IN THE SUPREME COURT OF FLORIDA

BARRY GILBERT O'CONNELL,

Appellant,

v. CASE NO. 64,565

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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Appellant,	:	
v.	:	CASE NO. 64,565
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, BARRY GILBERT O'CONNELL, was the defendant in the trial court and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal will be referred to by use of the symbol "R". All emphasis is supplied unless the contrary is indicated.

II STATEMENT OF THE CASE AND FACTS

Barry O'Connell was charged by indictment returned February 8, 1983 with the first degree murder and armed robbery of Terrance Drysdale, which occurred on December 31, 1982 in Escambia County (R.1294). O'Connell was charged by indictment returned February 18, 1983 with the first degree murder and armed robbery of Betty Rector Cameron, which occurred on January 2, 1983 in Santa Rosa County (R. 1295). On defense motion, the cases were consolidated and tried in Escambia County (R.1577-79). The trial, before Circuit Judge Edward T. Barfield and a jury, took place on August 22-29, 1983. The jury returned verdicts in each case finding appellant guilty as charged of first degree murder (premeditated and felony murder) and robbery with a firearm (R.1171,1584-85).

The evidence against appellant was entirely circumstantial; the key item of evidence was the testimony of FDLE firearms examiner David Williams that in his opinion the bullets recovered from the body of each victim were fired from the same weapon, a Colt .357 Magnum revolver which was in appellant's possession at the time of his arrest on January 27, 1983 (R.727,890). [See R.588, at which the prosecutor stated to the trial court, during argument on the defense's motion in limine, that the gun was the state's main piece of evidence to link appellant circumstantially to the case]. The presentation of the state's case can be divided into three segments. First, the state presented evidence concerning the two convenience store robbery-murders; the discovery of the bodies (see R.607-17, 659-63,673-75), the police investigation at the scene of each crime (see R.610-45, 673-82,689-709), the autopsies conducted by the respective medical examiners (see R.650-58,767-72), and the determination by the FDLE firearms examiner that the bullets recovered from the two victims' bodies were fired by the same firearm, which was a Colt .357 Magnum revolver (R.727, see R.712-50,764-67). Since appellant apparently did not become a suspect in the robbery-murders until after his arrest on unrelated charges some 3-4 weeks later, appellant was not even mentioned during this portion of the trial (R.607-772). Next, the state sought to introduce evidence concerning collateral crimes and the circumstances of appellant's arrest on January 27, 1983. The state profferred that appellant had robbed and attempted to kidnap at gunpoint a Cadillac saleswoman named Carolyn Ward; Ms. Ward escaped and notified the authorities, and appellant drove off in the stolen Cadillac (R. 1101-04). There ensued a high speed car chase, during which speeds of over a hundred miles an hour were reached and appellant eluded a fleet of police cruisers over a considerable time and distance (R.786-819). Appellant would run off the side of the raod, and cross into the lane going against the traffic, causing cars to scatter in his wake (R.799-800). At one point he deliberately attempted to ram a police cruiser head-on, causing the cruiser to collide with another police

car (R.801,810-13). When appellant was finally apprehended, police seized his handgun (R.816), a short barrel .357 Magnum, blue steel with brown wood handles, containing six live rounds of Remington Peters .357 Magnum ammunition (R.828-29). The gun and bullets, along with additional bullets subsequently seized from appellant's motel room, were submitted to the FDLE laboratory in Tallahassee, whereupon tests were conducted by the aforementioned David Williams (R.886-87).

The trial court excluded testimony concerning the robbery and attempted kidnapping of Carolyn Ward and concerning the stolen Cadillac. However, over the defense's continuing objection, he permitted the state to introduce the testimony of six Escambia County sheriff's deputies with regard to their having received a BOLO for a white male in a three piece suit driving a maroon late model Cadillac, and with regard to the ensuing car chase. [See Issue II, infra].

In the third segment of the trial, the state presented its circumstantial evidence linking appellant to the charged offenses. In addition to the firearms examiner, these witnesses included several persons who placed appellant or his automobile in the vicinity of each convenience store around the time of the respective murders* (R.921-62,1023-42), or in one instance, in the convenience store the day before the murder (R.1007-15); an FBI agent who expressed the opinion that a plastic garbage bag found in one of the convenience stores (a brand which the store did not stock or use) and another plastic garbage bag found in appellant's motel room were of the same chemical composition (R.875-885); and a dancer at Sammy's Go-Go who stated that appellant was a regular customer who averaged spending about $100 a night on her, and that on New Year's Eve, 1982, he came in, said he had no money to spend on her and had to leave to take care of some business, then returned and spent the "regular amount" (R.963-76).

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* It is important to emphasize that these "identifications" of appellant were initially made from photographs shown to the witnesses after appellant's arrest on January 27, 1983 (see R.928-32,934-36,952-54,958-59,1007-09,1112-13). There is no indication in the record that the police suspected appellant before that time, or were even aware of his existence.

[Due to the anticipated length of this brief, and since appellant is not challenging on appeal the sufficiency of the evidence to withstand a motion for judgment of acquittal, the foregoing is not intended to be a complete summary of the evidence presented at trial. Further facts of the case, as they relate to the particular issues raised, will be set forth in the appropriate section of argument].

Following the penalty phase of the trial, the jury recommended that the death penalty be imposed as to each count (R.1288,1586). On October 19, 1983, the trial court sentenced appellant to death as to each murder count, and to consecutive terms of life imprisonment as to each robbery count (R.1611-12,1617-18,1632-33). In his findings of fact, the court apparently found as aggravating circumstances (1) that each murder occurred in the course of a robbery; (2) that each murder was cold, calculated, and premeditated, and (3) that each murder was committed for the purpose of avoiding or preventing a lawful arrest (R.1590). The court found "insufficient, virtually no, mitigating circumstances to outweigh the aggravating circumstances" (R.1591).

Notice of appeal was filed November 18, 1983 (R.1637).

III ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO WOULD AUTOMATICALLY RECOMMEND THE DEATH PENALTY; IN REFUSING TO ALLOW ADDITIONAL PEREMPTORY CHALLENGES; IN PREMATURELY GRANTING THE STATE'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO WERE OPPOSED TO THE DEATH PENALTY; AND IN REFUSING TO ALLOW DEFENSE COUNSEL ANY OPPORTUNITY TO EXAMINE THE PREMATURELY EXCLUDED JURORS ON VOIR DIRE; THEREBY DEPRIVING APPELLANT OF HIS RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL JURY AND TO DUE PROCESS OF LAW, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, AND HIS RIGHT TO EXAMINE JURORS ORALLY ON THEIR VOIR DIRE AS PROVIDED IN FLA.R.CR.P. 3.300(b).

A. Introduction.

At the beginning of the jury selection proceeding, the trial court announced that he would begin with a panel of thirty-six prospective jurors, and if a jury was not empaneled from among that group, he would bring additional jurors up in increments of twenty or less (R.15). The trial court, over defense objection, ruled that each side would be limited to ten peremptory challenges as provided in Fla.R.Cr.P. 3.350 (R.15-17). The court stated that he would take defense counsel's request for additional peremptory challenges under advisement; however, he would not be inclined to give more "unless something suggests it is appropriate" (R-16-17). Defense counsel also requested that the trial court, in his discretion, allow him to proceed first in voir dire (R.17-18). The prosecutor asked "that the standard traditional method be used here, and that is the state be allowed to question the panel first, followed by the defendant." (R.18). The trial court said:

> It is my view that most of these cases -- It is only a psychological advantage in the mind of one Counsel over the other, who goes first or second in the early stages of Voir Dire. But I find no reason for breaking the tradition at this point, letting the State go forward, and followed by the defense. <u>You will both be given a full opportunity to fully examine each prospective juror, and ask all those questions you need</u>.
>
> And I am not going to sit here and allow you to develop a rapport with jurors anyway. That's not the function of Voir Dire. But, I am cer-

tainly going to give you an opportunity to fully explore all the situations or issues that go to prejudice, sympathy, bias, those things that would disqualify a juror for cause, and in the mind of Counsel.

So, your request is denied. State will go first.

(R.18-19)

The prosecutor, Mr. Hensel, proceeded to question the prospective jurors (R.30-115,214-64,302-10,325-43,355-68,381-93), followed by defense counsel, Mr. Terrell (R.124-206,264-77,288-99,310-21,343-54,371-79,393-410). Of the original group of jurors, defense counsel challenged ten for cause, on the ground that they could not consider the full range of punishment and would automatically impose the death penalty. The trial court granted the challenge for cause as to juror McIntosh (R.322); denied the challenges for cause as to jurors Burgess (R.213) and McNair (R.323), but subsequently excused them for cause on other grounds (R.300-324); and denied the challenges for cause as to jurors Wasden (R.210-11); Wester (R.211); Burmeister (R.212-13,322-23); Kirksey (R.301); McAdams (R.301); Lindsay (R.354-55); and McAnally (R.412-13). The defense used all ten of its peremptory challenges -- six of them on Wasden (R.301); Burmeister (R.354), Kirksey (R.301); McAdams (R.379); Lindsay (R.379), and McAnally (R.413). Just prior to exercising his last peremptory challenge on McAnally, defense counsel renewed his request for additional peremptory challenges; the trial court denied the request over objection (R.411). It is appellant's position that at least three of his challenges for cause (those made to Burmeister, Lindsay, and McAnally) were improperly denied as a matter of law[1], and that as a result he was forced to exhaust his peremptory challenges on persons who should have been excused for cause. See e.g. Leon v. State, 396 So.2d 203,205 (Fla. 3d DCA 1981); United States v. Nell, 526 F.2d 1223,1229 (5th Cir. 1976). Having exhausted his peremptory challenges, and his request for additional peremptory challenges having been denied, appellant was unable to peremptorily challenge two jurors whom he had unsuccessfully chal-

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1 Appellant is not conceding that the remaining rulings were correct, only that they fell within the range of the trial court's discretion.

lenged for cause (R.211,413); Wester (who said he would lean toward the death penalty for a planned murder (R.184)) and Landsgaard (a former FBI agent who was acquainted with several of the police officers who testified at trial (R.53,74, 143-44,395-96), and who believed that it would "possibly" take a greater showing than with other witnesses to demonstrate that law enforcement officers might not be candid (R.396)). Appellant was also unable to peremptorily challenge juror Keyes (R.539), who had acknowledged some prior exposure to the facts of the case (R.538-39), who indicated that he would more firmly believe that the death penalty was appropriate in a multiple killing situation (R.455,512), and who stated that, while he did not feel that it was an "absolute necessity" for a defendant to testify in his own behalf, " . . . [i]f I had attorneys, and were being protected by our great laws, I would certainly want to at least have the opportunity to defend myself" (R.520-21). Defense counsel told the trial court that he did not believe he had grounds for a challenge for cause to Mr. Keyes, but he once again renewed his request for additional peremptory challenges (R.539). The trial court once again denied the request (R.539). Wester, Landsgaard, and Keyes all served on the jury which convicted appellant and recommended that he be sentenced to death, and Keyes became its foreman (see R.1171-73,1288-89).

At the point when defense counsel used his last peremptory challenge, eleven potential jurors remained (R.413-14). After an overnight recess, a new group of twenty prospective jurors was called up for questioning (R.413-19). This group, in contrast to the first group, included three jurors who acknowledged, in response to the prosecutor's inquiry, that they were religiously, morally, or philosophically opposed to the death penalty (R.440-41). One of these three jurors, Ridings, was excused on the basis of his exposure to pre-trial publicity and his resulting inability to be impartial (R.485-87); appellant is not challenging that ruling on appeal. The other two "death-scrupled" jurors, Poniatowski and Caristi, were excused for cause based solely on their answers to the prosecutor's leading

questions. The defense (as defense counsel noted and as the trial court recognized R.484-85)) was denied any opportunity to "rehabilitate" these jurors, clarify their responses, or attempt to demonstrate that they were qualified to serve on the jury. In fact, defense counsel never had an opportunity to examine these two jurors at all. [In stark contrast, the prosecutor not only had the opportunity to question each juror initially (R.30-115), he was also permitted to re-examine the jurors (including every one of the "automatic death-penalty" jurors) after defense counsel had questioned them and in several cases after defense counsel had challenged them for cause, for the purpose of "rehabilitating" them. See R.222-23 (Wasden); 227-28 (McAdams); 236-37 (Wester); 247-48 (Kirksey); 250-51 (McNair); 253-55 (Burmeister); 260-62 (Burgess); 305-07 (McIntosh); 333-35 (Lindsey); 393 (McAnally). At least one of the defense's challenges for cause (McAnally) was denied specifically on the basis of the trial court's belief that the juror had successfully been rehabilitated (R.412-13). Yet the trial court excused the two "death-scrupled" jurors without allowing the defense to ask so much as a single question, in direct contravention of Fla.R.Cr.P. 3.300, which guarantees each party the right to examine each juror orally on their voir dire, and notwithstanding that Florida law appears to require that a defense attorney who objects to the excusal for cause of a "death-scrupled" juror make an attempt to rehabilitate the challenged juror. See Paramore v. State, 229 So.2d 855,858 (Fla. 1969); see also O'Bryan v. Estelle, 714 F.2d 365,376-78 (5th Cir. 1983). Such a "double standard" fails to comport with due process. See Crawford v. Bounds, 395 F.2d 297,303-04 (4th Cir. 1968).

The trial court's erroneous denial of defense challenges for cause to at least three "automatic death penalty" jurors, thereby forcing appellant to exhaust his peremptory challenges on jurors who should have been excused for cause, coupled with the court's repeated refusal to allow additional peremptory challenges, requires reversal of appellant's conviction and death sentence. See Thomas v. State, 403 So.2d 371 (Fla. 1981); see also Smith v. State, 573 S.W.2d 763 (Tex.Cr.App.

1977); Cuevas v. State, 575 S.W.2d 543 (Tex.Cr.App.1978); Pierce v. State, 604 S.W.2d 185 (Tex.Cr.App. 1980). The trial court's premature excusal of two jurors who expressed opposition to the death penalty without permitting the defense any opportunity to "rehabilitate" them or clarify their positions with respect to their ability to follow the law, requires, at minimum[2], reversal of appellant's death sentence. See e.g. Davis v. Georgia, 429 U.S. 122 (1977); Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), adhered to en banc, 626 F.2d 396 (1980). The Court's refusal to allow the defense any opportunity to question jurors Poniatowski and Caristi violated the fundamental rights protected by Fla.R.Cr.P. 3.300(b), and reversal would be required for this reason alone. See Barker v. Randolph, 239 So.2d 110 (Fla. 1st DCA 1970); Williams v. State, 424 So.2d 148 (Fla. 5th DCA 1982). Finally, the double standard employed by the trial court in allowing the state to rehabilitate the "automatic death penalty" jurors while denying the defense even an initial opportunity to question, let alone a chance to rehabilitate, the anti-death-penalty jurors, violated the most basic tenets of due process.

