford likewise denied Appellant's Sixth Amendment rights by

preventing him a meaningful opportunity to present complete defense. The jury could not consider David Crowe's explanation, e.g. his third statement regarding the armed robbery, and, at the same time, follow the complained of instructions.

In view of the foregoing argument and citation of authority, Appellant urges this Court reverse his death sentence.

CLAIM 9

ERRORS BY THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 14, 16, AND 17 OF THE GEORGIA CONSTITUTION

ERROR XXIII

THE TRIAL COURT ERRONEOUSLY ALLOWED CUMULATIVE, INFLAMMATORY AND PREJUDICIAL PHOTOGRAPHIC EVIDENCE INTO EVIDENCE IN VIOLATION OF O.C.G.A. § 17-10-35, TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

ERROR XXIV

THE TRIAL COURT ERRONEOUSLY ALLOWED A JURY VIEW OF THE CRIME SCENE.

A. Erroneous Introduction Of Gory Photographs.

The trial court erred in admitting every photograph of the decedent into evidence. In Edwards v. State, 213 Ga. 552, 100 S.E. 2d 172 (1957), the court stated that when photographs are admitted with no objection, then the photographs are allowed to go out with the jury. However, at 174, the court held:

> It might insure a fairer trial to exclude gruesome photographs of a slain person unless they serve a real purpose in proving the material elements of the case. Their introduction when they can serve no purpose but to show a terrible corpse is an excitement of passion against the accused, and the law should not allow a trial for life to be clouded with passion.

The present case before this court is a trial for life. The introduction of the photographs were obviously for the sole purpose of exciting the passions of the jurors. When as here, the Appellant has plead guilty to the charges, the entry of the photographs into evidence is prejudicial in that it inflames the

jury. The admission of the photographs served no purpose in proving the material elements of the case, as the prosecutor already had a plea of guilty entered by the Appellant.

An appellate court conducting its review is far removed from the actual trial. It can not watch the jurors' faces once exposed to gruesome photographs, as the jurors' faces and expressions turn from jovial, normal, bored or contemplatively listening -- to total nausea and disgust. Neither can appellate courts appreciate their reaction toward the defendant thereafter when the jury will not even look at him, and crane their necks and heads to avoid any eye contact with him and to avoid hearing what he has to say in his defense or mitigation.

Though the state may argue the jury was entitled to see the "work" of the Appellant, this court, like the trial court, must weigh the probative value against its prejudicial effect. A review of the state's use of the photographs is essential. From the time tendered until actually admitted, they were used and reused by the state, on every state witness and on many defense mitigation witnesses.

The district attorney not only manipulated the photographic evidence during the sentencing trial, but also used them in his closing argument, not to show the jury what happened to the victim, but rather, to inflame the passions of the jury and prejudice them in order to thwart any rational deliberation. (T. 1797, 1809, 1815).

Reviewing numerous capital cases over the years, with the

substantial amount of gruesome photographic evidence, this Court may no longer appreciate that the average juror does not normally see photographs like these ever in their lives. Though it is plausible that anyone could become inured over time to what was previously objectionable, it does not follow that forcing the jurors to see what is truly objectionable will not prejudice the defendant in a gruesome criminal case.

Appellant does not contend that all photographs, gruesome or not, should be excluded, but rather, that the criteria for determining just how far a jury should be pushed and how far the defendant can be prejudiced must be reviewed anew. This court has reviewed the admissibility of photographs countless times, and held them to be admissible if probative. However, the question of what is probative versus what is sufficient from the perspective of the average juror are two entirely different matters, and must be thoughtfully and honestly considered.

Appellant acknowledges that at times, the state must use photographic evidence to prove an element of a crime; yet, when the crime has been proved, e.g. when a guilt-innocence trial is concluded by a defendant's guilty plea, the admission of photographs thereafter to prove the same elements is irrelevant and only for the purpose of inflaming the passion and prejudice of the jury to the defendant's detriment.

The trial court erred in admitting into evidence State's Exhibit's # 27, 28, 32-39, 58-66, and 70, on the ground that the evidence was cumulative, gruesome, irrelevant, entirely

prejudicial and overly inflammatory.

David Crowe plead guilty to murder, and as a result, the state did not have to prove intent by defendant. The only issue to be determined by the jury was whether David Crowe would be sentenced to life or death by electrocution. The state had to prove the existence of at least one statutory aggravating circumstance, listed in the Georgia death penalty statute, for the jury to even consider whether death was an appropriate punishment for David Crowe. The jury must examine factors relative to the offense and the defendant in sentencing.

By admitting all of the pictures of the decedent, Appellant contends the Court erred because many of the pictures were cumulative; for example, numbers 32-34. The state admitted they were all pictures of the deceased, but taken from "slightly different angles." (T. 893). State's exhibits numbered 35-37 are also cumulative, showing close-ups of the decedent's face.

Cumulative evidence, while possibly being probative, should be excluded, if it is put into evidence for the sake of its prejudicial effect. (Rule 403, Federal Rules of Evidence). Appellant contends no more than one of each of the groupings of pictures of Mr. Pala should have been admitted into evidence, that would have been sufficient for the state to make out its case; multiples of virtually the same thing besides being cumulative, were highly inflammatory, and their probative value was exceeded by the prejudicial impact.

The trial court refused to balance these factors, as

required. See United States v. Bailey, 537 F. 2d 845 (5th Cir. 1976), United States v. Moton, 493 F. 2d 30 (5th Cir. 1974), United States v. Kaiser , 545 F. 2d 467 (5th Cir. 1977). The determination of admissibility, as articulated in Kaiser, supra, at 476, requires a balancing of probative value against prejudicial impact, same being reviewable for abuse of discretion.

State's Exhibits numbered 58-59 are the exit and entry wounds on the victim. Common sense tells us that there would be two wounds from the one bullet; however, there is no probative value to admitting both pictures, because neither the exit nor entry wound showed anything special in and of itself other than the wound.

State's Exhibits 60-64 are pictures of the decedent, in particular, his head and left side of the shoulder. Picture #62 is of the victim's hand, which served absolutely no purpose. Numbers 60-61, 63-64 are cumulative. Additionally, pictures numbered 60 and 64 were taken after the crime lab had started its autopsy, and as such, were clearly prejudicial. They do not depict anything the other pictures do not, but rather, they highlight certain aspects of the wounds.

The state contends these pictures do not show dissection, and therefore, are not so inflammatory as to prohibit their introduction. However, they serve only to inflame, and bolster the state's witness, Dr. James Byron Dawson's testimony, explaining all the injuries the decedent received, in graphic

detail.

In Kaiser, supra, the court considered the photographs tendered into evidence by the prosecution, and determined them to be admissible, because they established elements of the offense, but also held they were admissible "at least where no less prejudicial alternative evidence was available." Id. at 476. Here, although there was less prejudicial evidence available to the prosecution, in that there was ample graphic testimony about the wounds from Dr. Dawson, Kelly Fite and Sheriff Lee, and no real need to admit all the photographs other than to bolster their testimony, all were admitted. David Crowe submits that it was deliberately done to inflame the jury's passions and to deny the him a fair and reliable sentencing determination.

The State has not shown a compelling necessity to introduce all of the photographs of the victim in this case. Therefore, the trial court erred in not screening the photographs individually for relevancy. See Williams v. State, (300 S.E. 2d 301) (1983), Brown v. State, 250 Ga. 862, 302 S.E. 2d 347.

In Hance v. Zant, 696 F. 2d 940 (11th Cir. 1983), the court held that the prosecutor's presentation of photographs of the victim's body and fragments of her corpse were highly inflammatory, however admissible and not improper, because this evidence was relevant to the state's theory of the murder weapon.

Hance, supra, is inapposite to the present matter, because Appellant herein plead guilty and thereby, admitted what weapons were used in the murder. Therefore, the admissibility of the

photographs were irrelevant and improper, as the State did not have to prove its theory of the murder weapon.

The question to be addressed is whether admission of gruesome color photographs is harmful error where their introduction prejudices a defendant's right to a jury that will give fair and meaningful consideration to the mitigating circumstances at the sentencing phase of his trial. In Brown v. State, 250 Ga. 862, 302 S.E.2d 347 (1983), citing Ramey v. State, 250 Ga. 455, 298 S.E.2d 503, 504 (1983), the court indicated an increasing concern about the introduction of prejudicial photographs with no showing of compelling necessity:

> Pictures of the deceased taken at the scene of the crime are bad enough; pictures of the deceased taken while an autopsy was in progress are even worse .... Like duplicate photos, autopsy photos should be screened with particular care to determine their relevancy, if any, to the case at hand.

The rule as applied in Ramey, supra, is that photographs that are relevant to any issue in the case are admissible even though they may have an effect on the jury, provided they are not duplicitous, nor cumulative.

For the reasons stated herein, the complained of photographs should have been excluded. Moreover their erroneous admission is not harmless under Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, reh. denied, 386 U.S. 987 (1967) as the State cannot prove beyond a reasonable doubt that the error did not contribute to Appellant's sentence of death.

B. Erroneous Jury View Of the Scene.

The trial court also erred in allowing a jury view in this case. On the first day of trial, after voir dire had been completed, the state moved the court for a jury view of the scene of the crime. The reason for this request, the state explained, was that it would enable the jury to understand the photographs and the testimony of the experts they intended to call. The prosecutor added, "Second of all, there was no photo taken from the location in which we expect to present evidence that the bullet that killed Mr. Pala was fired ... ." (T. 746) (It turned out that Kelly Fite had six pictures with string, etc. T. 1061; S-1).

The Appellant objected strenuously to the jury view, arguing that the jury view did not exhibit anything that could not be shown in the courtroom. Further, during voir dire, every juror had been asked if they were familiar with that store, and almost every juror had been there at least once, indicating some understanding of how the store was laid out. Additionally, based on the district attorney's own admission, the store was in similar condition at time of trial as it was at the time of the crime, but that there had been changes in some of the displays (T. 741), that changed the appearance of the store.

There are two (2) types of jury views. One type involves evidence that is so large or affixed, that it cannot be brought into the courtroom. The other type of jury view involves a "scene view", to enable the jury to better understand the testimony and other evidence introduced in court. The second

type of view was the case herein. The State had more than enough photographs showing the crime scene at the store. Pictures were taken from every possible angle in that store, not only of the victim, but also of the surrounding area. The jury scene view in this instance did not provide the jury with a better understanding of how the crime took place, or where it took place. Each juror was at least minimally acquainted with the store and its layout. This jury view was cumulative to the photographs presented in evidence, and therefore should not have been permitted to take place.

Furthermore, it has been held many times that a jury view is not evidence. See Brookhaven Supply Co. v. Dekalb County, 134 Ga. App. 878, 880, 216 S.E.2d 694 (1975); Jordan v. State, 247 Ga. 328, 276 S.E.2d 224 (1981). And there is considerable controversy as to whether a jury view is understood by the jury not to be evidence in the case. See IV Wigmore on Evidence, § 1168 (1972); McCormick on Evidence, 2d, § 216 (1972).