> To permit a juror whose mind is foreclosed on one side of [the death penalty] issue to serve, while eliminating those who think to the contrary, and to exert special effort to qualify one whose mind may be foreclosed on the issue of guilt while freely excusing those who indicate a predisposition as to punishment, were not the ways to achieve the constitutional objective. Denial of equal treatment in the manner of selection inevitably resulted in denial of due process.
>
> Crawford v. Bounds, supra, at 304; see Witherspoon v. Illinois, 391 U.S. 510,522 n. 20 (1968).

B. The Trial Court Erred In Denying Appellant's Challenges for Cause to Prospective Jurors Who Would Automatically Recommend the Death Penalty; and in Refusing to Allow Additional Peremptory Challenges.

McAnally

In response to defense counsel's inquiry, prospective juror McIntosh stated that he believed that anyone convicted of premeditated murder should automatically

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2 On the basis of Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark.1983), appellant further contends that he is entitled to reversal of his conviction on this ground as well.

get the death penalty (R.157-58,161). Defense counsel then asked:

> Is there anyone else who has any belief similar to that of Mr. McIntosh?
>
> Mr. Burgess?
>
> PROSPECTIVE JUROR: I feel like if the man is found guilty, he should have the death penalty.
>
> MR. TERRELL [defense counsel]: Okay.
>
> PROSPECTIVE JUROR: Definitely.
>
> MR. TERRELL: Regardless of whether it is premeditated or felony murder?
>
> PROSPECTIVE JUROR: Well, those were innocent people.
>
> MR. TERRELL: Now, Mr. McAnally?
>
> PROSPECTIVE JUROR: I feel the same way.
>
> MR. TERRELL: All right.
>
> PROSPECTIVE JUROR: If he's convicted.
>
> MR. TERRELL: Does it make any difference whether it's a finding of guilt for one or two people?
>
> PROSPECTIVE JUROR: About the same to me.
>
> (R.162-63).

Further questioning of Mr. McAnally revealed the following:

> Mr. McAnally, how about you? What do you think about this distinction between what I call, with all delicacy, simple premeditation, and this higher standard under the aggravating circumstances?
>
> PROSPECTIVE JUROR: I would have to weigh all of the evidence, and then decide. But, I wouldn't want any doubt in my mind before I made a decision.
>
> MR. TERRELL: Okay. Now, I am trying to balance that with what you said there, about thinking that anyone convicted of premeditated killing should get the death penalty.
>
> PROSPECTIVE JUROR: If he's guilty, I do think so; yes, sir.
>
> MR. TERRELL: Okay. Do you understand that discussion I was having with Mr. McIntosh, the differences, the different types of premeditation?
>
> PROSPECTIVE JUROR: Right.
>
> MR. TERRELL: Okay. Do you see any difference between the two in your own mind?
>
> PROSPECTIVE JUROR: Not really.

MR. TERRELL: Okay. So, if I am not misphrasing you, anytime there is a premeditated killing, to you it's kind of automatic death penalty? And Ms. Burmeister, how about you?

(R.175-76).

Upon subsequent examination by the prosecutor, Mr. McAnally gave the following responses:

MR. HENSEL: What does premeditation mean to you, Mr. McAnally?

PROSPECTIVE JUROR: Same as all the other people here. I thought, at first, it was a long planned thing, but I didn't know it could happen at the spur of the moment. I found out different, I guess.

MR. HENSEL: And do you understand now? I think originally you were saying if they were found guilty of premeditated murder, automatically they deserve the death penalty.

PROSPECTIVE JUROR: Right.

MR. HENSEL: You under stand that's not what the law is in Florida? If they are found guilty of first degree murder, then you go into that weighing process.

PROSPECTIVE JUROR: Right.

MR. HENSEL: And you think you are going to be able to do that?

PROSPECTIVE JUROR: Oh, yeah.

(R.393).

The defense challenged Mr. McAnally for cause on the ground that he had expressed the view that the death penalty should be automatic in all cases of premeditated murder (R.412). The trial court said:

You and Mr. Hensel have done such a good job of educating Mr. McAnally, I think he has finally seen the light, and I have notations down here that he will obviously weigh the evidence before he comes up with any decision. So your challenge is denied.

(R.412-13).

Defense counsel then used a peremptory challenge (his last one) on Mr. McAnally (R.413).

Burmeister

After explaining that the death penalty and life imprisonment with a mandatory

twenty-five years before becoming eligible for parole are the alternative sentences for first-degree murder in Florida, and after observing that, in a two-count murder case like this one, the court could run the life sentences consecutively, resulting in a fifty year mandatory minimum, and that parole was not a certainty even then, defense counsel said:

> Okay. With those understandings, is there anyone else besides these three gentlemen who are of the mind that anyone convicted of premeditated killing should automatically get the death penalty?
>
> Yes, Ms. Burmeister?
>
> PROSPECTIVE JUROR: I feel that the death penalty is what they deserve.
>
> MR. TERRELL: Okay. Can you tell me what has caused you to come to feel that way?
>
> PROSPECTIVE JUROR: I think when you knowingly take someone else's life, then you should be held liable to give your life in return. You know, I think -- I certainly think there are reasons for killing. You know, I feel like I would kill if someone harmed my child or something like that. But, just to knowingly, willfully go out and shoot someone or kill someone, I think the death penalty is what they deserve. I think they have become a burden on us to support them in the prison system for fifty years.
>
> (R.164)

Ms. Burmeister subsequently indicated, upon further questioning by defense counsel, that she could see a difference between a "planned" premeditated murder as opposed to "an attempted robbery with a gun, and something happening that makes him instantly decide that he's got to kill her or just does" (R.176). Ms. Burmeister was "not totally comfortable" with the idea that the defendant has no burden of proof -- "I think that if a person is innocent, that you should be able to show why he was innocent. I just think that would help the case a whole lot" (R.177).

The prosecutor sought to rehabilitate Ms. Burmeister by explaining that the aggravating circumstance of "cold, calculated, and premeditated" requires a higher degree of premeditation than that necessary for conviction on a theory of premeditation in the guilt phase (R.254-55). He asked:

> Do you understand if you are on the Jury, and you get to the penalty

phase, that it's that weighing process, and at this time I am not, you know -- we don't know which, if any of the nine possible aggravating circumstances are going to apply to the facts of this case or what, if any, mitigating circumstances will be presented. You have to rely on that, and wait until you hear that evidence and make your decision.

(R.254)

At this point, the trial court announced a lunch break, and Ms. Burmeister never indicated whether she understood the weighing process of aggravating and mitigating circumstances or not. When they returned from lunch, the prosecutor asked her a different question, whether she had the "emotional ability" to look the defendant in the eye and say "A majority of our number recommend you die" (R.255). Ms. Burmeister replied that she could (R.255).

Defense counsel twice challenged Ms. Burmeister for cause (R.212-13,322-23). In support of the renewed challenge, counsel argued:

She said anyone convicted of premeditated murder should automatically get the death penalty. And, in addition, she felt the cost of incarcerating a person over a long period of time overrode any qualms she had about giving a death penalty.

(R.323)

On each occasion, the trial court denied the challenge for cause to Ms. Burmeister (R.213,323), and defense counsel was forced to expend a peremptory challenge on her (R.354).

Lindsay

The prosecutor asked prospective juror Lindsay:

MR. HENSEL: Do you think you can go through this weighing process we have outlined to make a determination of whether the death sentence is appropriate?

PROSPECTIVE JUROR: I believe so.

MR. HENSEL: Do you think you have the emotional --

PROSPECTIVE JUROR: I don't think it would upset me.

MR. HENSEL: You got the emotional strength to come in here and look that man in the eye, and say: We recommend you die for what you have done?

PROSPECTIVE JUROR: Yes; I do.

MR. HENSEL: Any problem with that, that you anticipate?

PROSPECTIVE JUROR: No, sir.

(R.335)

Shortly after the above discussion, Ms. Lindsay made the following statements in response to defense counsel's inquiry:

> MR. TERRELL: How do you feel about the death penalty, just as far as whether or not it's being used?
>
> PROSPECTIVE JUROR: I believe in the death penalty.
>
> MR. TERRELL: Along those lines, how would you describe your own feelings about the death penalty? When do you think it should be used?
>
> PROSPECTIVE JUROR: I believe if somebody commits a murder.
>
> MR. TERRELL: Can you give me any kind of idea about what you mean in that area?
>
> PROSPECTIVE JUROR: I mean, if you plan a murder or just not in anger, something like that.
>
> MR. TERRELL: Do you think it should be given in all cases like that, regardless of any of what may have gone into it?
>
> PROSPECTIVE JUROR: I believe so.
>
> (R.347-48)

Defense counsel challenged Ms. Lindsay for cause, on the ground that she believed that the death penalty should automatically be imposed for premeditated murder (R.354-55). The trial court disagreed:

> That's not my recollection of what she said. She felt like it was a proper punishment for premeditated murder, which is what the legislature thinks is correct as well. But my recollection is she she said she would weigh the mitigating and aggravating factors. The challenge is denied.

The defense subsequently used a peremptory challenge to remove Ms. Lindsay (R.379)

The accused in a capital case, just as much as the state and maybe more

so[3], has a right to a jury composed of persons who can and will consider the full range of punishment; consequently, the refusal to grant a challenge for cause to a juror who would automatically vote for a death sentence in every case, or in a particular kind of case regardless of whatever mitigating circumstances might be presented, violates the accused's right to an impartial jury, guaranteed by the federal and Florida Constitutions. See Thomas v. State, 403 So.2d 371,375-76 (Fla. 1981); Crawford v. Bounds, 395 F.2d 297,303-304 (4th Cir. 1968); Spinkellink v. Wainwright, 578 F.2d 582,594 (5th Cir. 1978); Alvord v. Wainwright, 564 F.Supp. 459,487 (M.D. Fla. 1983); Patterson v. State, 283 S.E.2d 212,214-16 (Va. 1981); Smith v. State, 573 S.W.2d 763 (Tex.Cr.App. 1977). See especially Cuevas v. State, 575 S.W.2d 543 (Tex.Cr.App. 1978)(defense challenge for cause to prospective juror who would automatically vote for death penalty in all cases of intentional murder unless insanity was proven should have been granted; judgment and sentence reversed); Pierce v. State, 604 S.W.2d 185 (Tex.Cr.App. 1980)(defense challenge for cause to prospective juror who would automatically vote for death penalty in all cases of robbery-murder should have been granted; judgment and sentence reversed).

Bias against the defendant in the sentencing aspect of a capital case amounts to a "fundamental violation . . . [of] the express requirements in the sixth amendment to the United States Constitution and in Article I, section 16, of the Florida Constitution, that an accused be tried by 'an impartial jury'" Thomas v. State, 403 So.2d 371,375 (Fla. 1981). It is error to deny a challenge for cause to a prospective juror who harbors such a bias. Thomas v. State, supra; Smith v. State, supra; Cuevas v. State, supra; Pierce v. State, supra. Where there is any reasonable doubt as to a juror's possessing the requisite state of mind as to render an impartial verdict (as to guilt or penalty or both), the defendant must be given the benefit of the doubt, and the juror should be excused for cause. See Blackwell

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3 The accused's right may be considered even more compelling than the state's, since the state has no constitutional right to the imposition of capital punishment in any particular case [Crawford v. Bounds, supra, at 312], while the accused has a constitutional right to an impartial jury.

v. State, 101 Fla. 997, 132 So. 468 (1931); Singer v. State, 109 So.2d 7,23 (Fla. 1959); Leon v. State, 396 So.2d 203,205 (Fla. 3d DCA 1981). A juror's statement that he can and will return a verdict according to the evidence and the law is not determinative of his competency, if it appears from other statements made by him that he is not possessed of a state of mind which will enable him to do so. Singer v. State, supra; Leon v. State, supra; see Irvin v. Dowd, 366 U.S. 717 (1961); Johnson v. Reynolds, 97 Fla. 591, 121 So. 793 (1929); Williams v. State, 440 So.2d 404 (Fla. 1st DCA 1983). In reviewing a trial court's refusal to excuse for cause prospective jurors who acknowledged having "automatic death penalty" beliefs, the appellate court must look at "the overall picture presented by the voir dire examination" of the challenged juror, to determine whether "[his] testimony as a whole indicated an inability to consider the full range of punishment." Smith v. State, supra, at 765; Cuevas v. State, supra, at 545; Pierce v. State, supra, at 187.

In Pierce v. State, supra, prospective juror Crenshaw clearly indicated in voir dire that he would automatically vote for the death penalty in any case in which the defendant was convicted of robbery-murder. The Texas Court of Criminal Appeals, in reversing the judgment and death sentence, wrote:

> The appellant contends that venireman Crenshaw's voir dire responses indicate that he was only able to consider the death penalty, and not life imprisonment, for a capital murder committed during a robbery. He urges that reversal is therefore required under Cuevas v. State, supra, and Smith v. State, supra. He also contends that the record in the instant case is more compelling for reversal than the records in Cuevas and Smith, in which reversals of capital murder convictions were required. We agree.
>
> In Smith, we held that the trial court committed reversible error in overruling the defendant's challenge for cause of a prospective juror. We found:
>
> > "The overall picture presented by the voir dire examination of Payne is one of a person holding strong convictions that death is the only punishment he could consider for a person guilty of capital murder, and that life imprisonment is not adequate punishment and would not be considered."
>
> 573 S.W.2d at 765. During attempts to rehabilitate the venireman in Smith, he indicated that he could consider both life imprisonment and the death penalty in answering the penalty issues, and that he would hold the State to its burden of proof on the punishment issues. Never-

theless, we concluded that the venireman's testimony as a whole indicated an inability to consider the full range of punishment.

In Cuevas, we also reversed because the trial court overruled the defendant's challenge for cause of a prospective juror who indicated he could not consider life imprisonment as a punishment for capital murder unless the evidence indicated the defendant was insane. We examined the venireman's voir dire responses as a whole, and determined that despite his statements during attempted rehabilitation that he could base his answers to the punishment issues on the evidence, his responses indicated an inability to consider the full range of punishment.

Reviewing the voir dire responses of venireman Crenshaw in light of our holdings in Smith v. State, supra, and Cuevas v. State, supra, we must conclude that he demonstrated an inability to consider the full range of punishment for a capital murder committed during a robbery. . . .

Pierce v. State, supra, at 187.

The appellate court in Pierce noted that in that case, in contrast to Smith and Cuevas, the state made no attempt to rehabilitate the challenged juror. As in the two previous cases, the court concluded that the challenge for cause was improperly overruled.

In the present case, after another juror stated "I feel like if the man is found guilty, he should have the death penalty", and emphasized that he "definitely" felt this way regardless of whether it was premeditated or felony murder, because "Well, those were innocent people" (R.162), juror McAnally volunteered that he felt the same way. (R.162). Later, when defense counsel tried to explain the difference between "simple premeditation" and the higher standard required to establish the aggravating circumstance, and said "Now, I am trying to balance that with what you said there, about thinking that anyone convicted of premeditated killing should get the death penalty", Mr. McAnally replied "If he's guilty, I do think so; yes, sir." (R.175). Asked whether he could see any difference in his own mind between different kinds of premeditation, Mr. McAnally said "Not really." (R.175). When the prosecutor attempted to rehabilitate Mr. McAnally, the juror said that he had learned that premeditation could happen at the spur of the moment as well as being a "long planned thing" (R.393). When the prose-

cutor stated that an automatic death penalty was not the law in Florida, and that if the defendant is found guilty "you go into that weighing process", and asked him if he thought he would be able to do that, Mr. McAnally replied "Right" and "Oh, yeah." (R.393).

Appellant would initially submit that the state should be estopped from arguing that Mr. McAnally was successfully rehabilitated by the prosecutor, since the defense was deprived of any corresponding opportunity to rehabilitate the anti-death-penalty jurors who were excluded for cause on the state's motion. See Crawford v. Bounds, supra. Moreover, considering the juror's testimony as a whole, it is clear that the state's attempt at rehabilitation was insufficient to overcome the bias as to penalty demonstrated by Mr. McAnally. See Smith v. State, supra; Cuevas v. State, supra. His statements made on two separate occasions, that he believed that anyone convicted of premeditated murder should receive the death penalty were volunteered and unequivocal. His monosyllabic affirmative responses to the prosecutor's advice that that was not the law in Florida and query whether he would be able to "go into that weighing process" were clearly inadequate to dispel the more than reasonable doubt, created by his earlier statements, as to whether he possessed the requisite state of mind to render an impartial penalty verdict. See Singer v. State, supra; Leon v. State, supra.

When defense counsel asked whether anyone else believed that anyone convicted of premeditated murder should automatically get the death penalty, Ms. Burmeister volunteered "I feel that the death penalty is what they deserve." (R.164). She explained "I think when you knowingly take someone else's life, then you should be held liable to give your life in return" (R.164). She repeated that, "to knowingly, willfully go out and shoot someone or kill someone" the death penalty is what they deserve (R.164), and expressed her dissatisfaction with the alternative of life imprisonment, "I think they have become a burden on us to support them in the prison system for fifty years" (R.164).

The state's attempt to rehabilitate Ms. Burmeister consisted of the following

quasi-question (which she never answered):

> Do you understand if you are on the Jury, and you get to the penalty phase, that it's that weighing process, and at this time I am not, you know -- we don't know which, if any of the nine possible aggravating circumstances are going to apply to the facts of this case or what, if any, mitigating circumstances will be presented. You have to rely on that, and wait until you hear that evidence and make your decision.
>
> (R.254)

At one point during her examination by defense counsel, Ms. Burmeister implied that her "automatic death penalty" views applied only to "planned" premeditated murders as opposed to a spur of the moment decision to kill (R.175-76). At no time did she ever retreat from the position that anyone convicted of a planned murder should automatically be sentenced to death, nor did she acknowledge that this was not the law, nor did she ever give any assurances that she could or would follow the trial court's instructions or consider and weigh the aggravating and mitigating circumstances in reaching a penalty verdict. [Contrast Fitzpatrick v. State, 437 So.2d 1072,1075 (Fla. 1983)]. At no time did she ever qualify her statement that the option of life imprisonment merely represented a burden on the taxpayers to support them in the prison system. Viewing her testimony as a whole, it is abundantly clear that Ms. Burmeister was not impartial on the issue of penalty and could not consider the full range of punishment. See Thomas v. State, supra; Smith v. State, supra; Cuevas v. State, supra; Pierce v. State, supra.

Ms. Lindsay, when asked by the prosecutor if she could "go through this weighing process we have outlined" to determine whether the death sentence was appropriate, answered "I believe so." (R.335). Shortly after making this statement, Ms. Lindsay told defense counsel that she believed in the death penalty, and believed it should be imposed for planned murderers (R.348). When defense counsel asked whether she thought the death penalty should be given in all cases like that "regardless of any of what may have gone into it", she replied "I believe so". (R.348). The state made no further attempt to rehabilitate Ms. Lindsay. Thus

it is clear that, contrary to what the trial court recalled, Ms. Lindsay did not say she thought death was a proper punishment for premeditated murder, she said it was the proper punishment for a planned murder, regardless of the circumstances. The fact that she had earlier given an affirmative answer to the prosecutor's question as to whether she thought she could "go through this weighing process" does not immunize her later statements from scrutiny, and certainly fails to demonstrate her impartiality in the light of her belief that the death penalty should be imposed in all cases of planned murder "regardless of any of what may have gone into it." (R.348). See Thomas v. State, supra; Smith v. State, supra; Cuevas v. State, supra; Pierce v. State, supra.

The trial court should have granted appellant's challenges for cause to prospective jurors McAnally, Burmeister, and Lindsay, and his failure to do so requires reversal of appellant's conviction and death sentence. See Thomas v. State, supra. It is reversible error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, since it has the effect of abridging the right to exercise peremptory challenges. Leon v. State, supra, at 205; Peek v. State, 413 So.2d 1225,1226 (Fla. 3d DCA 1982); Highlands Ins. Co. v. Lucci, 423 So.2d 947,948 (Fla. 3d DCA 1982); Williams v. State, 440 So.2d 404,405-406 (Fla. 1st DCA 1983); United States v. Nell, 526 F.2d 1223,1229 (5th Cir. 1976); see Swain v. Alabama, 380 U.S. 202 (1965); Singer v. State, supra, at 25. In the present case, appellant exhausted his peremptory challenges. Three of his peremptory challenges were spent on jurors McAnally, Burmeister, and Lindsay, after his challenges for cause to each of these jurors were denied. Just prior to using his last peremptory challenge on McAnally (R.413), defense counsel renewed his request for additional peremptory challenges, which request was denied (R.411). See Thomas v. State, supra; Cuevas v. State, supra, at 544; Pierce v. State, supra, at 186. Later, during a bench conference in which prospective juror Keyes was the topic of discussion, defense counsel, recognizing that he had no basis to challenge Keyes for cause, again renewed his request for additional peremptory chal-

lenges, again unsuccessfully (R.539). As a result of appellant's having been forced to exhaust his peremptory challenges on persons who should have been excused for cause, he had no peremptory challenges remaining with which to remove Keyes (who ultimately became foreman of the jury). See Cuevas v. State, supra, at 544. Appellant was also unable to exercise peremptory challenges on two jurors whom he had unsuccessfully challenged for cause, Wester (who said he would lean toward the death penalty for a planned murder) and Landsgaard (the former FBI agent who knew two of the police officer witnesses in the case, and who admitted that it might take a greater showing to demonstrate to him that law enforcement officers might not be candid)(R.53,74,143-44,184,211,395-96,413). Wester and Landsgaard also served on the jury. In Williams v. State, supra, the defendant appealed his conviction of battery of a correctional officer on the ground that his challenges for cause to two prospective jurors who were employed as correctional officers (one at the same institution where the incident occurred and the other at a related penal institution) were improperly denied. The appellate court agreed, reversed the conviction, and noted:

> The two officers challenged for cause did not actually serve on the jury in this case because they were excused upon appellant's exercise of two peremptory challenges. Appellant exhausted all of his peremptory challenges, however, and was required to go to trial with a jury panel including a maintenance and construction supervisor in a related prison institution in Union County after unsuccessfully challenging that juror for cause. "It is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges." Leon v. State, 396 So.2d 203,205 (Fla. 3d DCA 1981).

Williams v. State, supra, at 405-06.

In Pierce v. State, supra, at 186, the Texas appellate court said:

> The appellant argues that because he was constrained to strike venireman Crenshaw with a peremptory challenge, he was deprived of the use of that peremptory challenge to exclude a prospective juror he found objectionable. The appellant exhausted all of his peremptory challenges. His challenge of venireman Elliott English for cause was overruled, and his immediate request for additional peremptory strikes was denied. The appellant's written motion for additional peremptory strikes was also denied. Venireman English was ultimately seated on the jury. These facts are sufficient to entitle the appellant to a reversal, provided he can show the challenge for cause of venireman

Crenshaw should have been granted.

As previously discussed, the court in Pierce went on to hold that the challenge for cause to Crenshaw (who believed that the death penalty should automatically be imposed in cases of robbery-murder) should have been granted, and the judgment and sentence were reversed.

The trial court's erroneous denial of the challenges for cause to prospective jurors McAnally, Burmeister, and Lindsay, coupled with his repeated refusal to allow additional peremptory challenges, abridged appellant's right to an impartial jury, and his conviction and death sentence must be reversed. See Thomas v. State, supra.

C. The Trial Court Erred in Prematurely Granting the State's Challenges for Cause to Prospective Jurors Who Were Opposed to the Death Penalty; and in Refusing to Allow Defense Counsel any Opportunity to Examine the Prematurely Excluded Jurors on Voir Dire.

Poniatowski and Caristi

When the second group of prospective jurors was called up for voir dire examination, the prosecutor said "I need to find out from you folks here who is religiously, morally, or philosphically opposed to the death penalty?" Three prospective jurors, Poniatowski, Caristi, and Ridings[4], said they were. In response to the prosecutor's questioning, Ms. Poniatowski and Ms. Caristi gave the following responses:

> MR. HENSEL: Poniatowski? Okay. The question I need to pose to you, ma'am, what are your feelings about that? Could you tell me?
>
> PROSPECTIVE JUROR: I could not condemn someone to death. Punishment, yes, but not death.
>
> MR. HENSEL: Okay. Do you think you could not recommend a death sentence under any circumstances whatsoever because of your feelings? Are they that strong?
>
> PROSPECTIVE JUROR: Well, they are both morally and religiously. I

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[4] Appellant is not challenging Ridings' excusal for cause on other grounds, and he will not be further discussed.

have just been taught that you do not kill.

MR. HENSEL: Yes, ma'am.

PROSPECTIVE JUROR: That is punishment, yes, but not death.

MR. HENSEL: Okay. I understand. I can appreciate it. So, what you are telling me, if selected as a Jury member in the case, no matter what facts we presented, that you couldn't because of your religious or moral feelings recommend the death sentence; is that right?

PROSPECTIVE JUROR: I don't believe so. I really don't believe so.

MR. HENSEL: Anybody else feel that way? Mr. Ridings?

PROSPECTIVE JUROR: Same way.

MR. HENSEL: You likewise. Anybody else? Yes, ma'am? Ms. Caristi?

PROSPECTIVE JUROR: Yes.

MR. HENSEL: Okay. Anybody else? Mr. Ridings, are your feelings the same way, that under no circumstances do you think, because of your beliefs, you could recommend the death sentence?

PROSPECTIVE JUROR: I could not.

MR. HENSEL: Ms. Caristi?

PROSPECTIVE JUROR: I just don't think I could handle a death sentence. I believe they should be punished and gotten out of society, but two rights don't make a right -- I mean, two wrongs don't make a right.

MR. HENSEL: Under no circumstances do you think you could recommend the death penalty?

PROSPECTIVE JUROR: Not in this case.

(R.440-41)

* * * * * *

MR. HENSEL: Okay. I hate to butcher your name --

PROSPECTIVE JUROR: Poniatowski.

MR. HENSEL: Okay. I think you previously indicated your opposition to the death penalty; is that right?

PROSPECTIVE JUROR: Yes.

MR. HENSEL: Okay. And I think I have already asked you the questions about whether you could impose it under any circumstances, and you told me no; is that right?

PROSPECTIVE JUROR: No.

(R.468)

* * * * * *

MR. HENSEL: Anybody want to exercise what I call their wild card option? That is, I am getting ready to ask you the question does anybody just prefer not to sit on this case for any reason whatsoever? If so, raise your hand. When you do, I will get your name, and I am not going to follow up on it. It's your chance to back out gracefully, if you want to. So, if somebody prefers not to sit on this case, I would like to know who you are. Anybody want to exercise your wild card option? Ms. Caristi?

PROSPECTIVE JUROR: Caristi.

MR. HENSEL: You don't have to explain if you don't want to.

PROSPECTIVE JUROR: Other than what I told you, I don't think I would be appropriate in the case.

MR. HENSEL: Mr. Ridings, you feel the same way?

PROSPECTIVE JUROR: Yes.

MR. HENSEL: Anybody else?

PROSPECTIVE JUROR: I don't, except I don't believe in capital punishment.

(R.482-83)

After the prosecutor finished his examination of the second group of jurors, and before defense counsel had any opportunity to examine them, the following discussion took place at the bench:

THE COURT: What I am going to do, Randy --

MR. HENSEL: Yes, sir.

THE COURT: -- you are at a position, you are the only one with any preemptory challenges left. Some of these people that Terry -- I don't believe could rehabilitate under any stretch of the imagination because I wouldn't accept a change of moral values between now and the hour he gets through. Some of them may come off, and we may eliminate this panel for cause. Since you are the only one with preemptory challenges left, I will put your panel out, and as I indicated, we will start at the bottom, and come up the road. If you are going to now exercise any of your preemptory challenges, that will eliminate those Terry will have to talk to. So, let me let you look, and have a veiw of the entire panel.

Now, you have your panel, if you want to exercise --

MR. HENSEL: Can I refer to my notes?

THE COURT: You have to do it from memory. Get your notes.

MR. HENSEL: I'm going to bump these two, Clayton and Denmon.

THE COURT: Now, you are up to Mr. Keyes.

MR. HENSEL: Tender.

THE COURT: All right. Let's talk about -- He hasn't had a chance to Voir Dire yet. Let's talk about any challenges for cause out of the remaining panel. There may be some of those that would go, and no necessity of questioning them.

Mello, Miller, Peacock, Jensen, Ross, Caristi.

MR. HENSEL: Challenge her for cause, Judge.

MR. TERRELL: Are you going down the list, Judge?

THE COURT: Yes. I am up to Caristi.

MR. TERRELL: We may need to backtrack a moment.

THE COURT: Opposed to the death penalty and would not impose it under any circumstances. Granted.

MR. TERRELL: Note my objection, Judge. I haven't had an opportunity to Voir Dire.

THE COURT: That's right. And as I pointed out before, they wouldn't impose it under any circumstances, they would not be heard to change their minds in an hour.

Sarricks, Hagen, Poniatowski.

MR. HENSEL: I challenge her for cause, also, Judge.

THE COURT: Same basis? She said she could not recommend the death penalty under any circumstances, and she was religiously and morally opposed to it.

MR. HENSEL: Yes, sir.

THE COURT: Granted.

MR. TERRELL: Objection. No opportunity to Voir Dire --

THE COURT: Noted.

MR. TERRELL: -- or rehabilitate.

(R.484-85)

Prospective jurors Poniatowski and Caristi (along with Ridings and the two

jurors peremptorily challenged by the state) were excused by the trial court (R. 487-88). Defense counsel was then allowed to begin his voir dire examination of the remaining members of the panel (R.488).