In theory, a jury view in a criminal case is to assist the jury in determining the guilt or innocence of the defendant. But the Appellant herein was not on trial in the guilt/innocence phase, rather solely for sentencing. The jury view did not show or enlighten the jury as to any matter relevant for their consideration in sentencing, either about the crime or why the crime was committed. Neither did the challenged jury view assist the jury in understanding testimony to be introduced by the state, nor assist the jury in comprehending how the crime was

committed. There were too many photographs that exemplified all of that for the jury, making the jury view totally unnecessary, duplicitous of the duplicitous photographs, and error not to refuse it. This Court, again, cannot declare that this jury view did not contribute to the complained of sentence, nor can it escape the requirements set out in LaRue v. State, supra, its predecessors and their progeny for the standard of review.

CLAIM 10

THE DEATH PENALTY SCHEME ON ITS FACE AND AS APPLIED TO APPELLANT IS UNCONSTITUTIONAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH , AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 14, 16, AND 17 OF THE GEORGIA CONSTITUTION

ERROR XXV

THE STATE OF GEORGIA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL BECAUSE IT GIVES DISTRICT ATTORNEYS UNFETTERED DISCRETION IN SELECTING THOSE CASES THAT ARE DESERVING OF THE DEATH PENALTY.

ERROR XXVI

O.C.G.A. § 17-10-30(B)(7) IS UNCONSTITUTIONAL BECAUSE IT IS IMPERMISSIBLY VAGUE.

A. The (b)(7) Statutory Aggravating Circumstance Fails To Narrow The Class Of Death Eligible Cases.

B. The (b)(7) Statutory Aggravating Circumstance Promotes Arbitrary And Capricious Death Sentences.

For the same reason that the previous Georgia Death Penalty scheme was declared unconstitutional, the present scheme is unconstitutional in that it is impermissibly vague and promotes arbitrary and capricious prosecution and utilization, in violation of the Eighth and Fourteenth Amendment of the United States Constitution, as applied to the states. United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977).

The current scheme outlines ten circumstances where the death penalty may be imposed. However, no guidelines are provided to the differing jurisdictions' district attorneys on how to apply or interpret them. What constitutes a crime eligible for death penalty in one county may not be considered as an eligible death penalty crime in the adjacent county. Each

district attorney in each county or circuit determines those cases that are death penalty eligible, instead of having a narrowly defined criteria to meet the requirements of the Constitution.

In Lockett v. Ohio, 438 U.S. at 605, the United States Supreme Court stated there is "no perfect procedure for deciding in which cases governmental authority should be used to impose death." This is the critical issue because even though there is mandatory appellate review of each death sentence, there is no mandatory review of the other murder cases with aggravating circumstances not deemed death penalty eligible, the review in and of itself does not even remotely address the issue as to when or why the government seeks to impose death.

The United States Supreme Court, in Furman v. Georgia, 408 U.S. 238 warned that a system's standards could be so vague that the jury's sentencing decisions would not be properly channelled, with the result being arbitrary and capricious sentencing, which has been found to be unconstitutional. Davis v. State, 255 Ga. 588, 340 S.E.2d 862 (1986). To avoid the constitutional flaw found in Furman, supra, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862; Davis v. State, supra. A system that does not clearly define standards for eligibility for the death penalty to guide in the exercise of

sentencing discretion is constitutionally intolerable. United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977).

In Goodwin v. Balkcom, 501 F.Supp. 317 (M.D. Ga. 1980), the Court held that a death sentence cannot be imposed under sentencing procedures that create a substantial risk it will be inflicted in an arbitrary or capricious manner. See Gregg v. Georgia, 428 U.S. 153, 188-189. Punishment should fit the offender and not the crime, United States v. Lopez-Gonzales, 688 F.2d 1975 (1982), the punishment should not be excessive, pursuant to the Eighth Amendment to the Constitution of the United States. (See Gregg v. Georgia, supra). A community's outrage at the particular crime is the standard for the punishment imposed, Gregg, supra, and should not be left to the prosecutor.

When the prosecutor announces he seeks the death penalty in a particular case, it is normal that the community will be mollified. But, that still does not address the issue of why and when each prosecutor decides to seek the death penalty in a particular case, that means it is a discretionary decision of the prosecutor's, and is, therefore, unacceptable under Furman, supra, and its progeny, because subject to arbitrariness and capriciousness.

Justice White, in Gregg v. Georgia, supra, stated that over time, as the aggravating circumstances requirement is applied, the types of murders for which the death penalty may be imposed, will become more narrowly defined and will be limited to those

that are particularly serious or for which the death penalty is particularly appropriate. (Emphasis supplied). Although this statement by Justice White was made several years ago, it is apparent we are still wallowing in the same quagmire, as the once "narrow" grounds of Georgia's present system, when implemented, have, if anything been greatly expanded. This statement by Justice White can only lead one to believe that it will take many more cases before aggravating circumstances will be clearly defined so as to prevent arbitrary and freakish sentencing. As held in Gregg, supra, it is the State's responsibility to define the crimes for which the death penalty may be imposed in a way that obviates "standardless [sentencing] discretion."

At trial, (T. 782-784) counsel for Appellant raised the issue of arbitrariness in the trial court and presented evidence regarding when the death penalty is sought, by comparing an adjacent county's history with cases such as the instant case, or more extreme. The trial court refused to acknowledge the different criteria, and remarked

> I don't count Fulton [county] sometimes (T. 782)... Good reason not to go into Fulton County ...

(T. 783).

The trial court's own remark advanced the Appellant's argument more than ever could be anticipated. Pursuant to the Unified Appeal Section II. Pre-Trial Proceedings (A.)(1.):

> The prosecuting attorney shall state whether or not he intends to seek the death penalty. ...

This Rule applies to all counties in the State of Georgia, permitting a death sentence to be considered only where the state requests it, but providing no guidelines for the exercise of a local district attorney's discretion. As the trial court pointed out "Good reason not to go into ..." (mentioning a particular Georgia county); however, by the same analogy, the lack of any guidelines for local prosecutors creates the situation Appellant complains of herein: wholly arbitrary and capricious action by individual district attorneys.

Douglas County's district attorney is allowed to arbitrarily and capriciously seek the death penalty because the death penalty statute itself allows and expressly provides for subjective interpretation by the individual local prosecutor irrespective of what is done in any other Georgia County. The results are never really compared on a county by county or case by case basis, especially when an honest look reveals that no case has been reversed as disproportional sine 1979. Surely, there has been one case since 1979 that was a death case to a prosecutor in one county but not a death case to a prosecutor in another.

In United States v. Silagy, DC CIl1, No. 88-2390, 4/29/89, -- F.Suppl. 45 CrL 2183 (1989), habeas corpus relief was granted to a petitioner challenging the constitutionality of Illinois' death penalty where that Court found that the statute violates the precepts of the Eighth and Fourteenth Amendments. It is equally applicable to Georgia's present scheme:

> Our statute contains no directions or guidelines to minimize the risk of wholly

> arbitrary and capricious action by the prosecutor in either requesting a sentencing hearing or in not requesting a sentencing hearing. The vague belief, although the prosecutor may be sincere, will not 'minimize the risk of wholly arbitrary and capricious action' unless the exercise of discretion by the prosecutor is aided, directed and limited by guidelines prescribed by the legislature." This violates the principles outlined in Furman, supra.

In Gardner v. Florida, 430 U.S. 349, the Supreme Court stated it "is of vital importance to the Defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Id., at 358. (Emphasis supplied). "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Francis, 613 F.Supp. 747, at 755 (D.C. Ga. 1985). The same argument applies to the instant matter before this court.

In his second argument challenging the constitutionality of Georgia's death penalty statute, Appellant submits that section (b)(7) is impermissibly vague. Section (b)(7) reads:

> The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery of the victim;

In Maynard v. Cartwright, 108 S.Ct. 1853 (1988), the Supreme Court upheld the Tenth Circuit's decision declaring unconstitutional Oklahoma's aggravating circumstance of "especially heinous, atrocious, or cruel" indicating that a particular set of facts, however shocking, cannot be enough in

the finding that a murder was outrageous wantonly vile, and inhuman cannot stand because the words themselves provide no safeguards against totally arbitrary imposition of the death sentence." See Burger v. Zant, 718 F.2d 979 (11th Cir. 1983).

While the Georgia Supreme Court has held that (b)(7) will not be permitted to become a "catchall," Hance v. State, 245 Ga. 856, 268 S.E.2d 339, Harris v. State, 237 Ga. 718, 230 S.E.2d 1, there is nothing to prevent the prosecuting authority to use it as the catchall, thereby allowing the jury to interpret it as it sees fit. This does not provide the narrowing principles outlined in Zant v. Stephens, supra.

In Davis, supra, the court, citing Phillips v. State, 250 Ga. 336, 297 S.E.2d 217 (1982) held:

> At a minimum, a statutory aggravating circumstance "may not ... be interpreted so broadly that it can be applied to every murder; in that event, the requirement that the sentence of death may not be imposed unless at least one statutory aggravating circumstance is found could not serve its intended purpose of helping to distinguish cases in which the death penalty is imposed form the many cases in which it is not."

Pain and suffering is an inevitable by-product of any murder. What section (b)(7) condemns is the "unnecessary and wanton infliction of pain and suffering," aside from that resulting as a matter of course from the commission of any murder. Phillips v. State, supra, 250 Ga. at 339, 297 S.E. 2d 217.

The state duplicated its enumerated grounds of statutory aggravating circumstances. In its notice to Appellant, the state

contended that the following (4) aggravating circumstances were the basis for seeking the death penalty in the instant matter:

> (1) (b)(2) Defendant committed murder while in the commission of armed robbery; and
>
> (2) (b)(4) Defendant committed murder for purposes of pecuniary gain, a/k/a receiving money; and
>
> (3) (b)(2) Defendant committed murder while in the commission of a burglary; and
>
> (4) (b)(7) The murder was outrageously or wantonly vile, horrible and inhuman, in that it involved torture, depravity of mind and an aggravating battery on the victim.

Robbery, as defined in O.C.G.A. § 16-8-40 states in pertinent part:

> (a) A person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another: (1) by use of force; (2) by intimidation, by use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another ...

Armed robbery, as defined in O.C.G.A. § 16-8-41, in pertinent part:

> (a) A person commits the offense of armed robbery when, with the intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or devise having the appearance of such weapon. The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery.

Robbery and armed robbery are virtually the same, except that armed robbery requires the "use of an offensive weapon," as opposed to the "use of force." "Force" implies actual personal

violence, a struggle and a personal outrage. If there is any injury done to the person, or any struggle by the party to keep possession of the property before it is taken from him, there will be sufficient force or actual violence to constitute robbery." Long v. State, 12 Ga. 293, 320(9) (1852), Wallace v. State, 159 Ga. App. 793, 285 S.E. 2d 194 (1981).