The trial court's exclusion for cause of jurors Poniatowski and Caristi, without affording defense counsel any opportunity to rehabilitate them or even to question them at all, constitutes reversible error for three related but independent reasons. First and simplest, it was a serious violation of Fla.R.Cr.P. 3.300(b), which guarantees the right of both the state and the defendant to examine each juror orally on their voir dire. Second, as a result of defense counsel's being denied any opportunity to attempt to rehabilitate the challenged jurors, the state's challenges for cause were granted prematurely, in violation of the constitutional principles set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968). See Burns v. Estelle, 592 F.2d 1297,1300-02 (5th Cir. 1979), adhered to en banc, 626 F.2d 396 (1980). Third, and perhaps most disturbing, the double standard employed by the trial court in allowing the state not only the opportunity to question each juror first but also the opportunity to attempt to rehabilitate those jurors who, during the defense's voir dire examination, acknowledged having "automatic death penalty" beliefs, while denying the defense any opportunity to examine those jurors who, during the state's initial questioning, stated that they could not recommend imposition of the death penalty, was fundamentally unfair and violative of due process. See Crawford v. Bounds, 395 F.2d 297, 303-04 (4th Cir. 1968); Witherspoon v. Illinois, 391 U.S. at 522 n. 20.

Fla.R.Cr.P. 3.300 provides that after a panel of prospective jurors has been sworn:

> (b) Examination. The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both State and defendant shall have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The right of

the parties to conduct an examination of each juror orally shall be preserved.

(c) Prospective Jurors Excused. If, after the examination of any prospective juror, the court is of the opinion that such juror is not qualified to serve as a trial juror, the court shall excuse such juror from the trial of the cause. If, however, the court does not excuse such juror, either party may then challenge such juror, as provided by law or by these rules.

In the present capital case, the trial court, on motion of the state, excused jurors Poniatowski and Caristi after half an examination; to wit, the state's half. He did so over defense counsel's objection that he had not yet had an opportunity to examine these jurors on voir dire or to rehabilitate them. The court noted the objections and overruled them, essentially on the basis that he had already made up his mind -- "Some of these people that Terry -- I don't believe could rehabilitate under any stretch of the imagination because I wouldn't accept a change of moral values between now and the hour he gets through" (R.483-84); "That's right. And as I pointed out before, they wouldn't impose it under any circumstances, they would not be heard to change their minds in an hour" (R.485). [Interestingly the trial court didn't have to stretch his imagination that far to accept a change in moral values in Mr. McAnally, the "automatic death penalty" juror who, the court said in denying appellant's challenge for cause, "has finally seen the light" (R.412)].

Prior to January 1, 1981, Rule 3.300(b) provided only that counsel for the state and the defense "shall be permitted to propound pertinent questions to the prospective juror" after examination by the court. See Underwood v. State, 388 So.2d 1333 (Fla. 2d DCA 1980). (Recognizing that the pre-1981 version of Rule 3.300(b) "is quite different from Florida Rule of Civil Procedure 1.431(b), wherein there is specifically preserved the right of counsel for the parties to examine jurors orally on voir dire"). The Committee Note [see In re Rules of Criminal Procedure, 389 So.2d 610,628 (Fla. 1980)] recognizes that the purpose and effect of the 1981 amendment is to bring Rule 3.300(b) into conformity with Fla.R.Civ.P. 1.431(b). Thus, the clear language and clear intent of the current version of the criminal

rule is to guarantee in no uncertain terms the right of the defense as well as the state to orally examine each prospective juror.

Even under the former, less emphatic version of the rule, it was recognized that "[m]eaningful voir dire examination of prospective jurors, by the court and by counsel, is assured by Fla.R.Crim.P. 3.300(b)." Jones v. State, 378 So.2d 797 (Fla. 1980). Counsel for each party must have a reasonable opportunity to examine the prospective jurors as a matter of right; this right, however, is "subject to the trial court's control of unreasonably repetitious and argumentative voir dire questioning." Jones v. State, supra, at 797. Even when counsel for a party has already had an opportunity to examine a particular juror, circumstances may dictate that he be granted further and reasonable interrogation to pursue a line of questioning opened up during the other party's examination. Barker v. Randolph, 239 So.2d 110 (Fla. 1st DCA 1970). The trial court's failure to permit such "further and reasonable interrogation" may amount to an abuse of discretion. Barker v. Randolph, supra, at 113. See also Ritter v. Jiminez, 343 So.2d 659,661 (Fla. 3d DCA 1977)("Trial attorneys should be accorded ample opportunity to elicit pertinent information from prospective jurors on voir dire examination").

Williams v. State, 424 So.2d 148,149 (Fla. 1982), which was decided under the present version of Fla.R.Cr.P. 3.300(b)(which is also applicable in the instant case), states:

> In Florida, a reasonable voir dire examination of prospective jurors by counsel is assured by Florida Rule of Criminal Procedure 3.300(b). The purpose of voir dire is to obtain a "fair and impartial jury to try the issues in the cause." King v. State, 390 So.2d 315,319 (Fla. 1980). Time restrictions or limits on numbers of questions can result in the loss of this fundamental right. They do not flex with the circumstances, such as when a response to one question evokes follow-up questions.
>
> We recognize there may be situations where the trial court is justified in curtailing voir dire, and we agree it has considerable discretion in determining the extent of counsel's examination of prospective jurors. However, in this case defense counsel was prevented from asking pertinent questions not covered by the State or the court by a very short time limit imposed without apparent warning. This prevented counsel from asking questions which were neither repetitive

nor improper. We conclude Williams was deprived of a fair trial by this curtailment of voir dire and she should be afforded a new trial.

See also Peri v. State, 426 So.2d 1021,1024-25 (Fla. 3d DCA 1983)(counsel for both the state and defendant are participants in the jury selection process and "have the right 'to conduct an examination of each juror orally' to determine whether the juror is qualified to serve").

Obviously, the trial court's refusal to allow the defense an opportunity to examine jurors Poniatowski and Caristi cannot be justiifed as an exercise of "control of unreasonably repetitious and argumentative voir dire questioning", since defense counsel never got to ask either of them a single question. Of the original group of prospective jurors, defense counsel's voir dire examination occupies approximately 153 pages of the record[5], while the prosecutor's examination occupies about 186 pages[6]. Of the second group, at the point when the trial court granted the state's challenge for cause and excused jurors Poniatowski and Caristi, the state's examination occupies 51 pages[7], and the defense had not yet had an opportunity to inquire. As in Williams v. State, supra, defense counsel was prevented from asking questions which were neither repetitive nor improper. Even assuming arguendo that the state had made a prima facie showing that Poniatowski and Caristi could properly be excluded according to the criteria set forth in Witherspoon v. Illinois, supra, (which appellant does not concede), counsel for the defense, if he wanted to keep these jurors, had both a right and a duty to object to their exclusion and to make an effort, through his own questioning of the jurors, to qualify them for service. See State v. Claiborne, 397 So.2d 486 (La. 1981); State v. David, 425 So.2d 1241,1249-50 (La. 1983)(right to rehabilitate); Paramore v. State, 229 So.2d 855,858 (Fla. 1969); Brown v. State, 381 So.2d 690,693-94 (Fla. 1980); O'Bryan v. Estelle, 714 F.2d 365,376-78 (5th Cir. 1983)(duty to rehabilitate).

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5 See R.124-206,264-77,288-99,310-21,343-54,371-79,393-410.

6 See R.30-115,214-64,302-10,325-43,355-68,381-93.

7 See R.432-483.

In State v. Claiborne, 397 So.2d 486,487 (La. 1981), the Supreme Court of Louisiana[8] wrote:

> The issue in this case is whether a defendant is denied his constitutional right to a full voir dire examination of a prospective juror when the trial court sustains a prosecution challenge for cause without affording defense counsel an opportunity to examine the venireman. We hold that, when a defense attorney is precluded from voir dire examination of a prospective juror which may have demonstrated the juror's ability to render an impartial verdict, the granting of a prosecution challenge for cause by the trial court deprives an accused of his right to full voir dire examination.

The Court emphasized that the right to a full voir dire examination "includes the right to make such inquiries of prospective jurors as will enable him to secure his constitutional rights not only by showing grounds for challenges for cause, but also by eliciting facts which will empower him intelligently to exercise his right of peremptory challenge (citations omitted), the right to address, hear and observe the veniremen directly and as individuals (citation omitted), and the right to examine a prospective juror challenged for cause by the prosecution in order to demonstrate his impartiality (citation omitted)." State v. Claiborne, supra, at 489. See also State v. Penns, 407 So.2d 678,682 (La. 1981)(applying Claiborne to death-qualification voir dire in capital case, and concluding that, since defense counsel was allowed to question the prospective jurors and had the opportunity to rehabilitate them, defendant's Claiborne argument was refuted by the record); State v. David, 425 So.2d 1241,1249-50 (La. 1983)(discussing Claiborne in context of death-qualification voir dire in capital case; issue held moot because of reversal of death sentence on other grounds); State v. Owens, 284 S.E.2d 584 (S.C. 1981)(two

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8 In Louisiana, the right to "full voir dire examination" is guaranteed under the state constitution. In Florida, the right to an oral examination conducted by counsel of each prospective juror is guaranteed by a Rule of Criminal Procedure, adopted to effectuate the fundamental right to select a fair and impartial jury. Williams v. State, supra. Appellant submits that the rationale of Claiborne is fully applicable to the Florida rule, especially where, as in the instant case, the ground upon which the state successfully challenged the jurors for cause, and upon which the defense was denied the opportunity to rehabilitate, is one of constitutional dimension.

prospective jurors were disqualified by the court when they indicated opposition to the death penalty; defense counsel was not permitted to examine them; this was error under South Carolina statute establishing right of counsel in capital cases to question jurors on voir dire, but issue was moot since defendant was sentenced to life imprisonment).

The opinion in State v. Claiborne, supra, at 489-90 closes as follows:

> Our conclusion that full voir dire examination includes the right to examine a prospective juror for purposes of demonstrating his impartiality is buttressed by the numerous cases in which this court has condoned a trial court practice of permitting prosecuting attorneys to employ voir dire examination to rehabilitate and establish the impartiality of prospective jurors who initially expressed an opinion or impression of the defendant's guilt or innocence. This court has repeatedly dismissed a defense argument that its challenge for cause was improperly denied by observing that the juror, when questioned further by the prosecutor and the court, demonstrated a willingness and ability to decide the case impartially, according to the law and the evidence. [Citations to 13 cases omitted]. The United States Supreme Court has observed that while the trial court is vested with broad discretion as to questions to be asked during voir dire, that discretion is "subject to the essential demands of fairness." Aldridge v. United States, 283 U.S. 308,310, 51 S.Ct. 470,471, 75 L.Ed. 1054, 1056 (1931). We think these essential demands of fairness require that the defense counsel be given the same chance at rebuttal and rehabilitation of prospective jurors that we have consistently afforded the prosecution.

State v. Claiborne, supra, at 489-90.

Like its Louisiana counterpart, this Court has also rejected defense arguments that a challenge for cause was improperly denied, by observing that the juror, when questioned further by the prosecutor and the court, demonstrated a willingness and ability to decide the case impartially, according to the law and the evidence. See Fitzpatrick v. State, 437 So.2d 1072,1075 (Fla. 1983)(Ironically, appellant anticipates that the state will rely heavily on the Fitzpatrick opinion in trying to justify the trial court's denial of appellant's challenges for cause to the "automatic death penalty" jurors). As the Louisiana Supreme Court candidly observed, it cuts both ways. See also Crawford v. Bounds, supra, at 303-04.

The right to rehabilitate was implicitly recognized by this Court in Paramore v. State, 229 So.2d 855,858 (Fla. 1969), in which it said:

> If [a] defendant objects to a prospective juror being excused he should make his objection before the juror is excused. Ellis v. State, 25 Fla. 702, 6 So. 768 (1889). When these three prospective jurors expressed their convictions against the infliction of the death penalty, appellant's attorney made no effort to qualify them for service. Perhaps he did not want them for some other reason. It was not the duty of the trial court to take other steps toward attempting to qualify the veniremen, and the Witherspoon case, supra, should not be construed as imposing this additional duty upon the trial court in the absence of any expression of a desire by defense counsel to keep the prospective jurors. Pittman v. State, 434 S.W.2d 352 (Tex.Cr.App. 1968). See also State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968). The appellant is in no position to complain in the instant case because no objection was interposed, nor did defense counsel attempt to clarify the juror's attitude as it related to his or her ability to decide the issues impartially.
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> See also Brown v. State, 381 So.2d 690,693-94 (Fla. 1980).

Similarly, in O'Bryan v. Estelle, 714 F.2d 365,376-77 (5th Cir. 1983), the Fifth Circuit Court of Appeals rejected O'Bryan's argument that the exclusion of a juror, Wells, violated the Witherspoon requirements:

> The [State] maintains that it clearly established Wells' automatic opposition to the death penalty during its initial examination of him. Having done so, the State argues that if the petitioner wished to rehabilitate Wells as a juror successfully, it was incumbent upon defense counsel to take his inquiry into Wells' ability to answer the statutory questions one step further by clarifying, on the record, whether Wells understood the possible effect of his answers to those questions. The State argues that, since the defense failed to take that step, the exclusion of Wells on the basis of his initial unequivocal statements of automatic opposition to the death penalty was proper. We agree with the State.
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> A fair reading of Well's testimony in response to the initial questioning by the State and by the trial court indicates that Wells stated clearly, forcefully and without any equivocation that he would automatically vote against the imposition of the death penalty no matter what the trial revealed. Had the voir dire ended with the court's questioning, the State would clearly have properly obtained the exclusion of Wells under Witherspoon. If the defense wished to rehabilitate Wells by demonstrating that he could obey the law regardless of his opposition to the death penalty, perhaps because of the distinction between the jury as the fact-finder and the judge as the sentencer that Ward found persuasive in Cuevas, then it was incumbent upon the defense to establish, on the record, Wells' ability to engage in that fact-finding function with knowledge of the possible effect of those findings on the defendant's fate. This the defense failed to do. Accordingly, we hold that the exclusion of Wells on the basis of his initial clear and unequivocal statements that he would automatically vote against

the death penalty no matter what the trial revealed was proper under Witherspoon and its progeny.

The Court then summarized:

> The State established Wells' unequivocal opposition to the death penalty beyond speculation; it was then incumbent upon the defendant, if he wished to rehabilitate the juror, to ask enough questions to demonstrate that Wells could perform his fact-finding function in spite of his opposition to the death penalty.

O'Bryan v. Estelle, supra, at 378.