Use of force is implicit in an armed robbery, as the use of a weapon is use of force. Robbery by intimidation accomplishes the same as armed robbery. Both require a taking -- whether by use of force or intimidation or weapon, still the underlying crime being a theft.

Robbery therefore is an element of armed robbery. Both of these crimes bring the perpetrator money or something of value, i.e. pecuniary gain, explicit in the language of each statute.

In Cook v. State, 369 So.2d 1251 (1978 Ala.), on remand, (Ala. App.) 369 So.2d 1260, 384 So.2d 1158, cert. denied, (Ala) 384 So.2d 1161, the court found that the term "pecuniary gain" would cover a large variety of crimes with the hope of financial benefit, and such a factor could not be properly applied to a separate provision dealing with murders committed in the course of a robbery, which by definition involves an attempt at pecuniary gain.

The death penalty statute sets out pecuniary gain as an independent aggravating circumstance, when in fact, it is part and parcel of the definition of armed robbery, or robbery for that matter. This separation of an essential element of the

crime for the purpose of making a case death eligible is duplicitous and unconstitutional.

First, in Collins v. Lockhart, 754 F.2d 258, 264 (8th Cir. 1985), the Court held that "an aggravating circumstance which merely repeats an element of the underlying crime cannot perform" the narrowing function required under Zant v. Stephens, supra. Second, it gives the jury an inflated or exaggerated perspective of the crime and the aggravating circumstances attendant thereto, and doubles the weight of aggravating circumstances.

Burglary is defined in O.C.G.A. § 16-7-1 in pertinent part

> (a) A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building...

The definition of burglary also includes theft. Theft is part of robbery and of armed robbery. Where "theft" is the underlying crime in all three (3) of the above-defined crimes, it cannot then be used three different times and in three different ways for purposes of death penalty eligibility or application. It will not meet the criteria enunciated in Zant v. Stephens, supra, to narrow who is eligible for death penalty, nor does it meet with the requirements of Furman, supra, because it permits standards so vague that it will lead to arbitrary and capricious sentencing; furthermore, it highlights and inflates the aggravating circumstances impermissibly, by giving the jury three (3) opportunities to decide to impose the death penalty when there is only one indivisible act.

It is clear that David Crowe can only be sentenced for one of the offenses arising out of an indivisible cause of conduct with a single criminal objective. Robbery arising from the indivisible criminal act (in the present case, murder and armed robbery) amounts to a constitutionally impermissible "double up" of the aggravating circumstances. Burglary and robbery overlap because they describe virtually the same conduct. To use both burglary and robbery as separate aggravating circumstances at the sentencing phase of trial amounts to inflation and exaggeration of the particular circumstances of the crime, and strays, therefore, from the United States Supreme Court's mandate that death penalty statutes be tailored and applied so as to be narrow and to avoid arbitrariness and capriciousness. Zant v. Stephens, supra.

Additionally, the separation "for pecuniary gain" from armed robbery is duplicitous. It condemns Appellant twice for the one culpable act of stealing money. Both of these factors refer to the same aspect of the crime. Maynard v. Cartwright, supra, asserted the proposition applicable in this case: that the statutory aggravating circumstance 17-10-3-(b)(4) is unconstitutionally vague where the state contends that the offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

It follows therefore, that a defendant who commits murder in the course of a robbery will begin with two aggravating

circumstances against him, while a defendant who commits murder while in the course of any other felony will not. Where a single, indivisible cause of conduct may theoretically support multiple aggravating factors, the trial court should merge the aggravating factors so as to not exaggerate or inflate the process of weighing aggravating and mitigating circumstances to the state's favor. See 67 A.L.R.4th Ed 897, 898-899.

The bottom line is that the government may not use separate elements of a crime to create three statutory grounds for aggravating circumstances, and to give the jury three different grounds from which they may choose to impose the death penalty when only one ground is appropriate because it unduly inflates the aggravating circumstances when weighed against the mitigating circumstances, and does not meet the requirement that death penalty statutes be tailored so as to avoid arbitrariness and capriciousness because it provides three opportunities to impose a sentence of death for one criminal act.

For the foregoing reasons, individually as well as cumulatively, Appellant requests that this Court reverse his sentence as being in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

CLAIM 11

THE TRIAL COURT ERRED IN NOT DIRECTING A VERDICT FOR APPELLANT ON THE STATUTORY AGGRAVATING CIRCUMSTANCES SOUGHT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 14, 16, AND 17 OF THE GEORGIA CONSTITUTION

ERROR XXVII

THE TRIAL COURT ERRONEOUSLY REFUSED TO DIRECT A VERDICT FOR APPELLANT ON THE STATUTORY AGGRAVATING CIRCUMSTANCE OF ARMED ROBBERY FOR PECUNIARY GAIN.

ERROR XXVIII

THE TRIAL COURT ERRONEOUSLY REFUSED TO DIRECT A VERDICT FOR APPELLANT ON THE STATUTORY AGGRAVATING CIRCUMSTANCE OF AGGRAVATED BATTERY

ERROR XXIX

THE TRIAL COURT ERRONEOUSLY REFUSED TO INSTRUCT THE JURY WITH A CORRECT STATEMENT OF THE LAW REGARDING AGGRAVATED BATTERY.

At the close of evidence, Appellant moved for a directed verdict on the aggravating circumstance of armed robbery for pecuniary gain. (T. 1719) The trial court denied the motion at (T. 1723).

The trial court erroneously admitted David Crowe's statements, obtained in violation of his Fourth and Fifth Amendment rights, into evidence at his sentencing trial. (9/7,8/88 PT at 128, 129, 131, 134, 135, 136, 140, 146, 147, 149, 150, 151). These statements were the subject of his motion to suppress (motion number 1).

In addition, Appellant contends that the evidence seized at his home on the day of his arrest was fruit of the poisonous tree, and therefore, should also have been excluded from

evidence. (9/7,8/88 PT at 126, 146). These issues have been addressed in more detail in another section of this brief.

Assuming this Court agrees that the trial court erroneously admitted David Crowe's first two statements into evidence, the only statement left to be addressed is the "third" statement, (T. 1353), the one taken after David Crowe had been incarcerated in Douglas County Jail for over 13 months.

This third statement contains no reference as to when David decided to take the money and why he took the money from the store after killing the victim. Rather, the statement is devoid of any reference on this subject. If there is nothing to inculpate David Crowe in armed robbery in his third statement, and the first two statements, having been secured illegally, are suppressed by this Court, then the state has not and will never meet its burden of proof regarding the armed robbery for pecuniary gain because they cannot establish when David Crowe formed the intent.

In Young v. Zant, 506 F. Supp 274 (11th Cir. 1980), the defendant went to the home of the victim, a bank executive, to discuss delinquent loan payment notices. After an argument between them, the defendant struck the victim, fatally shot him, then removed his wallet. Later, with an accomplice, the defendant went to the victim's place of employment and gave a teller the victim's wallet and a note threatening to kill him, even though he was already dead, unless the teller gave the accomplice some sixty thousand dollars. The Court held the proof

was insufficient to establish the statutory aggravating circumstance for capital punishment purposes and sentencing beyond a reasonable doubt, that the murder was committed in the course of an armed robbery.

The court in Young v. Zant, supra, reasoned that the defendant had not formed an intent to take the money until after the murder had been committed, and thus it did not prove the aggravating circumstance of armed robbery and murder for pecuniary gain.

In Parker v. Florida, 458 So.2d 750 (1984), cert. denied, 470 U.S. 1088, the Florida Supreme Court was faced with the same problem. Despite the defendant's own admission that after murdering a 17 year old girl, he then took a necklace and ring from her body, that Court held improper the trial judge's finding as an aggravating circumstance that the murder was committed during the robbery. The rationale for this ruling was that the property was taken just as an afterthought, and was not a motive for the murder.

There is no credible evidence before this Court in the instant matter that could construe Appellant's intent as one of armed robbery for purposes of obtaining money or something of value, to wit: pecuniary gain. The only testimony before the trial court remotely suggesting such a motive concerned Appellant's financial condition weeks prior to the murder, (T. 827-828, 905-906), and is insufficient to serve as the sole basis for determining appellant's intent at the time of the murder. In

fact, (T. 1353), in David Crowe's third statement he said he had worked out his money problems by borrowing the money from his mother. (T. 1364)

Appellant's financial condition weeks prior to the murder is insufficient to prove that his intent at the time he entered the store was to commit armed robbery, burglary, or pecuniary gain. The intent to rob the Wickes Lumber Store was formed after the murder had occurred, and therefore, pursuant to Young v. Zant, supra, does not meet the criteria to establish that intent to rob or burglarize arose during the commission of the murder, and therefore, the aggravating circumstances of armed robbery, and burglary for purposes of pecuniary gain cannot stand.

To determine whether the state met its burden of proof beyond a reasonable doubt that David Crowe committed the armed robbery for purposes of obtaining money or for pecuniary gain, we must look at O.C.G.A. § 16-8-41, defining armed robbery as

> (a) A person commits the offense of, armed robbery when, with the intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or devise having the appearance of such weapon.

The evidence before this Court is that the victim was already dead when Appellant decided to make the murder appear to be an armed robbery. Therefore, the charge of armed robbery fails by definition. See Young v. Zant, supra.

The definition of burglary, O.C.G.A. § 16-7-1 states in pertinent part:

> (a) A person commits the offense of burglary when, without authority and with intent to commit a felony or theft therein, he enters or remains within ... any building...

According to the third statement made by Appellant, the victim asked, or invited Appellant to the store to show him the new displays and to talk to him. The only evidence at trial that controverted the invitation was taken from Appellant's first and second statements, obtained in violation of his Fourth and Fifth Amendment rights, and are therefore illegal and inadmissible, thereby eliminating the element of the crime defined as "without authority."

Moreover, the testimony regarding the element of the crime as defined "and with the intent to commit a felony or theft therein..." fails, as the evidence before the jury on the issue of intent to commit a felony or theft therein was likewise taken from the Appellant's first statement (T. 1272) and his second statement, (T. 1344), again, those secured by illegal means. The state has no additional evidence of intent to commit a felony or theft to prove beyond a reasonable doubt that the intent was formulated prior to David Crowe's entry into the store or that the entry to the store was unauthorized. Therefore, the state argument fails.

Because there is no proof that Appellant had any intent to rob or burglarize either the victim or Wickes Lumber Company prior to committing the murder, it is purely speculative as to the charges of armed robbery for pecuniary gain and burglary for pecuniary gain against David Crowe. With no evidence of intent

to commit the armed robbery or the burglary for purposes of pecuniary gain, the state has not met its burden of proof, as required, and therefore the trial court erred in denying Appellant's motion for directed verdict on that charge.

The trial court erred in denying Appellant's motion for a directed verdict that aggravated battery not be included as an aggravating circumstance. (T. 263, 1716). By definition, evidence presented to prove that a murder occurred will also prove an aggravating battery to that victim, in that the act that deprives the victim of life necessarily

> causes bodily harm to [the victim] by depriving him of a member of his body [and] by rendering a member of his body useless.

O.C.G.A. § 16-5-24.

The testimony of Dr. Dawson (T. 1121, 1157, 1159, 1160, 1169-1170), Kelly Fite (T. 988, 990) and Sheriff Lee (T. 1407, 1410, 1442), as experts in their respective fields of investigating homicides, murders, etc., all stated the victim was dead prior to any battery being committed upon him by Appellant.

As required in Davis v. State, 255 Ga. 588, 340 S.E. 2d 862,

> insofar as aggravating battery...[is] concerned, only facts occurring prior to death may be considered...i.e., only facts showing aggravated battery...which are separate from the act causing instantaneous death, will support a finding of "aggravated battery."

Id. at 868.

In Blake v. State, 239 Ga. 292, 236 S.E. 2d 637 (1977), the Court reasoned that torture must be construed in pari materia

with aggravated battery so as to require evidence of serious physical abuse of the victim before death. The state in this case, did not prove any evidence of torture of the victim prior to his death, nor did it prove any aggravated battery on the victim prior to death, so as to satisfy the requirements of Davis, supra, in relation to the United States Supreme Court's ruling in Furman. Therefore, the trial court should have excluded aggravated battery as a (b)(2) aggravating circumstance.

Pursuant to Godfrey v. Georgia, 446 U.S. 420, the Court found Godfrey did not torture or commit an aggravated battery on his victims, nor did he cause them to suffer any physical injury preceding their deaths. Therefore, it held Godfrey's "crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." Id., at 433.

Appellant contends Godfrey, supra, is equally applicable to the facts now before this Court.

The prosecution argues that in Appellant's third statement (the video tape), he admits the victim got up and was on one knee when Appellant hit him with the crowbar. However, the evidence from the trial refuted Appellant's statement, and that statement was taken over one year after the incident. The testimony of these experts, overwhelmingly stated the victim was dead, or at the moment of death when inflicted with what the State contends is aggravated battery.

The State cannot have it both ways. It cannot come into

court with evidence saying the victim was dead at the time the alleged aggravated battery took place, while alleging an aggravated battery upon the victim while alive. The evidence does not support the charge of aggravated battery.

Our courts have consistently held that where there is no conflict in the evidence and a verdict of acquittal [on that charge] is demanded, as a matter of law it is error for the trial court to refuse to direct a verdict. See Bryan v. State, 148 Ga. App. 428, 251 S.E.2d 338 (1978), United States v. Mulherin, 529 F. Supp. 9916, aff'd, 710 F. 2d 731, cert. denied, Hornsby v. United States, 104 S. Ct. 1305 (1981).

The standard for determining whether a motion for a directed verdict was erroneously denied is "any evidence", i.e, whether there exists any evidence to sustain the ruling of the trial court. Collins v. State, 164 Ga. App. 482, 297 S.E. 2d 503 (1982), Bryan v. State, supra.

O.C.G.A. § 17-9-1 states in pertinent part:

> (a) Where there is no conflict in the evidence and the evidence introduced with all reasonable deductions and inferences therefrom shall demand a verdict of acquittal or not guilty, as to ... some particular count or offense, the court may direct the verdict of acquittal to which the defendant is entitled under the evidence and may allow the trial to proceed only as to the counts or offenses remaining, if any.

The trial court erred in denying Appellant's motion for a directed verdict on aggravated battery, because the testimony and evidence provided by the State showed the victim to be dead prior to the infliction of the other wounds to the body.

Appellant submitted a correct statement of law regarding aggravated battery to the trial court as a charge request [R-360, pg. 6). Appellant's tendered instruction on aggravated battery included the clause "that is to say, intentionally and without justification or serious provocation," beginning after "maliciously" in the first sentence of the instruction ultimately given by the trial court, that was as follows:

> An aggravated battery occurs when a person maliciously causes bodily harm to another by depriving him of a member of his body, by rendering a member of his body useless, or seriously disfiguring his body or a member thereof. In order to find that the offense of murder involved an aggravated battery, you must find that the bodily harm of the victim occurred before death

(T. 1880). At the charge conference (T. 1767), Appellant cited Davis v. Kemp, 752 F.2d 1515, 1521 (11th Cir. 1985)(en banc), to the trial court and requested the court to give the corrected charge on aggravated battery. (R-360, pg. 6).

When the additional clause was being discussed, the district attorney objected to Appellant's request to charge (T. 1768). Appellant responded that it was a correct statement of the law, and cited the authority for the language. The prosecutor again objected to the Appellant's request (T. 1769; 1888).

This court eventually found this exact instruction on aggravated battery to be erroneous and denied Appellant's request to charge. "[T]o give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder .... Gregg v.

Georgia, 428 U.S. at 201, -- would effectively grant it unbridled discretion to impose the death penalty." Godfrey v. Georgia, 446 U.S. 420, at 437.

It cannot be said as a matter of law that the jury would not have returned a different verdict with the proper instruction, the trial court erred in refusing to give the correct jury instruction on the aggravating circumstance of aggravated battery, that error is prejudicial to Appellant and requires a reversal of the death sentence.

Therefore, Appellant urges this Court to follow the precedent cited herein and reverse Appellant's death sentence.

CLAIM 12

ERROR XXX

THE TRIAL COURT ERRONEOUSLY REFUSED TO RECUSE THE ASSISTANT DISTRICT ATTORNEY FROM ANY FURTHER PROSECUTION OF APPELLANT ON BEHALF OF THE STATE OF GEORGIA IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 1, ¶¶ 1, 2, 11, 14, 16 AND 17 OF THE GEORGIA CONSTITUTION.

The Assistant District Attorney William H. McClain is currently writing a book that he intends to publish about former Douglas County Sheriff Earl Lee. It is Earl Lee's blatant trickery that served as the basis for Appellant's extraordinary motion for new trial. Mr. McClain and Earl Lee have an agreement "between friends" to share any money they make from the proceeds.

The book will be about cases Earl Lee has worked on, as well as criticism Earl Lee has received. And although Mr. McClain can "virtually guarantee" right now that Appellant's case will not be in the book, he cannot claim, in good faith, that he has no vested interest in the outcome. Nor can he "guarantee" that any public criticism of Earl Lee for his conduct in this case will not be a part of his book.

That financial interest is, however, only one aspect of his impartiality. Mr. McClain also, as it became obvious during the hearing on the extraordinary motion for new trial, assumed responsibility for the personal representation Earl Lee and Judge Robert James. In that respect, he serves many masters. Not only is he the prosecutor in this case, he also has his own self-interest in the publication of the book and his friendship with Earl Lee and Judge James.

A fair trial in a fair tribunal is a basic requirement of due process. Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). Due process is not a technical conception with a fixed context; it has never been and perhaps never can be precisely defined. Lassiter v. Department of Social Services, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). "Fundamental fairness," as a by product of due process, is a "term whose meaning can be as opaque as its importance is lofty." Id.

In Berger v. United States, 295 U.S. 78,88, 55 S.Ct. 629, 633, 79 L.Ed.2d 1314 (1935), the United States Supreme Court held that a prosecutor's duty is not only to use every legitimate means to bring about a just conviction but to refrain from improper methods calculated to produce a wrongful conviction.

Moreover, courts have held that position to be quasi-judicial; creating a duty that must be free from any appearance of bias or partiality. In Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967), for example, the United States Court of Appeals for the Fourth Circuit stated that the primary duty of a prosecuting attorney is essentially a quasi-judicial position, the prosecution of the guilty and the protection of the innocent and, in that endeavor, the prosecuting attorney could not serve two masters:

> We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment.

Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed.2d 791

(1935); see also Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967)(prosecutor's arbitrary use of nolle pros with leave held unconstitutional)."

The law in that regard is abundantly clear: a defendant's rights to due process and fundamental fairness are denied when he is prosecuted by a prosecutor who has a conflict of interest arising from either a financial or personal interest in the outcome of his case. The applicable standard, set out in Hughes v. Bowers, 711 F.Supp. 1574 (N.D. Ga. 1989), aff'd, 896 F.2d 558 11th Cir. 1990), requires that the petitioner, in order to demonstrate a denial of due process, show that:

> the district attorney failed to retain control and management over the case, or must show evidence of specific misbehavior on the part of the prosecutor which prejudiced defendant. Other factors to consider are whether the prosecutor is simultaneously involved in civil litigation that creates a conflict of interest with his duties as prosecutor and an appearance of impropriety, whether the prosecutor has a pecuniary interest in the outcome of the case and has misused his position as prosecutor to benefit in the civil action, and whether the prosecutor is privy to information important to the criminal action gained through representation in the civil action.

(emphasis supplied).[48]

Our own Georgia Supreme Court noted its approval of this decision in Frazier v. State, 257 Ga. 690, 694, 362 S.E.2d 351 (1987), cert. denied, 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988).

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[48] Again, the book will include reference to cases Earl Lee has worked on and criticism he has received.

Indeed most courts reason that because public trust in the scrupulous administration of justice and the integrity of the judicial process are paramount, any serious doubt as to whether or not the prosecuting attorney should be disqualified will be resolved in favor of disqualification. Amemiya v. Sapienza, 629 P.2d 1126. (Hawaii 1981), quoting Hull v. Celanese Corporation, 375 F.Supp. 922, aff'd, 513 F.2d 568 (2d Cir. 1975).

In Davenport v. State, 157 Ga. App. 704, 278 S.E.2d 440 (1981), cert. denied, for example, the Georgia Court of Appeals stated that even the appearance of impropriety will render a trial fundamentally unfair, noting that no cases reviewed by the Court required a showing of "an actual conflict of interest" only an appearance of impropriety as in a pecuniary interest in the outcome of the case.

It is the duty of a prosecutor not only to convict but to seek justice. See ABA Standards For Criminal Justice, 2d Ed. (1982) §3-1.1 (b)(c); Code of Professional Responsibility, EC 7-3; See also Berger, Supra. He has a responsibility to guard the rights of the accused as well as those of society at large. ABA Standards, § 3-5.8 (c),(d). This is so because, "society wins not only when the guilty are convicted but when criminal trials are fair; our system suffers when any accused are treated unfairly." Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Before a federal constitutional error can be rendered harmless, the court must be able to declare that it was harmless

beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 711 (1967); Davenport at 704.

The fact that Mr. McClain has a personal and financial interest in the outcome of Appellant's case, apart from his prosecution of the case, makes it impossible for him to fairly seek the truth in this case. His participation denied Appellant fundamental fairness and due process of law in that the prosecutor refused to investigate the allegations of misconduct or allow a record to be made regarding the misconduct of the sheriff and the judge, instead of taking affront at the allegations.

The fact that the trial court failed to disqualify this assistant district attorney from the prosecution at an evidentiary hearing pursuant to Unified Appeal Procedure Rule (4)(b)(1), absolutely obstructed the fair presentation of evidence and administration of justice at that evidentiary hearing involving allegations of misconduct.

David Crowe respectfully requests this Court to find that the trial court in Douglas County and the Douglas County District Attorney's Office impeded the presentation of evidence by failing to remove the interested assistant district attorney from the prosecution on behalf of the State and the guilty pleas and sentence of death should be set aside to the extent they were secured by trickery and dishonesty.