When defense counsel is denied an opportunity to rehabilitate, it not only eliminates any possibility that he will be able to qualify the juror for service in the trial, it also prevents him from making a record for appeal of the court's Witherspoon ruling. Application of the Witherspoon rule is a mixed question of law and fact subject to independent review by an appellate court. Darden v. Wainwright, __F.2d__ (11th Cir. 1983)(case no. 81-5590, opinion filed February 22, 1984). The appellate court may accord some deference to the trial court's conclusions, since he has had an opportunity to hear the venireperson's responses and observe his demeanor, but "the prescribed independent appellant review of mixed questions of fact and law and Witherspoon's strict rule that venirepersons make unmistakably clear their automatic opposition to capital punishment ultimately require an appellate court to reach its own judgment on the question whether a venireperson was improperly excluded from a jury." Darden v. Wainwright, supra. By preventing the defense from attempting to rehabilitate the juror, the trial court artificially and improperly restricts the scope of review. The only voir dire testimony available to be reviewed is the juror's responses to the state's leading questions, framed to elicit a simple "yes" or "no" answer. Once the prosecutor has elicited a response which, in the absence of further inquiry, would disqualify the juror under Witherspoon, he obviously has no incentive to make that further inquiry; it is to his advantage to drop the matter right there. [In Barker v. Randolph, supra at 113, it was noted that "[i]t is not likely that the party in whose favor the juror's attitude slants will pursue a line of questioning designed to de-

velop the bias or prejudice of the juror." Similarly, it is not likely that the party who wishes to have the juror excluded for cause will pursue a line of questioning which might reveal that he is qualified to serve]. At that point, the burden shifts to the defense to try to rehabilitate the juror. See Paramore v. State, supra; O'Bryan v. Estelle, supra.

In Mead v. State, 645 S.W.2d 279 (Tex.Cr.App. 1983), the issue was whether the trial court erred in excusing juror Espindola on the basis of his beliefs regarding the death penalty. "The record reflects that Espindola, by the initial responses he gave to questions asked by the prosecuting attorney during voir dire examination, which responses indicated Espindola's views of the death penalty and the stance he would take in answering the special issues, appears, at that point in time, to have been disqualified from serving as a juror in this cause." Mead v. State, supra, at 283 [emphasis in court's opinion]. Subsequently, however, "[d]efense counsel effectively rehabilitated Espindola by asking explicit, clear questions to which Espindola gave clear, definite answers, showing that despite his feelings against the death penalty, he could and would truthfully answer all of the special issues according to the evidence adduced." Mead v. State, supra, at 283. The Texas Court of Criminal Appeals therefore held that the trial court committed reversible error in granting the state's challenge for cause and excluding Espindola over objection. Mead v. State, supra, at 283.

Mead demonstrates that even when the juror's responses to the state's initial examination establish a prima facie showing that he may be disqualified for cause without violating Witherspoon, nevertheless, his subsequent responses to defense examination can successfully rehabilitate him to the point where his exclusion does violate Witherspoon. Yet, if the trial court in Mead had excluded Espindola without allowing the defense an opportunity to rehabilitate him, then the record on appeal would have included Espindola's responses to the prosecutor's questions, and nothing else. Mead would not only have been deprived of his right to examine the juror and attempt to qualify him, he would also have been effectively deprived of

his right to appeal the "buried" Witherspoon error. In this sense, when a juror is excluded for cause on the basis of his opposition to the death penalty, and the court refuses to allow the defense any opportunity to examine the juror, the error is equivalent to a denial of the right to proffer testimony. See e.g. Pender v. State, 432 So.2d 800, 802 (Fla. 1st DCA 1983); Piccirrillo v. State, 329 So.2d 46,47 (Fla. 1st DCA 1976); Francis v. State, 308 So.2d 174,176 (Fla. 1st DCA 1975). In order to "ensure full and effective appellate review" [Pender v. State, supra at 802], of a trial court's Witherspoon ruling, it is essential that neither party be deprived of an opportunity to make a record, especially since the issue is a mixed question of law and fact upon which the appellate court must make an independent determination. Darden v. Wainwirght, supra. How can the appellate court make an independent determination of the legal effect of the prospective juror's responses to defense counsel's examination, when the trial court refuses to hear any responses or allow any examination?

The trial court in the present case evidently made up his mind in advance that no matter what the prospective jurors might say, he would not consider any possibility of rehabilitation ("they would not be heard to change their minds in an hour" (R.485, see R.484)). This was wrong as a matter of due process and basic fairness, especially since the trial court had allowed the state to rehabilitate jurors, and since the court had even expressly found that one automatic death penalty juror had "finally seen the light" (R.413). It was wrong as a matter of law, since it is possible that a juror's responses to defense counsel's examination may rehabilitate him to the extent that his excusal for cause would violate Witherspoon. Mead v. State, supra. The trial court decided in advance that if he allowed defense counsel to attempt to rehabilitate jurors Poniatowski and Caristi, and if they gave responses indicating that despite their opposition to the death penalty they could and would return a verdict based on the law and the evidence, he would reject their testimony as not credible. Thus the trial court rejected testimony (which may or may not have been the testimony the jurors would actually have given) without having "an

opportunity to hear the venirepersons' responses and observe their demeanor" [Darden v. Wainwright, supra]. This was an abuse of discretion, or perhaps more accurately, a refusal to acquire the information necessary for a just and proper exercise of discretion. See Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970). Finally, the trial court was wrong in perceiving it to be simply a question of whether the jurors would be "heard to change their minds". The prosecutor, in his voir dire examination, basically sought to identify the "death-scrupled" jurors, pin them down to a Witherspoon-excludable position with leading questions, and move on (see R.439-41). Neither Poniatowski or Caristi were ever asked whether they thought that, notwithstanding their opposition to the death penalty, they could return a verdict according to the law and the evidence. Neither juror was asked whether they could think of any circumstances under which they could consider recommending the death penalty. As anyone familiar with trial techniques, psychology, or the Gallup Poll is well aware, how you frame the question goes a long way toward determining the answer. This is why it is essential that when the state seeks to disqualify a "death-scrupled" juror, the defense must be allowed a reasonable voir dire examination to demonstrate, if it can, that the juror cannot constitutionally be excluded under the Witherspoon standards. Ms. Caristi, in particular, when asked "Under no circumstances do you think you could recommend the death penalty?," answered "Not in this case." What does that mean? It would have been entirely appropriate for defense counsel to have asked her whether her answer was based on facts of the case she had learned from pre-trial media coverage[9] and, if so, whether she could put any opinion she may have formed aside and return verdicts (as to both guilt and penalty) based solely on the evidence adduced at trial. If she could do so, she would be qualified to serve as a juror [see Murphy v. Florida, 421 U.S. 794 (1975); Dobbert v. State, 328 So.2d 433 (Fla. 1976); Straight v. State, 397 So.2d 903 (Fla. 1981)], and her exclusion would

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9 Pre-trial publicity was extensive in this case (see R.1512-29,1562-76), and many prospective jurors had been exposed to it (R.277-88,419-25). Ms. Caristi indicated that she had read something about it "briefly" (R.422).

be violative of Witherspoon. Moreover, "[o]nly the most extreme and compelling prejudice against the death penalty, perhaps only or very nearly a resolve to vote against it blindly and in all circumstances is cause to exclude a juror on Witherspoon grounds." Burns v. Estelle, supra, 592 F.2d at 1300; Darden v. Wainwright, supra. Jurors "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." Witherspoon v. Illinois, supra, 391 U.S. at 522 n. 21. If the defense had had an opportunity to examine Ms. Caristi, such examination might well have revealed her position to be: "I am morally opposed to the death penalty. There are a few circumstances in which I might be able to recommend it, but this case, from what I know of the facts, is not one of them. However, I am willing to put aside my extrajudicial knowledge and reach my verdict based only on the evidence presented at trial." Such a position would not disqualify her as a juror -- if she were excluded for cause it would be in violation of Witherspoon -- and would not be inconsistent with her statements to the prosecutor. See Burns v. Estelle, supra, 592 F.2d at 1301.

Finally, the questionto which Ms. Caristi answered "Not in this case" was framed in terms of "do you think" under no circumstances you could recommend the death penalty. Her answer, then, was that in this case she didn't think she could. Since the state is not entitled to a jury of twelve persons all of whom know or at least think they can impose the death penalty in this case, or in any particular case [see Witherspoon v. Illinois, supra, 391 U.S at 522, n. 21; see also Crawford v. Bounds, supra, at 312], the excusal for cause of Ms. Caristi, even apart from the various arguments relating to the denial of defense voir dire examination, was error on pure Witherspoon grounds. See also Granviel v. Estelle, 655 F.2d 673,677 (5th Cir. 1981), in which a prospective juror, when asked if he could ever vote to inflict the death penalty, replied "No, I don't think I could" (emphasis in court's opinion); then in response to question "You just don't feel like you would be en-

titled to take another person's life in that fashion?" said "No, I could not" (emphasis in court's opinion); the Fifth Circuit Court of Appeals held that these questions and answers fell short of the unequivocal, unambiguous commitment to automatically vote against the death penalty regardless of the evidence necessary to permit the juror's exclusion for cause in accordance with Witherspoon[10].

Ms. Caristi's responses to the prosecutor's questions were not sufficiently unequivocal and unambiguous to justify her excusal for cause; thus, even ignoring the distorting effect of the one-sided voir dire, her disqualification violated Witherspoon. Under the totality of the circumstances, and considering the fact that the defense was deprived of any opportunity to examine or rehabilitate them, the exclusion of both Caristi and Poniatowski was at best premature -- this also amounts to a violation of Witherspoon. See Burns v. Estelle, supra. This is per se reversible error. See Davis v. Georgia, 429 U.S. 122 (1976); Burns v. Estelle, supra, at 592 F.2d 1300; Witt v. Wainwright, supra, at 1083; see also Chandler v. State, 422 So.2d 171,174 (Fla. 1983)(recognizing that the plain language of the majority opinion in Davis v. Georgia, supra, precludes application of a "harmless-error" test). At a minimum, reversal of appellant's death sentence is constitutionally required. Davis v. Georgia, supra; Burns v. Estelle, supra; Chandler v. State, supra. Appellant further submits that reversal of his conviction is mandated as well. Grigsby v. Mabry, supra.

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10 In Witt v. Wainwright, 714 F.2d 1069,1083 (11th Cir. 1983), in which the Eleventh Circuit Court of Appeal held, as in Granviel, that the excusal of a juror who said she thought her beliefs about the death penalty would interfere with her judging the guilt or innocence of the defendant was a violation of Witherspoon, the Court emphasized that it was not adopting a per se "I think" rule; the use of the qualification "I think" is to be evaluated by the appellate court as "a part of the total circumstances of the voir dire, although a justifiably important part." In the instant case, the prosecutor never asked Ms. Caristi anything more unequivocal than "Do you think?", Ms. Caristi, never said anything to resolve the ambiguity of "Not in this case", and defense counsel never got a chance to examine her at all.

D. The Conduct of the Voir Dire in this Case Amounted to a Denial of Due Process and a Departure from the Essential Demands of Fairness.

In closing this long argument, appellant contends that, of all the various errors he has asserted, the single most appropriate ground for relief is that the overall conduct of this voir dire, and particularly the double standard employed in allowing the state to rehabilitate the definite or possible "automatic death penalty" jurors while preventing the defense from rehabilitating (or even examining at all) the definite or possible "automatic life sentence" jurors, amounted to a denial of due process and a departure from the essential demands of fairness. See United States v. Hawkins, 658 F.2d 279,283 (5th Cir. 1981); United States v. Gerald, 624 F.2d 1291,1296 (5th Cir. 1980)(although a trial court has broad discretion in its conduct of voir dire, this discretion is limited by the requirements of due process); Aldridge v. United States, 283 U.S. 308,310 (1931); United States v. Nell, 526 F.2d 1223,1229 (5th Cir. 1976); Leon v. State, 396 So.2d 203,205 (Fla. 3d DCA 1981); Peek v. State, 413 So.2d 1225,1226 (Fla. 3d DCA 1982); State v. Claiborne, 397 So.2d 486,489-90 (La. 1981)(trial court's discretion in conduct of voir dire is subject to the essential demands of fairness). The essential demands of fairness "require that defense counsel be given the same chance at rebuttal and rehabilitation of prospective jurors" as the prosecution is afforded. State v. Claiborne, supra, at 490. In a capital case, in which the accused has a constitutional right that no juror be excluded for cause by reason of his opposition to the death penalty unless his voir dire examination unmistakably reveals that he would automatically vote against a death sentence in all circumstances and without regard to the evidence, it becomes that much more imperative that fundamental principles of fairness be observed. See Crawford v. Bounds, supra, at 303-304 ("Denial of equal treatment in the manner of [jury] selection inevitably resulted in denial of due process"). Immediately prior to the selection of this jury, the trial court, in denying defense counsel's request to questionthe panel first, promised "You will both be given a

full opportunity to fully examine each prospective juror, and ask all those questions you need" (R.18). His failure to follow through on this promise deprived appellant of fundamental rights and transgressed the essential demands of fairness.

ISSUE II

THE INTRODUCTION OF IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF INADMISSIBLE COLLATERAL CRIMES, AND OF APPELLANT'S FLIGHT FROM POLICE OFFICERS ATTEMPTING TO ARREST HIM FOR THOSE COLLATERAL CRIMES, DEPRIVED APPELLANT OF A FAIR TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Trial Proceedings.

Appellant was originally charged, in separate indictments, with the robbery and murder of Terrance Drysdale in Escambia County on December 31, 1982 (R.1294) and with the robbery and murder of Betty Rector Cameron in Santa Rosa County on January 2, 1983 (R.1295). The state gave notice of its intent to introduce collateral crime evidence in the Santa Rosa County case; specifically, evidence of the aforementioned Escambia County robbery-murder, and also evidence of the crimes (charged in a six-count information) alleged to have occurred in Escambia County on January 27, 1983 (R.1508-11). This information alleged, inter alia, that appellant committed an armed robbery (with a firearm) upon Carolyn Ward with intent to take a 1983 Cadillac belonging to Mitchell Motors, Inc.; that appellant attempted to kidnap Carolyn Ward by ordering her to get into the trunk of an automobile; that appellant unlawfully operated a motor vehicle in that he fled in an attempt to elude a law enforcement officer; and that appellant unlawfully drove a vehicle recklessly and with a willful andwanton disregard of the person and property of persons traveling along State Road 297 (R.1509-10). Subsequently, on motion of the defense, the December 31, 1982 and January 2, 1983 robbery-murder cases were consolidated, and directed to be conducted in Escambia County (R.1577-79).

Before the trial commenced, the defense requested an order in limine prohibiting the state from introducing evidence relating to the circumstances of appellant's arrest on January 27, 1983 (R.556-57). Defense counsel argued that such evidence would

be irrelevant to the charged crimes, and would tend only to show bad character (R. 557). Counsel emphasized that he was not moving to suppress the evidence that was taken in conjunction with the arrest (notably the revolver and bullets); he was challenging only the admissibility of the circumstances surrounding the arrest (specifically the robbery and attempted kidnapping of Carolyn Ward, the theft of the Cadillac, and appellant's attempt to elude the police and the ensuing car chase) (R.557).