CONCLUSION

The various errors in this case during the pretrial stage, jury selection and the penalty phase, deprived Samuel David Crowe of a fair trial and reliable sentencing determination in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Section I, Paragraphs 1, 2, 11, 12, 13, 14, 16 and 17 of the Georgia Constitution, and Georgia Statutory law. Because of the individual and cumulative effect of the errors, and applying the heightened protections required in a death penalty case,[49] this Court should set aside Samuel David Crowe's guilty pleas and sentence of death and grant him a new trial.

This 14th day of November, 1994.

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[49] See Johnson v. Mississippi, 486 U.S. 578, 584, 100 L.Ed.2d 575, 584 (1988); Morrison v. State, 258 Ga. 683, 373 S.E.2d 506, 509 (1988).

DAVIS v. ZANT

Appendix A

PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-9245

D. C. Docket No. 91-19-COL

JOHN MICHAEL DAVIS,

Petitioner-Appellant,

versus

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(October 21, 1994)

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

ANDERSON, Circuit Judge:

John Michael Davis appeals the denial of his federal petition for habeas corpus pursuant to 28 U.S.C. § 2254. Davis was convicted by a jury of first degree murder and armed robbery in connection with the death by strangulation of Susan Marlene Isham; he pled guilty to theft arising from the same incident. He was sentenced to death for the murder, twenty years for the armed robbery and ten years for theft. Davis's trial was conducted in June 1985. However, Patricia Underwood, Davis's codefendant, has consistently maintained, since at least November 1984, that she committed the murder. Because we find that prosecutorial misconduct at trial violated Constitutional guarantees of due process, we reverse the decision of the district court and order that the writ be granted.

I. FACTS AND PROCEEDINGS BELOW

A jury convicted Davis of murder and armed robbery on June 8, 1985. He was sentenced to death that same day. Davis appealed, and the Georgia Supreme Court affirmed the conviction and sentence. Davis v. State, 255 Ga. 598, 340 Se.2d 869 (Ga. 1986), cert.

denied, 490 US. 111 (1986). Davis petitioned for postconviction relief in the Superior Court for Butts County, Georgia, in December 1986. Evidentiary hearings were conducted on October 21, 1988, and November 21, 1988. The petition was subsequently denied. Davis filed a certificate of probable cause to appeal, which was denied by the Georgia Supreme Court on February 21, 1990. The U.S. Supreme Court denied certiorari. Davis v. Kemp, ___ U.S. ___, 111 S. Ct. 217 (1990).

Davis then filed a petition for habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Middle District of Georgia. Davis also moved for the right to conduct discovery, for funds for depositions and expert assistance, for an evidentiary hearing, and to expand the record. The district court denied Davis's motions and eighteen months after the petition was filed, the district court denied the habeas petition in a one paragraph order. The court held that all of Davis's claims were unexhausted, procedurally defaulted, or meritless. There were no findings of fact or conclusions of law. This appeal followed.

First we detail the relevant facts. The record before us contains the evidence presented at trial, and in addition evidence presented in

the state habeas proceedings. Davis confessed to the murder twice immediately after he and Underwood were arrested. His confession was admitted at trial through the testimony of a police officer that witnessed the confession. Gary Lofton and Wayne Kite were key prosecution witnesses who had interaction with Davis and Underwood immediately before the crime. Lofton testified at trial for the prosecution. He was a friend of the victim, a member of a musical band that played at the bar where the victim met Davis and Underwood, and was bartending at that bar the day Isham was murdered. Wayne Kite was working the front desk of the Nora Faye Motel when Isham was murdered there.

Prior to Davis's trial, Underwood made a detailed tape recorded confession in the presence of Davis and his attorneys.[1] Underwood also told her attorney, Richard Mobley, that she alone had murdered Isham, that she wished to dismiss him from her case, and that she

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[1] The tape recording itself is not contained in the record on appeal, although a transcript of the tape, and Underwood's affidavit reiterating the contents of the tape, are contained in the record before us. The tape recording, the transcript, and the affidavit were first submitted to the state court during the postconviction proceedings.

wanted to speak to Davis's attorneys.[2] All extrinsic evidence of Underwood's confession was excluded from the trial, however, and she refused to testify at trial by invoking the Fifth Amendment. Five days after Davis's conviction Underwood pled guilty to the murder and received a life sentence plus twenty years. Davis testified at trial that he had confessed to the murder in order to protect Underwood and that Underwood had actually committed the murder.

The facts up to the day of the murder are essentially undisputed. In December of 1983, Davis and Patricia Underwood, a woman whom he had dated for one month, stole an automobile in Philadelphia. They discovered large quantities of methamphetamine (or "speed") in the car, along with paraphernalia familiar to Davis, used in manufacturing speed. Davis and Underwood determined that they had stolen the car of a drug dealer. Fearing reprisal, they stole the methamphetamine and the drug dealer's identification pieces, abandoned the car, stole another automobile, and drove to Georgia. Davis and Underwood traveled in the stolen vehicle to Ellijay,

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[2] The state argues that Davis's attorneys met with Underwood without obtaining Mobley's consent. However, as set out above, Underwood had already confessed to Mobley and expressed her desire to dismiss him. More significantly, the record indicates that Davis's attorney obtained permission from Judge Land to visit Underwood and interview her.

Georgia, where Underwood's parents lived. After a short stay in Ellijay the couple drove on to Columbus, where they rented a room at the Nora Faye Motel on December 30, 1983. During their travels, Davis and Underwood consumed much of the methamphetamine in a week-long binge.

Davis encountered members of a musical band, including Gary Lofton, who were playing at a bar called the Peachtree Pub located across the street from the Nora Faye motel. The band members invited Davis and Underwood to come to the bar that evening. Davis and Underwood went to the Peachtree Pub for the evening and drank heavily. Underwood left the bar alone, before Davis. At some point Davis left the Pub and wrecked the automobile which he and Underwood had been using.

The next day was December 31, 1983, and the parties' versions of events begin to diverge. It is undisputed that the next afternoon Davis returned to the Peachtree Pub where he met the victim, Susan Marlene Isham, at the bar. Later, Underwood came to the bar to join Davis. The undisputed facts reveal that Davis and Isham conversed at some length and that Isham accompanied Davis to the Nora Faye Motel in a Mercury Marquis belonging to Isham's father. Apparently,

Isham decided to purchase some of the remaining drugs from Davis. The evidence shows that Underwood came to the Peachtree Pub that same afternoon after Davis had arrived and left before Davis. The facts also indicate that Underwood spent little time at the Peachtree Pub with Davis.

There is some dispute over the interaction between Davis and Underwood at the Peachtree Pub. According to Davis and Underwood, Underwood became upset at the interaction between Isham and Davis. Underwood and Davis argued, and Underwood left the bar alone. Underwood claims that she was angry and returned to the motel room and began drinking. Lofton testified at trial that he witnessed no confrontation between Underwood and Davis, and that Underwood spent most of her time at the bar separated from Isham and Davis.

Underwood's confession states that Davis returned to the motel with Isham and let himself into the room using a spare key that he had obtained from the front desk. Wayne Kite testified, however, that he witnessed Davis, Isham and Underwood conversing in the doorway of their motel room moments after Davis and Isham drove up to the motel in the Mercury Marquis. Kite testified that Davis

came to pick up the spare key a few minutes later, after he had gained entry into the room.

Davis and Underwood maintain that Isham accompanied Davis to the motel in her car in order to purchase drugs before leaving to visit a friend in Atlanta. The state does not dispute the purpose of Isham's visit. According to Davis and Underwood, Underwood and Isham began arguing as soon as Isham entered the room. Underwood states that she was jealous and angry over the attention Davis had given to Isham. Davis testified that he calmed Underwood down in order to consummate the drug transaction. Isham allegedly purchased marijuana and some powdered vitamins that Davis and Underwood had falsely represented was "speed." After taking the money from Isham, Davis then left the room to pay for more lodging at the motel.[3] It is undisputed that Davis spent at least five minutes

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[3] Davis states that he paid for two more nights at the motel when he went into the office. Wayne Kite testified that Davis paid for one night at that time; motel records were inconclusive. Wayne Kite testified that Underwood had come into the motel office earlier that day and moved the couple from room seven of the motel to room one. Wayne Kite testified that Underwood paid his father, who was operating the front desk at that time, for a night's stay at this time. Wayne Kite testified that Davis came in later and paid for an additional night. Kite's father, Harold Kite, who also testified at trial for the prosecution, disputed his son's testimony that Underwood had paid for the first additional night during her visit. Harold Kite was not present later in the afternoon when Davis visited the front desk.

in the office talking with Wayne Kite while he paid for the room. According to Underwood, she and Isham argued again after Davis left. Underwood states that she was furious at Isham for the attention she had elicited from Davis. Underwood states that Isham was watching television while she went into the bathroom, that she ripped the cord from her electric curling iron, crept up behind Isham and wrapped the cord around her neck and began choking her. The two fell to the floor. Underwood and Davis stated that Isham urinated on Underwood's boots as she died.

Moments later, according to the testimony of Davis and Underwood, Davis returned to find Underwood engaged in strangling Isham. Davis testified that he pushed Underwood off of Isham, checked Isham's pulse and discovered that she had no pulse. Davis assisted Underwood in dragging Isham's body into the bathroom. Underwood left her own soiled boots in the motel room and took Isham's. Underwood stated that no other items were taken from Isham, although Davis admitted at trial that he removed some items from Isham's body before they left. The two fled the Nora Faye Motel in the Mercury Marquis that Isham had been driving. They claim that Davis decided to claim responsibility for the crime so that Underwood

could avoid the death penalty.

According to the prosecution, Davis strangled the victim after she entered the motel room, while Underwood stood by. Their version of the events in the motel room is based on Davis's post-arrest confessions. According to those confessions, Davis impulsively ripped the electric cord from the curling iron and strangled Isham in the midst of the drug transaction. The prosecution argued that Davis had picked up the key and paid for another night at the motel in an effort to prevent entry into the motel room in order to delay discovery of the body. The prosecution argued that based on the testimony of Lofton and Wayne Kite, there was no evidence to support the notion that a feud between Underwood and Isham preceded the murder, thus attempting to undercut the motive Davis presented for Underwood's alleged murder. Furthermore, the prosecution highlighted Davis's greater size and strength, as compared to Underwood, and his long criminal record to support the conclusion that Davis had strangled Isham.

Admitted at trial and part of the record is a photograph of the scene of the crime which shows the boots Underwood allegedly left in the motel room after the victim urinated upon them. There is no

evidence that disputes that these boots belonged to Underwood. Apparently, no tests were undertaken to verify or discount the urination allegation. At oral argument the parties had no knowledge of what became of the boots; they were not admitted at trial.

Davis and Underwood returned North after stealing the Mercury Marquis. On January 11, 1984, Davis and Underwood were arrested in New Jersey. Davis confessed to local police that he had committed the murder. After being returned to Georgia, Davis confessed again to police that he had committed the murder.

Both Underwood and Davis were indicted for first degree murder, armed robbery and theft. The prosecution entered into plea negotiations with the defendants, and offered both a life sentence in exchange for a plea. Later, however, the prosecution decided to seek the death penalty against Davis. In late 1984, Underwood began to send postcards to Davis's attorney, Richard Hagler, stating that she wished to dismiss her court-appointed attorney, Richard Mobley, and that she wished to speak to Hagler about the case. Hagler attempted to contact Mobley regarding Underwood's request, and was unsuccessful. However, defense counsel did confirm with Judge Land that Underwood had written to Judge Land to discharge Mobley,

and did obtain Judge Land's approval of the interview with Underwood.

On November 1, 1984, Hagler, his assistant Hyles, and Davis spoke to Underwood at the jail. Underwood's attorney was not present at this meeting. During this meeting, Hagler made an audiotape of the interview. Underwood stated that she had murdered Isham and that Davis had confessed to the crimes in order to prevent Underwood from bearing the brunt of the prosecution.

After making this tape recording Davis's lawyers sought to compel the state to reinstate it's prior plea offer to Davis. A hearing was held December 17, 1984 on this issue. Underwood was called to testify at this hearing. The prosecutor had learned that Underwood had spoken to Hagler and knew the substance of their conversations. He attempted to question her regarding her attempts to assist Davis and informed the trial judge, Hon. E. Mullins Whisnant, that Underwood intended to testify that she had committed the murder. The court denied the motion to compel reinstatement of the plea offer, and the case proceeded to trial.

II. DISCUSSION

Davis raises numerous claims in this appeal. First, he argues that errors in the district court's handling of the habeas petition preclude affirmance without an evidentiary hearing and factual and legal conclusions. Given our decision this claim is moot. Some of the other claims are meritless, including (1) the claim that Davis was denied constitutional rights because of the prosecution's failure to produce allegedly exculpatory fingerprint evidence, (2) the claim that the failure to guide the jury at sentencing violated Davis's constitutional rights, and (3) the claim that trial court errors rendered the proceedings fundamentally unfair. Davis raises other claims that we will not discuss, but about which we express no opinion. These are (1) Davis's claim that he was unconstitutionally denied funds for a mental health expert at trial and sentencing, (2) his claim of witness intimidation (coercing Underwood to remain silent or face the death penalty),[4] and (3) Davis's claims of ineffective assistance of counsel. This opinion will discuss only two of the issues, (1) the exclusion of the codefendant confession, and (2) prosecutorial misconduct. For the reasons indicated below, and because our disposition of the

[4] We also will not discuss, and express no opinion on, the instances of prosecutorial misconduct which Davis alleges but which we do not discuss or rely upon in this opinion.

prosecutorial misconduct claim makes it unnecessary, we decline to resolve the merits of the codefendant confession claim.

A. Exclusion of the Codefendant Confession

On May 31, 1985, a few days before Davis's trial was to begin, the prosecution made a motion in limine to exclude all evidence pertaining to out of court statements made by Underwood regarding the murder.[5] The trial court made the following statement regarding evidence of Underwood's confession to Hagler, "I dont believe that would be admissible unless you planned or unless you were to assure the Court that you planned to call her." Hagler did not divulge

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[5] This motion stated in relevant part:

> Now comes the state of Georgia before trial in the above referenced case and moves the Court in limine for an order instructing the defendant to refrain absolutely from making any direct or indirect reference whatsoever in person, by counsel or through witnesses, to the evidence or testimony hereinafter described and shows the following:
>
> 3. The State furthermore shows this Court it has been made aware that Counsel for the defendant have talked to defendant Davis's co-defendant, Patricia Underwood, without the knowledge or consent of her court appointed lawyer, Mr. Richard Mobley. The State has learned that evidence of the conversation will be attempted to be placed in evidence by the defendant. The State shows this honorable Court that this is hearsay and improper evidence from a person out of Court and therefore should be excluded.

the defense's strategy at that time regarding Underwood. At trial, however, the defense called Underwood to testify, but she refused to testify by invoking the Fifth Amendment right against self-incrimination.

Davis took the stand himself, and in response to questioning regarding the retraction of his confession, Davis stated that one reason he had abandoned the effort to portray himself as the murderer was because Underwood had already confessed herself. The prosecutor objected and the court sustained the objection.

Davis argues that the exclusion of all evidence related to the codefendant's confession violated Davis's constitutional right to due process. He relies heavily on three cases, Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150 (1979); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973); Wilkerson v. Turner, 693 F.2d 121 (11th . Cir. 1982). The constitutional analysis focuses upon two criteria: whether the excluded testimony was highly relevant to a critical issue, and whether the excluded testimony exhibited adequate indicia of reliability.

The Supreme Court of Georgia rejected Davis's argument, concluding that Underwood's confession was not sufficiently reliable.

Davis v. State, 340 S.E.2d at 877. The state spends little time arguing the merits of the exclusion; but rather argues that the issue is procedurally defaulted. Contrary to the state's argument, it is clear that the exclusion of the confession is not procedurally barred. The issue was raised before and during the trial and throughout the post-conviction proceedings. Moreover, the Supreme Court of Georgia addressed the merits of the federal claim, finding that the confession did not satisfy Green. Id. However, the state also argues that some of the evidence relied upon by Davis to buttress the reliability of Underwood's confession was not presented until the state post-conviction proceedings, and that it is not appropriate for a federal habeas court to consider same. See Keeney v. Tamayo-Reyes, ___ U.S. ___, 112 S.Ct. 1715, 1718 (1992).

In light of our disposition of this case on another ground, we decline to address the merits of this difficult issue. The issue necessarily involves the complicated question in this case of the precise scope of the evidence which appropriately should be considered by a federal habeas court in evaluating the reliability of Underwood's confession. That in turn would involve a series of equally difficult subissues, including whether each distinct piece of

evidence was in fact subject to a procedural default, and if so, whether Davis could establish cause and prejudice or a miscarriage of justice to overcome the bar.[6] The determination of some of those subissues might also require further evidentiary development.

B. The Prosecutorial Misconduct Claim

Davis contends that many specific instances of prosecutorial misconduct during the guilt phase of his trial rendered the trial Constitutionally unfair; he also argues that the misconduct taken as a whole rendered the trial unconstitutional. Several of the alleged instances of misconduct involve Underwood's confession and the

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[6] It is clear that the fact of Underwood's confession was presented to the trial court, based on a December 17, 1984 pretrial hearing, the state's motion in limine to exclude the confession, and the trial itself. It is also clear that evidence was presented to the trial court indicating that Underwood's confession was voluntary; evidence was submitted that Underwood had initiated the interview with Hagler by writing several postcards. It is less clear whether evidence that Underwood had also confessed to her own attorney, Mobley, was presented to the trial court, although there is at least an inference to this effect in the transcript of the Dec. 17, 1984, hearing. It is clear that neither the tape recording itself, nor a transcript thereof, were presented to the trial court. However, that evidence, along with the affidavit of Underwood and the affidavit of Mobley, was presented in the state post-conviction proceedings. Moreover, it is at least arguable that the state court's post-conviction order makes an implicit factfinding that it would have been futile for defense counsel to have proffered a tape recording itself or a transcript thereof.

heart of the defense's case — that Underwood and not Davis actually killed Isham by strangulation. We conclude that these instances of misconduct, taken together, rendered Davis's trial unconstitutionally unfair.[7]

1. Procedural Bar

The record before us does not reflect a contemporaneous objection by Davis's counsel to any of the specific instances of prosecutorial misconduct mentioned below. Under Georgia law, failure to object at trial to prosecutorial misconduct has long constituted a waiver, or procedural default, of such claims later in the litigation. See e.g. Earnest v. State, 262 Ga. 494, 422 S.E.2d 188 (1992), Aycock v. State, 188 Ga. 551, 4 S.E.2d 221 (1939). It is not clear whether the Georgia Supreme Court ruled on the merits or invoked a procedural bar with respect to the instances of prosecutorial misconduct mentioned below. However, we need not

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[7] Although Davis alleges a litany of instances of prosecutorial misconduct, our decision is based only on the particular ones discussed and relied upon in the text below. we express no opinion with respect to the other alleged instances. See n. 4, supra.

ascertain that because the state did not assert, either in the district court or in this appeal, a procedural bar against the specific instances of misconduct that inform our decision.[8]

In its answer to the petition in the district court, the state specifically denied that the prosecutor's actions rendered the trial fundamentally unfair, and then went on to invoke the procedural bar against specific paragraphs of Davis's petition pertaining to his misconduct claim. Thus, the state enumerated precisely the particular instances of alleged misconduct with respect to which the state is asserting a procedural bar. In addition, the state's briefs, both in the district court and in this court, do not assert the procedural bar against Davis's claims of prosecutorial misconduct, except in specific instances, none of which affect our holding. Therefore, the state has waived the procedural requirements for those claims with respect to which it did not assert a procedural default. See Harrison v. Jones, 880 F.2d 1279, 1282 (11th Cir. 1989); Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir.), cert. denied, 470 U.S.

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[8] Because no procedural bar was asserted, see text below, we assume that counsel for the state, who have a reputation for competence, professionalism and candor, determined either that there was a contemporaneous objection or that the Georgia Supreme Court ruled on the merits.

1059, 105 S. Ct. 1775 (1985).[9]

2. Standard of Review

This court set out the standard for constitutional claims of prosecutorial misconduct in closing argument in Brooks v. Kemp, 762 F.2d 1383, 1399-1403 (11th Cir. 1985)(en banc), vacated on other grounds, 478 U.S. 1016, 106 S.Ct. 3325 (1986), reinstated, 809 F.2d 700 (11th Cir.)(en banc), cert. denied, 483 U.S. 1010, 107 S. Ct. 3240 (1987). We relied on the Supreme Court case Donnelly v. DeChristoforo, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974), which held that a prosecutor's argument violates the Constitution if it renders the defendant's trial "so fundamentally unfair as to deny him due process." Improper argument by a prosecutor reaches this threshold of fundamental unfairness if it is "so egregious as to create a reasonable probability that the outcome was changed." Id. at 1403. A "reasonable probability" is a probability sufficient to

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[9] Despite the state's waiver of the procedural bar, the defendant's failure to object will still be a factor in our analysis of the fairness of the trial. Brooks v. Kemp, 762 F.2d 1383, 1397, n. 19 (11th Cir. 1985).

undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668, ___, 104 S.Ct. 2052, 2068 (1984). Thus, the defendant must show a reasonable probability that, but for the prosecutor's statements, the result of the proceeding would have been different. Brooks, 762 F.2d at 1401-02.[10] We review Davis's prosecutorial misconduct claim under the Brooks standard, including the misstatements that preceded closing argument.[11]

In a constitutional claim based on prosecutorial argument we generally do not analyze whether a particular comment or action is

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[10] On direct review of a federal conviction, we review improper prosecutorial statements for which there were no objections at trial under the "plain error" standard. See United States v. Young, 470 U.S. 14, 15, 105 S.Ct. 1038, 1046 (1985); Fed. R. Crim. P. 52(b). In Georgia , assertions of error raised for the first time on appeal are also reviewed under a "plain error" standard, which the Georgia Supreme Court has held to be identical to the federal standard. See Lynd v. State, 262 Ga. 58, 60, 414 Se.2d 5, 8 (Ga. 1992), cert. denied, __ U.S. __, 113 S.Ct. 420 (1992). These standards, however, apply only on direct appeal. Federal habeas corpus review of a state trial is a collateral review; the standard of review must be narrower. Thus, the two-part standard articulated above is narrower than the plain error standard. Any case which abridges the fundamental fairness standard will automatically be plain error.