The following discussion then took place:

> MR. HENSEL [prosecutor]: Judge, I think it's important to make sure the Court understands that the facts in question here, basically what we have are two separate murder occurrances. One on New Year's Eve, the other one January 2nd. Subsequently, on January the 27th, 1983, the evidence would show that this Defendant approached a local car lot, went for a test drive with the car saleswoman, produced a revolver from a valise carried with him, and put in that car by that Defendant. He ordered her into the trunk, and she ran across the parking lot fleeing for her life.[11] She notified the authorities. They put out a description of he and the vehicle. And in essence, what we have then were several law enforcement officers who made an attempt to apprehend him. We will have testimony showing he attempted to elude several officers, a high speed chase, went through road blocks, and was finally apprehended fleeing across a field with a valise in one hand and that loaded .357 in the other, and that is the gun that is the only evidence we have, circumstantially, to link the Defendant to the case. We have got some other witnesses to help link him, but is a key part of the testimony, and the key part of the State's case.
>
> THE COURT: All right. Please describe for me any similar facts between that incident and any of the others, and any of the crimes charged?
>
> MR. HENSEL: Judge, I don't believe, under the Williams' Rule decision, we are required to show similar facts. I believe that we can offer this evidence, that is the interaction he had with the Cadillace saleswoman, and the subsequent use of the gun, to show evidence of flight. I will cite the case to the Court, several cases. I have done significant research on the case law. Specifically in State versus --[12]
>
> THE COURT: His decision to flee twenty-five days after his last --
>
> MR. HENSEL: Yes, sir.
>
> THE COURT: --criminal act?

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11 In conjunction with his argument against appellant's motion for mistrial, the prosecutor profferred a more complete version of Carolyn Ward's testimony concerning the January 27 incident, see R.1001-04.

12 The prosecutor is apparently referring here to this Court's decision in Straight v. State, 397 So.2d 903 (Fla. 1981), which will be discussed infra.

MR. HENSEL: In this case, the man was charged in Florida, and he fled, and was in the State of California, and when police tried to apprehend him there, he fired at the police officer.

THE COURT: He had fled from Florida, and then he fled again in California?

MR. HENSEL: Yes, sir; that's correct. The Court held that that was admissible evidence, even though it was evidence of other crimes or acts. It was certainly admissible. Says, when a suspected person in any manner attempts to escape or evade prosecution by flight, concealment, resistance to lawful arrest or any other indication after the fact of desire to evade prosecution, such fact is admissible knowledge relevant to the consciousness of guilt, which may be inferred from such circumstances.

THE COURT: Excuse me. This flight was from police officers in California?

MR. HENSEL: Yes, sir, and the offense in question in which this evidence was offered occurred in the State of Florida.

THE COURT: And he already fled Florida?

MR. HENSEL: Yes, sir.

THE COURT: And then when he was approached by officers in California, he fled the officer in California?

MR. HENSEL: Yes, sir. The Court said, in this case, we hold the --

THE COURT: Excuse me, Mr. Hensel, who was he fleeing from when he was trying to steal a car in Florida, in this case? You are alleging he was fleeing from whom; the car salesman?

MR. HENSEL: No, sir. I am saying that he stole the car in Florida, and when he pulled the gun originally -- I have got a different argument on the gun, itself, Judge, as far as when he pulled it on that Cadillac saleswoman. I think the gun is relevant because that gun has been hinged to both these murders. His ownership, possession, custody, and control of that gun is relevant, and I think it is certainly relevant, and the whole Williams' Rule case holds it's a question of relevancy, and it's certainly relevant to go to his mode, manner, and method of exercising control over that weapon when he was holding it in his hand, pointing it at that Cadillac saleswoman. It's a much different situation if he is exercising that type of care, ownership, custody or control over that weapon than driving around with it locked in the glove box, and the Jury is entitled to hear it.

THE COURT: All right. Motion in Limine is going to be granted.

MR. JOHNSON [second prosecutor]: Could I --

THE COURT: You will be permitted when you are examining the witness that apprehended the Defendant, of those witnesses you will be permitted to lead them to the extent that it will help avoid any overlapping of discussions of the circumstances of that crime. That is, did they

apprehend him? At the time they apprehended him, did they conduct a search of the person, and where on him did they find the weapon, and so forth, and continue to describe it without going into the details of the kidnapping. That's solely for the purpose of your case in chief. That's not saying it will be precluded for every purpose.

MR. HENSEL: Judge, I have several other cases, and I think it's important that the Court understand these lines of cases before it makes a ruling. I think it's certainly relevant information and I ask the Court to at least review these cases before it makes its ruling.

THE COURT: I just did. So, that's the ruling. Gentlemen, you have anything else to take up before we proceed?

MR. JOHNSON: Judge, will you reconsider this at the time it is admissible? We are dealing with two separate issues. One is the separate use of the gun. There is case authority in Florida that says subsequent or previous use of that gun can in fact be introduced to show his possession or how in fact be introduced to show his possession or how in fact he obtained that gun. The use of Williams' Rule, evidence is not necessity, but relevance. We have case authorities to substantiate that. It's very clear that flight after the commission of a crime can in fact be introduced to show his knowledge or his intent to evade prosecution.

THE COURT: I just heard all that argument, Mr. Johnson. I am not going to hear that argument again. What has been described for me was a flight when the woman got away from him. All I know is he was stealing a car, based on the evidence you have presented. Any indication of what was said, that he was stealing the car to leave the State of Florida or anything else, he fled from officers, not when he tried to steal the car or kidnap the woman. I don't see where that fits under the character in the case of California that you described at all. You can argue interminably, but you can do it outside. We will not discuss it in here.

MR. JOHNSON: We might submit you a brief on the fact, if you might consider -- or this particular case here involves a prosecution where the Defendant fled Florida, and was apprehended in North Carolina, after stealing the car in Florida. They said that was evidence of his flight, that he stole a car in Florida, and evaded prosecution.

THE COURT: Well, in this instance, he never even got out of the State of Florida. He tried to steal a car, and kidnap a woman, and he could have been going to South Florida for all we know about the facts of this case. I will not change my ruling.

MR. HENSEL: Let me be sure I understand so I conduct an opening statemen properly, what portion of the Motion in Limine the Court has granted.

THE COURT: The facts of other crimes not charged on the 27th of January, kidnapping and car theft, the fact of apprehension and possession of that firearm, identification of that firearm, and where it was at the time he was apprehended is going to be admissible, unless they raise the question about the circumstances of the seizure of the firearm. If they do, the door is wide open, and you can put it all in.

MR. HENSEL: The evidence of his flight from officers after they were alerted that he had committed an offense, none of that is going to be admissible? I have got him running road blocks, going over a hundred miles down the road, police officers in hot pursuit, trying to ram officers head-on, patrol cars running into each other --

THE COURT: Evidence of kidnapping, give me the scenario again. You have a kidnapping, attempted kidnapping?

MR. HENSEL: He pulled a gun on a Cadillac saleswoman. She fled. He got in the car and took off. That was reported to the police, be on the lookout for a maroon Cadillac, and a description of the driver. Officer saw that Cadillac, and saw that driver. And when he saw them -- And he saw him, he took off. And he went through -- I have got six or seven officers to testify about his activity.

THE COURT: Theft of the automobile, and attempted kidnapping are out. And, as I indicated, you will be permitted to lead your witness to avoid that. They were on the lookout for a suspect that was identified. They pursued him, and at that point forward it's coming in.

MR. TERRELL [defense counsel]: Your Honor, My Motion in Limine goes to the extent that I am requesting that the circumstances of the pursuit --

THE COURT: Well, you lose on that one, Mr. Terrell. I have ruled on that one, but I will tell you attempted kidnapping and theft of the automobile, the incident involving the salesman and the pulling of the gun, that instance is out. But, the flight from the officers, the arrest and the discovery of the weapon, you can go from that point forward.

MR. TERRELL: May I state my grounds, Judge?

THE COURT: State your grounds and get them on the record, and let's get started.

MR. TERRELL: My grounds are the circumstances of a flight immediately after he is accused of attempting to kidnap, and accused of robbing this lady of this car, are circumstances relating to possibly that offense, and I think the State's is [estopped] from denying the fact that they have charged him by Information in this Circuit that is set for trial next week, and that's a separate criminal act. This flight can be, at best, interpreted because of the time frame being immediately after that incident with the BOLO there to establish nothing more than fleeing from that particular incident. It is a flight of imagination to conclude that that is an inference of guilt relating to these offenses some one month before, and that's the basis for the Motion in Limine, as to the circumstances of the officers alleging chasing him.

THE COURT: Thank you. You all ready for the Jury?

MR. HENSEL: Judge, I have one other problem with this scenario. What am I going to tell this Jury, as far as in evidence, about the reason why these officers were pursuing this man, if we don't have the evidence of the car theft?

THE COURT: Well, I don't really want to tell you what to tell them, except you can tell them he was apprehended by the officers, and he was fleeing from them.

MR. HENSEL: High speed pursuit?

THE COURT: And they recovered the weapon, not going to talk about the kidnapping and attempted robbery or robbery in this instant.

(R.557-67).

In his opening argument, the prosecutor told the jury that on January 27, 1983, police officers were alerted to be on the lookout for a Cadillac and a driver, of whom they had a description (R.588). When the officers saw him he "took off"; "first he was heading on the Interstate, then he took off up Pine Forest Road, seen up near Tate school, turned around, evading the officer, doing over a hundred miles an hour". (R.588). The prosecutor told the jury "You will hear about road blocks set, trying to ram police cars." (R.589). Finally, by another roadblock near the fair grounds "he stopped and bailed out of that Cadillac" (R.589).

Toward the middle of the trial, the state called as a witness Hubert Smith, the owner of a used car lot, who testified that on January 27, 1983, at about 1:30 or 2:00 p.m., he paid appellant $1500 cash for a 1970 Barracuda convertible (R.780-83). Defense counsel objected to Smith's testimony, renewed his motion in limine, and said:

> . . . any testimony from him saying that on the 27th he bought the Defendant's Barracuda, and then testimony from other witnesses later on saying they were in hot pursuit of a fellow with a Cadillac on the same day, just within hours of it, puts us in a posture where, for the purposes of our defense, I am virtually going to be required to place my Defendant on the stand and have him say, "Yeah, I took the car from the lady at Mitchell Motors," and having him admit to another crime to explain the reason for fleeing the police on that day, a month after these incidents. It's totally irrelevant to these incidents. So, my objection is twofold. One, irrevlevant that my client sold the car on a particular day. He has other witnesses who can testify, if he wanted to find he was in possession of a Barracuda automobile during December and January, whether he had it in late January before he was arrested; it has no bearing on the case. And in addition, it strongly affects any strategy we may have in trying to determine whether or not to place my client on the stand.
>
> THE COURT: Well, I don't accept the conclusion he is going to have to get up there and testify he stole that Cadillac car, and I am not going to preclude the State from showing his ownership of that specific car. The other people are going to identify it as having seen it in the vicinity where they also saw him. So, your objection is overruled, and I am going to allow him to testify. And your strategy will be a matter for you and your client to determine. And I don't necessarily agree with you that you are going to be compelled to make him testify to others crimes.

MR. TERRELL: Your Honor --

THE COURT: He could have bought that car. We are not going to let them testify as to why they were looking for him.

(R.773-75).

* * * * * *

MR. HENSEL [prosecutor]: Judge, just so we can clear it up right now, I intended, when Mr. Smith takes the stand, to ask him the circumstances on January 27, when he purchased that automobile from this Defendnat, get him to identify photographs of that automobile, and in addition, after the purchase was completed, Mr. Smith gave him a ride to where the Defendant directed him to take him. When he let that Defendant out, he was headed toward the Cadillac dealership, and I intend to bring all that out in my Direct Examination.

MR. TERRELL: Your Honor, this is the point of my Motion in Limine. They are dancing all around the incident inferring, the whole inference is there was a crime committed or why would they be on the lookout for this Cadillac, if he is trying to show he was walking toward the Cadillac dealership.

THE COURT: What is the reason for having him testify as to where he took him?

MR. HENSEL: Judge, I think it's relevant because of what the Defendant told him. He told him, he said, "I need a ride to the airport. I am going to meet a friend. How about letting me out at the Cadillac dealership, that's where I am going to meet him." The dealer, last time he saw him, he was walking over toward the Cadillac dealership. The Jury is going to hear that the man just received $1,500.00 cash from Mr. Smith. They can draw their own inference, whether he purchased that Cadillac, made a down payment or whatever.

MR. TERRELL: Why would the police be on the lookout --

THE COURT: What I am trying to ascertain is what is the relevancy of any of this testimony, other than tying this Defendant to the car that's going to be identified by somebody else? What difference does it make whether he was going to meet somebody at Gulf Power or Mitchell Motors or in Timbuktu unless he was intending to be in a flight situation by saying he was going to the airport?

MR. HENSEL: Judge, I think the full circumstances are relevant. I think it is important to show this Jury, that on that day and time, he sold a car.

THE COURT: Why is that relevant, other than to tie him to the car?

MR. HENSEL: I will not pursue it, Judge.

THE COURT: Thank you because I think all you are going to be doing is suggesting great inference. They were looking out for him because he stole a brand new Cadillac from Mitchell Motors, and we will stop

right here on that one.

MR. HENSEL: I will concede the point.

(R.777-79).

After Hubert Smith testified, the state called William Chavers, the first of seven Escambia County sheriff's deputies to testify with regard to the high speed chase and apprehension of appellant (R.786). Defense counsel renewed his motion in limine and requested a continuing objection (R.785). The trial court expressed the view that his ruling on the motion in limine was sufficient to preserve the issue for appeal (R.785-86), but added "You don't have to pop up and down. If it will stop you from popping up and down, Terry, I will overrule your objection (R. 786).

William Chavers testified that on January 27, 1983, he received a BOLO on his radio for a maroon Cadillac, late model, driven by a white male in a business suit (R.786). A car fitting that description subsequently passed him on the Interstate (R.78u). Chavers, who was in full uniform and driving a marked unit, turned around and began to follow the Cadillac, which accelerated to a high rate of spped and turned off at the Pine Forest exit ramp (R.787). Due to traffic, Chavers was unable to follow the car off the exit ramp (R.787). He radioed its last known location (R.788).

Deputy Sheriff D. L. Rowland heard the BOLO broadcast for a maroon late model Cadillac with a white male driver in a three piece business suit (R.789). Rowland sent one of his men, Henry Lewis, further south (R.789,792); Rowland then set up at the intersection of 29 and West Roberts Rd. and waited for 20-30 minutes (R.789-90). He then headed north on Tate School Rd., and the maroon Cadillac turned southbound onto Tate School Rd. right beside him (R.790). The man in the car matched the description Rowland had been given over the radio (R.791). [Rowland identified appellant in court as being the driver of the Cadillac (R.793-94)]. The driver "poured the coals on" and sped off (R.792). Rowland supposed he shoved the gas pedel to the bottom (R.792). Rowland, who was in full uniform and driving an un-

marked unit with a blue teardrop bulb, gave chase and reached speeds in excess of a hundred miles an hour, but the Cadillac outran him (R.791-92). Rowland radioed the car's location to other officers (R.792).