[11] Although the Brooks case dealt exclusively with prosecutorial argument, we apply the Brooks standard to prosecutorial misconduct at other stages of trial. See Walker v. Davis, 840 F.2d 834, 838 (11th Cir. 1988)(alleged prosecutorial violation of advocate-witness rule); Johnson v. Wainwright, 806 F.2d 1479, 1486 (11th Cir.), cert. denied, 484 U.S. 872, 108 S.Ct. 205 (1987)(alleged misconduct in cross-examination). Thus, we examine improper comments made during the trial, as well as improper comments in closing argument, to determine whether they rendered the trial fundamentally unfair.

unconstitutional, unless the conduct violates an expressly enumerated right. See Donnelly v. DeChristoforo, 416 U.S. at 643, 94 S.Ct. at 1871; Brooks, 762 F.2d at 1400. Instead, we determine whether a remark or a series of remarks, in the context of that trial, rendered the entire trial unfair. Id. Therefore, the essence of such a claim is that the prosecutor's conduct as a whole violated the Fourteenth Amendment due process right to a fair trial. Different factors have been utilized by various courts in order to decide whether or not the cumulative errors at trial could be said to have, in reasonable probability, changed the result at trial including: 1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; 2) whether they are isolated or extensive; 3) whether they were deliberately or accidentally placed before the jury; and 4) the strength of the competent proof to establish the guilt of the accused. Id. at 1402, Walker v. Davis, 840 F.2d 834, 838 (11th Cir. 1988).

Although it is not the task of a habeas court to retry the defendant, the standard for reviewing prosecutorial misconduct requires a weighing of the nature and scope of the instances of misconduct against the evidence of guilt against the accused. See,

e.g. Brooks, 762 F.2d at 1401. Clearly, where the evidence against the accused is very strong, in order to merit relief, prosecutorial misconduct would have to be even more egregious and pervasive than in cases where the evidence is less compelling, e.g. where the defendant has a viable defense.

3. The Prosecutor's Remarks

a. Misrepresentation during Davis's Testimony

First we will discuss the remarks of the prosecutor regarding Davis's attempt to bring to light Underwood's confession, which was mentioned in the above discussion. Davis took the stand as the last witness in his trial. On direct examination, defense counsel Hagler asked Davis why he was recanting his confessions if he had earlier intended to protect Underwood. Davis responded, "Number one, Patty stepped forward and confessed to this crime about three months ago which they won't allow the confession." As soon as Davis made this statement, the prosecutor stated, "Objection to that, Your Honor. That's not evidence. That's not true and it's not

evidence." [emphasis added]. Thus, the prosecutor stated in front of the jury that it was not true that Underwood had confessed.

It is clear, however, from the pretrial proceedings that the prosecutor knew for a fact that Underwood had confessed to the crime. He stated as much himself at the December 1984 pretrial hearing.[12] The prosecutor also admitted at the state postconviction proceedings that he knew that Underwood had confessed to the crime. Furthermore, he testified at the state postconviction proceedings that he and his assistant had given much thought to the means by which the defense would attempt to introduce evidence of Underwood's confession.[13] Thus, although the prosecutor's hearsay objection was entirely appropriate, his statement was false

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[12] At the December 17, 1984 hearing, the prosecutor made the following statement to the court:

> Also, Your Honor, what they've done, we would submit that this is important because it would show that what we expect to prove or believe to prove happened is that down at the jail a change was made in the way in statements [sic] that the defendants had formerly given. We expect to show that this defendant is going to try to testify that she did the killing to try to get him off the hook and try to get a life sentence for him and a life sentence for herself.

[13] The prosecutor testified at the state habeas proceeding that "I remember at the trial, Mr. Pullen [co-prosecutor] and I was sitting back and wondering how they'd try to get it in ...." Transcript of State Postconviction Proceedings Held on November 21, 1988 at 115.

when, in addition to his objection, he said that Underwood had not confessed.

b. Misstatements in Closing Argument

Below we set out the portions of the prosecutor's closing argument that we find improper.

i. First Argument

First the prosecutor portrayed Davis's defense that Underwood killed Isham as a last minute fabrication. As noted above, this misrepresented the facts known by the prosecutor at least as early as December, 1984, approximately six months before the trial.[14]

> Now ladies and gentlemen, let's consider old Jack Davis, alias John Marks alias George Sambucca alias Thomas Foster right here. Has he got any reason to get up here and swear to you something that isn't true. Has he got any reason in the world? He's got more reason than anyone I'm presently acquainted with. This defendant if he gets

[14] In the quotations below, of course, all instances of emphasis have been added.

one of you or twelve of you to believe in this hogwash that he's got up on that witness stand and told for the first time in living memory to anybody he's got a chance of getting out of here. He's got a chance of riding down that elevator with you all and Mr. James Isham and going back to Philadelphia and being a street hustler again.

II. Second Argument

The prosecutor again brought up the theme that the defense was a last minute fabrication while reminding the jury of Davis's prior confessions:

> Detective Oscar Jones said that everything that was in that statement is exactly what the man said. Nothing in there about Patty did it or I'm trying to save Patty or I'm just doing this because I can get a deal down there in Georgia or any of that kind of hogwash. That is last minute stuff that they have come up with to try to save him from even a life sentence in this case because they're not asking you anything other than to turn him loose.

III. Third Argument

Next the prosecutor made his most disparaging and egregious comments with a rambling and highly improper commentary on the defense management of the trial. The

centerpiece of the argument was the misrepresentation that the case of the defense — i.e., that Underwood and not Davis had actually killed Isham — was "thought up" during trial, after the prosecution closed its case. The prosecutor said this, all the while knowing that Underwood had confessed to the crime months earlier.

> Now ladies and gentlemen, when you think about this defendant and you think about his defense and you think about what you've heard in this case wasn't it rather amazing to you that after I got up in my opening statement and I talked about him and I came over here and I purposely got in his face, I got in his face and I told you what we were going to prove about him that he had come sown here and done this and done that and taken Susan Marlene Isham over there and strangled the life out of her, his lawyer did not even get up and utter one peep in defense of those charges. No. They said they were going to reserve their opening statement. And I noticed some of you folks on the jury looked, you looked astounded by that. You looked, you said, I could see you thinking, you mean they're going to let him, he's going to let that short fat guy call his client that and not even say anything? ...
>
> When you're a defense lawyer and you've got a man that is guilty and you've got to get him off and you ain't got the truth on your side and you're doing the best you can sometimes the best policy is to wait and see what the State has and see if there are any weak spots in it. And then being a good lawyer you find a weak spot and you shoot a hole. You start aiming for that and maybe you can hustle the jury into believing something that ain't quite true but it might get him off which is the paramount thing here of course. So that is what Mr. Hagler did. <u>He didn't get up and tell you anything about Patty doing this, Patty doing that and about Gary Lofton lying</u>. He didn't ask Gary

Lofton any questions about what he said Gary Lofton did, like about weren't you going to deal dope from this man over here. Did we hear any questions like that? No. Why not? They hadn't thought them up yet. They hadn't decided where the weak spot was. ...

I submit to you that there was a good possibility of a mistaken identification issue being the defense in this case but when they heard the witnesses and they heard the testimony they decided that old Jack was just too distinctive and everybody could identify him over here so they were going to have to put him down here in Georgia. What is next? Well, we got him going to the room with some pretty good iron clad witnesses. The only thing left is we're going to have to make the girl do it and that's the one they use.

iv. Fourth and Fifth Arguments

Finally, the prosecutor offered two more comments reinforcing his theme that the idea that Underwood had perpetrated the crime was fabricated by the defense at the last minute. First Conger stated, "[h]e is guilty because everything he has said in this courtroom yesterday made him guilty except his statement given for the first time that Patty Underwood did it." Near the end of his closing Conger added one final comment, opining, "I don't think you're going to buy this first time defense yesterday that we heard."

4. Whether the Improper Remarks Denied Davis a Fair Trial

Brooks and its progeny indicate that a court should first determine whether the remarks were in fact improper, and only then turn to the issue of whether fundamental fairness was denied. In this case, however, the impropriety lies in the prosecutor's use of misstatements and falsehoods. Little time and no discussion is necessary to conclude that it is improper for a prosecutor to use misstatements and falsehoods.[15]

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[15] We have noted before that prosecutors have a special duty of integrity in their arguments. See Brooks, 762 F.2d at 1399-1400. It is a fundamental tenet of the law that attorney's may not make material misstatements of fact in summation. See, e.g., U.S. v. Teffera, 985 F.2d 1082, 1089 n.6 (D.C. Cir. 1993)(prosecutor's repeated references in closing argument to alleged eye contact between codefendants at time of arrest, not supported by evidence, clearly improper and would merit reversal despite any curative instructions, because "phantom evidence" was a key part of closing argument).

Moreover, Georgia law, although it gives wide latitude to prosecutors in their jury arguments, see, e.g., Brooks, 762 F.2d at 1399, recognizes the duty of the prosecutor is "alone to subserve public justice." Scott v. State, 53 Ga. App. 61, 185 S.E. 131 (1936), affirmed, 184 Ga. 164, 190 S.E. 582 (1937). Furthermore, Georgia statutory law proscribes the very conduct at issue in this case. Ga. Stat. § 15-19-4 states, in relevant part:

> It is the duty of attorneys at law:
>
> (1) To maintain the respect due to courts of justice and judicial officers;
>
> (2) To employ, for the purpose of maintaining the causes conceded to them, such means only as are consistent with truth and never seek to mislead the judges or juries by any artifice or

Thus, we turn without delay to the issue of whether the prosecutor's misstatements rendered the trial fundamentally unfair. Before applying the law to the facts, some further elaboration of the impropriety is appropriate. As noted, when the prosecutor objected to Davis's testimony that Underwood had in fact confessed, the prosecutor stated in front of the jury not only his proper hearsay objection, but also the misstatement that Davis's testimony was not true. Had this miscue stood alone, we would hardly have faulted the prosecutor, and surely would not find error of constitutional magnitude. Such a misstatement could understandably slip out in spontaneous response to Davis's improper insertion into the trial of the fact of Underwood's confession. However, the spontaneity and innocence of this first misstatement is cast in doubt by the prosecutor's closing argument which contained repeated and clearly intentional misrepresentations of a similar nature.

A major theme of the prosecutor's closing argument was that the defense had, as a last minute fabrication, invented the theory that Underwood actually committed the murder. On at least five separate

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false statement of the law.

occasions during closing, the prosecutor made such statements which were either patently false or misleading with respect to this central defense. These misstatements portrayed the core of the defense case as an afterthought fabricated during trial after the state closed its evidence. The statements were not only clearly false, but the record in this case establishes beyond doubt that the misrepresentations were intentional and known to the prosecutor to be false. The prosecutor knew at least as early as the December 1984 pretrial hearing that Underwood had confessed, and he told the trial judge at that time that this would be Davis's defense. Moreover, the prosecutor admitted at the state post-conviction hearings not only that he had known about Underwood's confession but also that he had been concerned as to how Davis and his attorneys would go about mounting this defense.

Thus, when the prosecutor spun out before the jury his extended argument that the crux of the defense case had been "thought up" at the last minute after the prosecution closed its evidence, the prosecutor was attempting to subject the jury to the influence of clearly false information, and information clearly known to the prosecutor at the time to have been false. The prosecutor

knew approximately six months before the trial that this was the likely defense. The other arguments, quoted above in full — all reinforcing the prosecutor's false theme that the crucial defense in the case was a "last minute," "first time in living memory," "first time defense" — were dispersed throughout the prosecutor's closing argument.

Thus, the prosecutor intentionally painted for the jury a distorted picture of the realities of this case in order to secure a conviction. Underwood's confession and the prospect that she actually committed the killing loomed over this trial. The prosecutor properly asserted a legal challenge to the admissibility of the confession, and was successful in excluding it. A prosecutor may argue his case with vigor. However, a prosecutor may not make intentional misrepresentations to the jury.[16]

We now undertake an evaluation of whether the foregoing improper remarks, considered in the context of the entire trial,

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[16] We note in passing that the prosecutor's misrepresentations took improper advantage of the exclusion of Underwood's confession and of the unavailability of Underwood's testimony by virtue of her invocation of the Fifth Amendment. Of course, the prosecution was entirely within its rights to challenge the admissibility of Underwood's confession. However, the prosecutor exceeded the bounds of propriety when it sought to convey to the jury inconsistent false information.

rendered the trial unfair. As noted earlier, in determining whether there is a reasonable probability that prosecutorial misconduct changed the result of the trial, relevant criteria include (1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish the guilt of the accused. Brooks, 762 F.2d at 1402; Walker, 840 F.2d at 838.

First, it is clear that the challenged remarks were extremely misleading to the jury and prejudicial to the accused. As noted above, this record leaves no doubt that the prosecutor's statements were in fact false and misleading to the jury. The prejudice to the accused is equally clear. Although of course the confession of Underwood was not in evidence, the defense that Underwood had actually killed Isham was squarely placed before the jury in the testimony of Davis. Thus, the prosecutor's misrepresentations were intended to induce the jury to discredit Davis's testimony that Underwood had in fact killed Isham by strangulation. The prejudicial effect in this case is enhanced because the prosecutor's

misrepresentations were designed to undermine the core of the defense.[17] The misrepresentations were calculated to undermine the credibility of Davis, and the whole defense hinged upon the jury's credibility determination, i.e., whether they believed Davis's eyewitness testimony, or whether they believed the contrary inferences arising from the state's circumstantial evidence.[18] Thus, we conclude that the prosecutor's statements were highly misleading and highly prejudicial.

Second, the extensive nature of the misconduct weighs in favor of Davis. During Davis's testimony, the prosecutor laid the groundwork for his assault on the defense and the defendant by making the false statement discussed above regarding the fact of Underwood's confession. Next, the prosecutor's closing argument hammered home to the jury the misrepresentation that the

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[17] In United States v. Harp, 536 F.2d 601, 603 (5th Cir.), cert. denied, 423 U.S. 934, 96 S.Ct. 289 (1975), the former Fifth Circuit held that a prosecutor's comment during closing argument regarding defendant's post-arrest silence would not be harmless error because it struck at the jugular of the defense. This illustrates that prosecutorial misconduct is least acceptable under the Constitution when aimed the core of the defense's case.

[18] The prosecutor's own closing argument acknowledged that the outcome of the case depended upon whether or not the jury believed Davis's testimony that Underwood had actually killed Isham.

Underwood-as-perpetrator defense was a last minute defense conceived and fabricated during the course of the trial. The false statements were not isolated comments; they were part and parcel of a concentrated use of misrepresentation clearly aimed at discrediting the core of the defense. The repetitive nature of the comments distinguishes the instant case from those such as Donnelly, where the "impropriety was but one moment in an extended trial and was followed by specific disapproving instructions." 416 U.S. at 643, 94 S.Ct. at 1972.

Third, we noted above that the prosecutor's misrepresentations were deliberately placed before the jury. In this particular case, the clearly intentional nature of the misrepresentations weighs heavily in favor of Davis; such a patently dishonest argument brings this case close to the more traditionally established forms of misconduct such as the proscription against a prosecutor's knowing use of false testimony, See e.g., Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972); Brown v. Wainwright, 785 F.2d 1457, 1464 (11th Cir. 1986), or the knowing use of false evidence, See, Brooks, 762 F.2d at 1402, n. 26 ("...[T]here may be cases where the prosecutor's intentional conduct rises to a level equivalent to a knowing use of false

evidence.")

Finally we review the strength of the proof against Davis. After a careful review of the trial record, it is clear that the evidence against Davis was not strong enough to overbalance the prosecutorial misconduct in this case. We conclude that there is a reasonable probability that the jury would have come to a different conclusion but for the aforementioned misconduct. The evidence at trial and in the record before us overwhelmingly shows that either Davis, Underwood or both committed this crime. However, the evidence is inconclusive as to what actually happened in the motel room and who actually killed Isham. The only direct evidence bearing on that is Davis's trial testimony that Underwood killed Isham while he was at the motel office, and Davis's two prior inconsistent statements to police post-arrest. The facts before the jury simply do not confirm or foreclose either version of the events.

The state relied heavily on Davis's confessions and an inference that Davis was the stronger of the two and thus was far more capable of strangling the victim. The state's expert, however, did not deny that Underwood could have committed the murder. Moreover, the state had no fingerprint evidence linking Davis to the curling iron or

the cord that was ripped from it and used to strangle the victim.

Furthermore, neither party knows the whereabouts of the boots that Underwood claims she left in the motel room after the victim urinated upon them during the struggle. A photograph introduced at trial clearly shows such a pair of boots in the motel room. The state admitted numerous pieces of clothing found in the vehicle stolen from the victim, but they did not admit these boots. The defense highlighted the boots, and their absence from the record, in its jury argument, as did the defendant in his testimony. Obviously, if the boots had been tested and had revealed the presence of Isham's urine, that would have been strong evidence corroborating Davis's testimony that Underwood had killed Isham by strangulation and that Isham urinated on Underwood's boots during the struggle.

The evidence at trial indicated that Davis was away from the room — i.e. in the motel office — long enough for Underwood to have committed the murder. Nothing in the record suggests that Underwood was incapable of the killing. Indeed, Underwood pled guilty to a murder charge herself. Thus, the defense had a viable case that Davis was not the actual perpetrator of this crime, despite the exclusion of Underwood's confession.

The uncertainty of the evidence in this case distinguishes it from several other cases where prosecutorial misconduct was found to exist but did not render the trial fundamentally unfair. For example, in Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2644, 2472 (1986), the Supreme Court found lamentable prosecutorial argument, but found that the misconduct did not render the trial fundamentally unfair. The court based its decision on several factors, including the fact that the weight of the evidence against the petitioner was so heavy that there was little likelihood that the prosecutor's argument influenced the jury's decision. Id. at 181, 2472.[19] In the instant case, the evidence at trial was much closer.

The defense counsel's closing argument failed to ameliorate the damage done to the defense by the prosecutor's misstatements. Defense counsel Hagler made a vigorous argument based on the evidence admitted at the trial. Nevertheless, it is very unlikely that this closing argument eliminated the taint placed on the defense by the prosecution's misrepresentations. Hagler was able to counter the

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[19] Neither does the misconduct in the instant case fall within the "invited response" doctrine on which the Darden court relied as another reason that the misconduct at issue did not render the trial unfair. 477 U.S. at 182, 106 S.Ct. . at 2472.

prosecutor's closing by relying on the evidence of the boots and pointing out inconsistencies in some of the state's evidence. He attempted to overcome the prosecutor's assault on his trial tactics by asserting that he had a right to reserve his argument. Nevertheless, aside from the boots, he was unsuccessful in countering the notion planted by the prosecutor that the defense was a last minute fabrication.

After a careful consideration of this record,[20] and in light of all the circumstances -- including inter alia the fact that the misconduct consisted of intentional misrepresentations which were both highly misleading to the jury and prejudicial to Davis, the fact that the

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[20] We noted above that counsel for Davis made no contemporaneous objection, but that the state in this case has waived any procedural bar. Nevertheless, failure to object is properly weighed in the overall evaluation of fundamental fairness. The failure to object can sometimes serve to clarify an ambiguous record as to whether a particular argument was in fact misleading or prejudicial. In this case, however, the statements above discussed were clearly false and were clearly highly prejudicial. Defense counsel's spontaneous reaction at this late stage of the case might have been not to call further attention to the false statements and hope to counter the argument in his own rebuttal. Hagler did make several attempts in his rebuttal to counter the prosecutor's misstatements; however, our examination of Hagler's rebuttal argument persuades us that he was utterly unsuccessful in countering the highly prejudicial misrepresentations by the prosecution. Under all the circumstances of this case, we conclude that the prosecutorial misconduct rendered the trial fundamentally unfair.

misrepresentations were calculated to undermine the crux of the defense, the fact that the misconduct was pervasive and the fact that there was a substantial conflict in the relevant evidence — we conclude that the prosecutorial misconduct in this case rendered the trial fundamentally unfair.

III. CONCLUSION

Accordingly, the judgment of the district court is reversed and the case is remanded with directions to grant the writ of habeas corpus.

REVERSED.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document on counsel for Respondent on this day by causing a copy of same to be deposited in the United States Mail, first class postage prepaid, addressed as follows:

Mr. David McDade, Esq.
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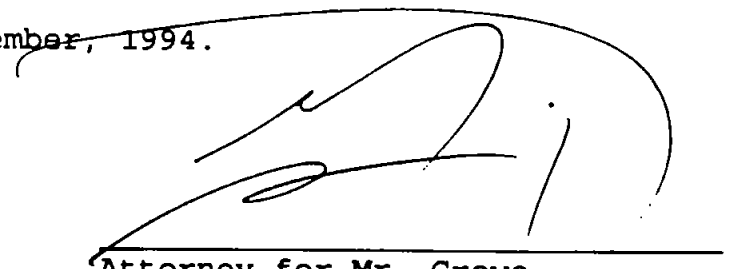
This the 14th day of November, 1994.



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