Deputy Sheriff Henry Lewis, who was in full uniform and driving a marked cruiser, heard the BOLO for a white male in a three piece suit driving a maroon late model Cadillac (R.798). He positioned himself at Pine Forest and Nine Mile Rd. (R.798). After hearing Sgt. Rowland broadcast that he was in hot pursuit of the vehicle, Lewis pulled up to a light, and the Cadillac came through the intersection heading south on Pine Forest at close to a hundred miles per hour (R.798-99). Lewis joined in the pursuit (R.799). The Cadillac "would go around cars on the opposite side of the road. He sometimes would go off the road onto the side of the road, the grassy portion, missing mailboxes, going over the edges of the driveways" (R.799). When Pine Forest split and became a four lane highway, the Cadillac, still heading south, got in the northbound lane, going against the traffic (R.799-800). The southbound lane was totally blocked with traffic; "cars were running off both sides of the road to keep from hitting him head-on" (R.800). About a quarter of a mile south of the Interstate, the Cadillac cut back across the median "on one of those paved turning parts" and got back in the southbound lane (R.800). "He goes around cars again, very erratical" (R.800). As they approached a roadblock around Long Leaf and Pine Forest, they were traveling at speeds at times exceeding one hundred miles an hour (R.800). They came over a little rise, and Lewis observed another cruiser coming down the median portion of the road toward them (R.800). The Cadillac went toward the other police cruiser "like he was going to sort of hit him head on", which caused the other cruiser to take evasive action, which resulted in its coming head on in the direction of Lewis' cruiser (R.801). Lewis applied his brakes and the other cruiser went sideways (R. 801). Lewis hit the back end of the other cruiser, spinning him around, and damaging the front end of his own vehicle (R.801). Lewis was not involved in the subsequent apprehension of appellant; he stayed with his disabled vehicle (R.801).

Lewis testified that, while chasing the Cadillac, he had his lights and sirens on (R.801). This had no effect on the driver of the Cadillac (R.801).

Deputy Sheriff Otis Davis was also involved in the attempted stop of the maroon Cadillac (R.803). He was on his way home when he heard Sgt. Rowland broadcast that he had spotted the suspect vehicle on Pine Forest Rd. coming south (R. 803). Davis, who was driving a plain car with a blue light and siren, set up in the median (R.803-04). He attempted to create a traffic jam to make the Cadillac take to the side of the road (R.804). Davis heard Sgt. Rowland saying he's going down the wrong side (R.804). The Cadillac, followed by Sgt. Rowland's cruiser, came over the rise, heading south in the northbound lane (R.804-05). Davis began pursuit (R.805). The Cadillac went under the Interstate and crossed back into the southbound lane (R.805). Davis was going over a hundred miles an hour and was not gaining much on him (R.805). A dispatcher came on and asked the location of the suspect vehicle; Davis gave the location of the Five Flags Race Track (R.805). He directed other officers to set up on Mobile Highway at Pine Forest (R.806). Davis saw a "commotion" down to the right, and radioed in that he thought the Cadillac had wrecked (R.806). As he got closer, he could see that it was a police cruiser which appeared to have spun out on the right-hand side (R.806). Davis lost track of the suspect vehicle (R.806).

Subsequently, Davis had occasion to go to the scene where appellant was finally apprehended (R.806). The Cadillac had taken a side street; it was on the north side of Mobile Highway and appeared to be against a power pole (R.806). Two officers were on the ground, handcuffing the driver; another officer was standing there with a shotgun (R.807). On the ground were a tan or brown attache case and a revolver (R.807-08).

Deputy Sheriff Harry Robert Gray attempted to assist in the apprehension of a suspect, described in the BOLO as a white male in a business suit driving a late model burgundy Cadillac (R.809-10). Gray had occasion to wreck his cruiser that day (R.810). He was northbound on Pine Forest, and moved into the median strip

in an attempt to block the Cadillac (R.810). Gray was in a marked unit and his lights and siren were going (R.810-11). As he topped the hill, the Cadillac was coming southbound at a high rate of speed (R.810). Gray testified that the driver of the Cadillac "attempted to aim his car right at me. At that point, I swerved my vehicle, and was hit by Officer Butch Lewis, in his marked cruiser" (R.810). The prosecutor repeated "And you say he tried to ram you head-on? (R.811). Gray said "Yes, he did." (R.811). On re-direct, the prosecutor twice again elicited Officer Gray's opinion that the driver of the Cadillac was deliberately trying to hit him head-on (R.812,813).

Deputy Sheriff David Hightower was involved in the attempted apprehension of the subject of the BOLO, a white male in a business suit driving a late model Cadillac proceeding southbound on Pine Forest Rd. (R.814-15). Hightower took up a position on Mobile Highway at Pine Forest (R.815). He heard a transmission that the suspect was out of the car, running across Mobile Highway (R.815). He looked out his window and observed a man in a dark suit trying to cross Mobile Highway on foot (R.815). The man would "[run] a short distance, fall, get up, fall, get up again" (R.815). Hightower turned his cruiser car around and turned on his blue lights (R.815). Several other police cruisers converged on the scene (R.815). An officer had his shotgun drawn on the suspect, who was running across a small field (R.815). Hightower got out of his cruiser and pulled his shotgun out; before he could get it to his shoulder, the suspect "whirled around" and very carefully laid his handgun and briefcase on the ground" (R.816). Hightower, with his handgun drawn, approached the suspect and ordered him to hit the dirt (R.816). The suspect immediately went face down in the mud, whereupon he was handcuffed and searched (R.816-17). [Hightower made an in-court identification of appellant as the person he saw running across the field who was subsequently apprehended (R.817)].

Corporal Thomas Jones of the Escambia County Sheriff's Department was called to the scene of the car wreck and apprehension to do some identification work

(R.820-21). Jones took several photographs of the vehicle and of the items of property seized from the suspect, including the weapon and the brown portfolio type folder (R.821,824-25). The trial court sustained defense objections as to two photographs of the automobile, and allowed the rest to go into evidence (R. 823). When asked by the prosecutor to describe to the jury State's Exhibit Number 48, Officer Jones testified, "State's Exhibit 48 reflects the right and front -- front and left side of the vehicle, which was in pursuit, and reported stolen" (R.825).

Defense counsel immediately objected and moved for a mistrial, and noted that the officer's statement violated the Court's ruling on the motion in limine (R. 826). The prosecutor asked for an instruction to the jury "as opposed to granting the Motion for Mistrial." (R.826). The trial court said:

> Mr. Hensel, I just knocked out Exhibits 46 and 47 because it shows Escambia County, Florida, license plates, and there is no way this man could have acquired those, and also have a set of Virginia plates between the time he sold this Barracuda and he went and bought himself a Cadillac. However, he acquired that Cadillac to avoid creating any inference of that kind, that it belonged to somebody else. I know that's the reason I sustained his objection to him.
>
> I am going to take your Motion for Mistrial under advisement, and I will, at the present time, instruct the Jury to disregard any gratuitous comments of speculation by this officer as to how any items in his possession were required.
>
> (R.826-27).

Defense counsel asserted that such an instruction would be inadequate (R.827). The Court said "You have your motion on the record, Mr. Terrell. That's all that is necessary" (R.827). The court then instructed the jury:

> ladies and gentlemen, you are going to disregard any speculation by this witness as to how any property came into this Defendant's possession, how it's described in any of those photographs, any gratuitous remarks by the witness, as to how the automobile or license tags or gun or anything else came into his possession, to be stricken, and entirely disregard that.
>
> (R.827).

Subsequently, in the absence of the jury, the trial court told the prosecutor

that Officer Jones' statement was in contravention of the ruling made on the motion in limine, and asked "Mr. Hensel, why shouldn't this Court grant that Motion for Mistrial and start this thing over again?" (R.993). The prosecutor reasserted his position that the testimony of Carolyn Ward, the Cadillac saleswoman, should be admitted (R.993-94). The court agreed to allow the state to proffer her testimony (R.994, see R.1001-04), but said "Let's assume I will not change my mind on the Motion in Limine. And you have a witness now who has volunteered to tell this Jury information I said they couldn't tell them." (R.994). The prosecutor then cited several cases in which a "curative instruction" was held to have been sufficient to alleviate the prejudice caused by an improper comment by a witness (R.994-1000). The trial court pointed out, and the prosecutor conceded, that none of those cases involved a violation of "a preliminary ruling by the Court on a Motion in Limine, telling the state that none of that evidence will be admissible." (R.997). The prosecutor contended that this made no difference (R.997). The prosecutor further argued:

> MR. HENSEL: In this particular case, Judge, Officer Jones' statement was merely that that was the car reported stolen and in pursuit. He never said the Defendant stole it. There is no evidence or testimony that the Defendant knew the car was stolen or anything of the sort.
>
> THE COURT: It doesn't take a mental giant to figure out who they were talking about.
>
> MR. JOHNSON [second prosecutor]: Still, Judge, no allegation of criminal conduct, on the part of this Defendant, that he had any knowledge or stole the car; I don't think.
>
> (R.999).

Defense counsel argued:

> Your Honor, in abundance of precaution, we requested the Court to enter an order in limine, at pretrial, which the Court did. It didn't grant it to the extent we requested it, but it did grant it to some degree. And then a witness in direct contravention of that order violated it in front of this Jury. We had challenged the whole allegation of potential Williams' Rule application, with regard to the testimony of the salesman from Mitchell Motors, and even the circumstances of the chase. It is patently obvious, considering the testimony that this Jury did have before it, that on this very day, around noontime, my client is alleged to have sold his Barracuda vehicle for $1,500.00, and then at 3:00 o'clock in the afternoon, whatever the short time span in between there,

> suddenly chasing this fellow in a burgundy or maroon Cadillac. The statement is obvious, it's patent on its face. It refers to no one else but my client. And based on that, we feel there is substantial prejudice that justifies a mistrial, and that is the only adequate remedy under the circumstances.
>
> We don't feel the instruction of the Court was sufficiently curative to take care of the error involved.
>
> (R.1006).

The trial court denied the motion for mistrial (R.1006).

In his closing argument to the jury, the prosecutor again recounted the circumstances of appellant's attempt to elude the police who were chasing the Cadillac, paying particular emphasis to appellant's deliberate attempt to run head-on into Deputy Gray (R.1114-16).

B. The Trial Court Erred in Permitting the State to Introduce Irrelevant and Highly Prejudicial Evidence of a Car Chase in which Appellant Attempted to Outrun the Police, where this "Flight" Evidence Related not to the Charged Crimes (which had Occurred Nearly a Month Earlier) but Related Instead to an Intervening Criminal Episode, and where the Intervening Crimes were Themselves Inadmissible.

In Straight v. State, 397 So.2d 903 (Fla. 1981), Straight, Palmes and Jane Albert (all of whom shared an apartment) murdered Albert's employer, James Stone; the next day they took Stone's car, money, and credit cards and fled to California, where they were subsequently arrested. Straight fled as police officers approached him, and attempted to avoid arrest by firing at the officers. This Court, in rejecting Straight's argument that this flight evidence and collateral crime evidence was improperly admitted, said:

> It is improper for a jury to base a verdict of guilt on the conclusion that because the defendant is of bad character or has a propensity to commit crime, he therefore probably committed the crime charged. See, e.g. Winstead v. State, 91 So.2d 809 (Fla. 1956); Nickels v. State, 90 Fla. 659, 106 So.479 (1925). Therefore, evidence of criminal activity not charged is inadmissible if its sole purpose is to show bad character or propensity to crime. But evidence of criminal activity not charged is admissible if relevant to an issue of material fact. Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). If irrelevant, its admission is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.
>
> When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance. State v. Young, 217 So.2d 567 (Fla. 1968), cert. denied, 396 U.S. 853, 90 S.Ct. 112, 24 L.Ed.2d 101 (1969); Daniels v. State 108 So.2d 755 (Fla. 1959); Blackwell v. State, 79 Fla. 709, 86 So.224 (1920).
>
> We hold that the evidence of appellant's flight from police and use of his gun was relevant to the issue of his guilty knowledge and thereby to the issue of guilt. Appellant was willing to use at least the threat of deadly force to try to avoid arrest. This is probative of his mental state at the time.
>
> Straight v. State, supra, at 908.

In Straight, the co-defendants fled the state the day after they committed the charged murder, and Straight again attempted to flee when the police apprehended him in California. While the opinion does not expressly say so, it appears that Straight was a suspect in the murder, and that he was being arrested in California on the murder charge. [At any rate, there is nothing in the Straight opinion to indicate that he was being arrested on some other charge, or that he had committed any intervening crimes]. In the present case, in contrast, the police were apparently unaware of appellant's existence or his presence in Pensacola until January 27, 1983. Appellant was not a suspect in the charged crimes - the two convenience store robbery-murders - until after the police apprehended him at the end of a wild car chase in a stolen Cadillac. The police were chasing appellant because, and only because, Carolyn Ward reported the robbery and attempted kidnapping which had just occurred, described the suspect and described the stolen vehicle down to the tag number, and informed them of the suspect's probable location and destination (see R.1004). Appellant was obviously aware that he was driving a stolen car; he was also aware that Carolyn Ward had gotten away from him and could reasonably be expected to call the police (see R.1004). Armed robbery and attempted kidnapping are not nickle and dime offenses; the former carries a potential penalty of life imprisonment. Thus, when the police spotted him on the Interstate, appellant had excellent reasons to try to elude them. His "flight," under these circumstances, was not probative of consciousness of guilt of the charged crimes. It was far more likely the product of his consciousness of guilt of the collateral crimes - the robbery, attempted kidnapping, and theft of the Cadillac - which were properly excluded from evidence by the trial court. This presented a very confusing and misleading picture to the jury, since the most reasonable explanation for appellant's flight was inadmissible, but the evidence of his flight was

admitted. The introduction of this bastardized "flight evidence" invited the jury to draw either or both of two highly prejudicial inferences - either appellant's desperate attempt to elude the police must have been motivated by consciousness of guilt of the convenience store murders (an inference which the circumstances do not support), or else he must have committed some other crime serious enough to provoke such behavior (which of course, is true, but, as the trial court correctly ruled, the Carolyn Ward incident showed only bad character and propensity to commit crime, and was therefore inadmissible).

"Analytically, flight is an admission by conduct. . . . Its probative value as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977); United States v. Howze, 668 F.2d 322, 324 (7th Cir. 1982); United States v. Borders, 693 F.2d 1318, 1325 (11th Cir. 1982). If the prosecution wishes to offer evidence of flight to demonstrate guilt, it must ensure that each link in the chain of inferences leading to that conclusion is sturdily supported. United States v. Beahm, 664 F.2d 414, 420 (4th Cir. 1981). In United States v. Borders, supra, at 1324-27, the appellate court held that the introduction of flight evidence was proper under the circumstances of that case, and noted that "[t]he cases in which flight evidence has been held inadmissible have contained particular facts which tend to detract from the probative value of such evidence." The court noted two lines of cases in which flight evidence has been held inadmissible - the "Beahm-Myers line of cases" where the defendant might have fled because of guilt feelings about a different and unrelated crime he had committed

[see United States v. Myers, supra, at 1050 and n.20] or where the defendant was unaware at the time he fled that he was the subject of a criminal investigation [see United States v. Beahm, supra, at 419-20], and a related line of cases in which there exists "a significant time delay from the commission of the crime, or the point at which the suspect becomes aware that he is the subject of a criminal investigation, to the time of flight." United States v. Borders, supra, at 1326. See e.g. United States v. Howze, supra, at 324-25, in which the court said:

> Where this time lag is substantial, as in this case, "evidence of the defendant's knowledge that he is being sought for the crime becomes an increasingly important factor." In other words, when there is no immediacy between the flight and the crime, the court must be certain there is evidence that a defendant knows he is being sought for the specific crime charged and not some other crime or event.

In United States v. Ramon-Perez, 703 F.2d 1231, 1233 (11th Cir. 1983), the Eleventh Circuit Court of Appeals recognized that a significant time delay may render flight evidence inadmissible, but, in holding that the evidence of flight was properly introduced in the case before it, said:

> . . . the interpretation to be gleaned from an act of flight should be made with a sensitivity to the facts of the particular case. United States v. Borders, 693 F.2d at 1325. We do not now consider a situation in which occurrences intervening between the indictment and the flight cloud or confuse the inference of a causal relationship between the two. In sharp distinction to Myers, this is not a case where the evidence suggests that appellant might have been fleeing from an entirely different crime, or might not have been fleeing at all.

In the present case, the evidence not only suggests that appellant was fleeing from an entirely different crime than the ones charged, the evidence virtually compels that conclusion. There was a time lapse of nearly a month between the charged murders and the flight; whereas the flight occurred immediately in response to the Carolyn Ward robbery-kidnapping incident, after Ms. Ward escaped

from appellant and called the police.[13] The "immediacy requirement" was clearly satisfied as to the intervening collateral crimes; appellant's attempt to elude the police was clearly probative as to his consciousness of guilt of those offenses. However, as to the charged convenience store murders, not only was appellant unaware that he was a suspect [see United States v. Howze, supra; United States v. Beahm, supra], in point of fact he was not a suspect. It was only after his capture, when the police seized (and subsequently had ballistics tests conducted upon) a Colt .357 Magnum revolver containing six live rounds of Remington Peters .357 Magnum ammunition, that appellant became a suspect in the convenience store murders.

The state may attempt to argue that appellant's flight could have been motivated by his awareness that he was in possession of evidence, i.e. the revolver and bullets, which could be used to connect him to the murders. Compared to the strong and obvious motive to flee created by the bungled robbery-kidnapping of Carolyn Ward, such an argument would be speculation piled upon speculation. First of all, such an argument presupposes that appellant knew (because he committed them) that the gun had been used in the two murders, when that is the ultimate question of fact of which the "flight evidence" is supposed to be slight circumstantial proof. Secondly, assuming arguendo that appellant committed the murders, and assuming much further that he was cognizant that if he were ever arrested while in possession of the revolver he could be linked to the murders by means of ballistics comparison, he had twenty-five days in which to discard the weapon, and (according to several state witnesses[14]) plenty of

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[13] In United States v. Myers, supra, at 1051, the court observed "The immediacy requirement is important. It is the instinctive or impulsive character of the defendant's behavior, like flinching, that indicates fear of apprehension and gives evidence of flight such trustworthiness as it possesses."

[14] See the testimony of Angela Shaw (R.965-68, 974-75); Lucky Lee Dortch (R.979-80); William Crosby (R.1043-44, 1046); Betty Crosby (R.1057-58, 1059-60); and see also the penalty phase testimony of Dale Butler (R.1232).

money with which to replace it. Clearly, the far more reasonable likelihood is that appellant attempted to elude the police because he was driving a Cadillac he had just stolen, and because the woman he stole it from and tried to kidnap at gunpoint had gotten away.

Appellant is unaware of any Florida case law dealing specifically with the question of the admissibility of flight evidence where the flight could reasonably have been motivated by an intervening collateral crime which is itself inadmissible.[15] Federal case law, as perviously discussed, strongly suggests that such evidence is irrelevant, prejudicial, and inadmissible. See United States v. Myers, supra, at 1048-51: United States v. Beahm, supra, at 420; United States v. Howze, supra, at 324-25; United States v. Borders, supra, at 1325-27; United States v. Ramon-Perez, supra, at 1233. The appellate courts of Texas have, even more explicitly, reached the same conclusion. In Fentis v. State, 582 S.W.2d 779, 780-81 (Tex.Cr.App. 1976), the court said:

> The test governing flight was aptly stated in Damron v. State, 58 Tex.Cr.R. 255, 125 S.W. 396, 397:
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> "Evidence of flight is admissible, where one is charged with an offense, on the ground, in substance, that it is some evidence of guilt, and amounts in effect to a quasi admission of guilt of the offense charged. If, however, the flight is in respect to another and different offense, it ought not to be considered as evidence of the guilt of an offense in which there was no flight."
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> In short, the circumstances must indicate that the flight is "so connected with the offense on trial as to render it relevant as a circumstance bearing upon his guilt." Hicks v. State, 82 Tex.Cr.R. 254, 199 S.W. 487, 488.

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[15] Cf. Clark v. State, 378 So.2d 1315 (Fla. 3d DCA 1980), in which the defendant was charged with possession of heroin and cocaine after the police saw him running with a brown paper bag, chased him, and caught him hiding beneath a truck concealing the bag which contained the narcotics. At trial, the officers testified that on sixteen prior occasions they had attempted to detain the defendant but he escaped them by running. There was no evidence connecting the sixteen privious incidents to the currently-prosecuted crime. The Third District Court of Appeal held that the Williams rule had been violated because of "the clear implication . . . that the defendant was engaged in criminal conduct from which he was consistently fleeing the police." However, in view of the fact that the defendant was literally caught holding the bag, the appellate court concluded that the error was harmless.

> In Jones v. State, Tex.Cr.App., 481 S.W.2d 900, the State showed that one week after the primary offense the defendant committed a second robbery and attempted to flee, but was apprehended. We held that the attempted flight was more likely probative of consciousness of guilt of the second offense than the primary offense. Because the second offense was not otherwise admissible under any other exception to the rule barring the admission of extraneous offenses, the judgment was reversed. We reaffirm the holding in Jones, which is applicable whenever the flight sought to be shown follows and reasonably appears to be motivated by an extraneous offense, rather than the primary offense.
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> On the other hand, in Woods v. State, Tex.Cr.App., 480 S.W.2d 664, and Israel v. State, 158 Tex.Cr.R. 574, 258 S.W.2d 82, evidence of flight was held admissible even though there were intervening extraneous offenses because the facts in those cases indicated that the flight and the extraneous offenses were likely related to each other and were motivated by consciousness of guilt of the primary offense.

The court went on to hold that the circumstances in Fentis were like those in Woods and Israel, in that both the flight and the extraneous offense were likely motivated by consciousness of guilt of the primary offense, so the flight evidence in that case was held admissible. [Note that the circumstances of Straight v. State, supra, also fall into that category; Straight's act of shooting at the officer in California was for the purpose of avoiding arrest for the primary offense, i.e. the Florida murder. Straight v. State, supra, at 908]. In the instant case, it would be ridiculous to even imagine that the robbery and attempted kidnapping of the Cadillac saleswoman could in any way have been motivated by consciousness of guilt of two unrelated and dissimilar convenience store robbery-murders which occurred nearly a month earlier and in which appellant was not a suspect.

Hines v. State, 646 S.W.2d 469 (Tex.App. 1 Dist. 1982), involves a fact pattern remarkably similar to the instant case. On November 3, 1979, a jewelry store in Houston was robbed of jewelry worth approximately $500,000. One of the robbery victims was pistol whipped. On February 2, 1980, Midland, Texas police officers received a radio dispatch regarding a high speed chase of a

stolen vehicle. The Midland officers joined the chase, in which speeds of 125 miles per hour were reached and gunfire was exchanged. When the stolen vehicle was finally stopped and the driver was searched, seven gem stones thought to be diamonds were found. Also found were two pistols, a ski mask, a pair of "Groucho Marx" glasses, and gloves. The suspect's photograph was taken and shown to victims of the Houston robbery, who identified him as one of the persons who had robbed the jewelry store. Prior to that time, no identification had been made in the Houston case. Thus, as in the instant case, there was a significant time lapse between the charged crime and the act of flight, there was an intervening collateral crime which in all likelihood provided the motivation for the attempt to elude the police, and perhaps most significantly, the defendant was not even a suspect in the charged crime until after he was apprehended for the collateral crime. As in the instant case, the defendant in Hines, when apprehended, was in possession of items (the gems, pistols, and mask), which ultimately were used to connect him to the charged crime. The defendant in Hines claimed on appeal that "as there were no charges pending against him at the time of the shoot-out, and since the flight and shoot-out were the results of a specific crime other than that for which he was charged, . . . it was reversible error to admit the police officers' testimony regarding the facts surrounding his arrest." The appellate court agreed:

> The test governing the admissibility of evidence concerning flight is that such evidence must be so connected with the offense on trial as to render it relevant as a circumstance bearing upon the defendant's guilt. Hicks v. State, 82 Tex. Crim. 254, 199 S.W. 487 (1917). Stated differently, evidence of flight is admissible, where it is some evidence of guilt, and amounts in effect to a quasi admission of guilt of the offense charged. Damron v. State, 58 Tex.Crim. 255, 125 S.W. 396 (1910); Fentis v. State, 582 S.W. 779 (Tex.Cr.App. 1976). Unless the testimony of the officers concerning the extraneous offenses in Midland constituted some evidence of the appellant's guilt of the jewelry store robbery in Houston, it should not have been admitted.

> The officers' testimony revealed that the chase commenced because the police had a report of a stolen vehicle. The officers were unaware of the jewelry store robbery and the appellant had not been identified as one of the robbers at the time of the chase. The record does not contain any specific evidence that the appellant's flight from the police was due to his guilt of an aggravated robbery in Houston. To the contrary, the evidence appears to show that the appellant was fleeing because he was in a stolen vehicle.
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> Hines v. State, supra, at 470-71.

In the present case, appellant was fleeing in a Cadillac which he had just stolen from a saleswoman who got away from him when he tried to force her into the trunk of the car at gunpoint. This evidence shows that appellant had a strong, immediate, and independent motive to elude the police. As in Hines, the record contains no evidence that appellant's flight from the police stemmed from any consciousness of guilt of the convenience store murders which occurred nearly a month earlier.

The appellate court in Hines held that the erroneous admission of the misleading "flight evidence" required reversal of the defendant's conviction. Rejecting the state's "preservation" argument, the court said:

> The State contends that the appellant waived his objection to this testimony. We cannot agree with this contention because the appellant filed a motion in limine, prior to the officers' testimony, apprising the court of the nature of their testimony and objecting to the admission of such testimony on the basis of relevance. In addition, the appellant's counsel objected to the officers' testimony at the time the testimony was being elicited. The court overruled the objections, but granted the appellant a continuing objection to the testimony of each officer. The State also contends that appellant's objections were not specific enough to be valid. Considering the fact that the appellant filed a motion in limine prior to the officer's testimony, we are of the opinion that the objections were sufficiently specific to apprise the court and opposing counsel of the nature of his objections. We hold that the appellant did not waive his objection to the officers testimony, and that the admission of the evidence of the extraneous offenses, committed by the appellant in Midland, was not evidence of flight from the robbery committed three months earlier in Houston.
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> Hines v. State, supra, at 471.

In the instant case, defense counsel moved in limine to exclude as irrelevant any testimony concerning the Carolyn Ward incident or appellant's flight

therefrom (R.556-57). The trial court granted the motion as to the robbery and attempted kidnapping of Ms. Ward and the theft of the Cadillac (R.561). The trial court initially appeared to agree with the defense that the ensuing car chase was irrelevant and inadmissible as well (see R.557-61), and his ruling on the motion in limine appeared to encompass the "flight evidence" (see R.561, 562-63, 563-64); however, after persistent efforts by Assistant State Attorneys Johnson and Hensel to convince the court to allow them to introduce the police officers' testimony concerning the chase (see R.561-565), the court relented (R.565). Defense counsel objected and stated as his ground that the flight evidence sought to be admitted established nothing more than an attempt to elude the police after the robbery and attempted kidnapping of Carolyn Ward, and could not be interpreted as giving rise to an inference of guilt of the charged crimes (R.565-66). Defense counsel renewed his motion in limine prior to the testimony of Hubert Smith (R.773,778), and again prior to the testimony of Deputy Chavers (R.785). Defense counsel requested a continuing objection to the testimony of any witnesses concerning the circumstances of the chase (R.785). The trial court noted that the defense's objections to this testimony was "already well preserved" (R.785, see R.786), and that "the record is fairly complete with your objections" (R.785), and said, "You don't have to pop up and down. If it will stop you from popping up and down, Terry, I will overrule your objection" (R.786).

The appellate court in Hines v. State, supra, also rejected the state's "harmless error" argument:

> The State further contends that if the admission of the evidence of extraneous offenses was error, it was harmless error. It urges that the testimony of the two witnesses to the Houston robbery was clear and unequivocal that the appellant was one of the robbers. This infers that the officers' testimony was not needed and that the appellant would have been found guilty without such testimony.

> The record reveals that prior to evidence being presented about the Houston robbery the State presented the testimony of the two Midland police officers concerning the events that transpired in Midland. This testimony informed the jury that the appellant was in a stolen vehicle, fleeing at one hundred twenty-five miles per hour and shooting at the police. In addition, the testimony concerning possession of guns, diamonds, and a "Groucho Marx" face mask was introduced. These facts indicate that the State desired to portray the appellant as a felon prior to presenting its evidence on the case for which the appellant was being tried. That the State succeeded in its purpose can hardly be doubted, and we are of the opinion that the minds of the jurors were likely prejudiced by the admission of this testimony. See, Fentis v. State, 528 S.W.2d 590 (Tex.Cr.App. 1975). We hold that the admission of the testimony of the two Midland officers concerning the extraneous offenses committed by the appellant was of such nature and magnitude that the harm to the appellant is manifest.
>
> Hines v. State, supra, at 471.

In the instant case, the state first presented evidence concerning the two convenience store robbery-murders; the discovery of the bodies (see R.607-17, 659-63, 673-75), the police investigation at the scene of each crime (see R.610-45,673-82, 689-709), the autopsies conducted by the respective medical examiners (see R.650-58, 767-72), and the determination by an FDLE firearms examiner that the bullets recovered from the two victims' bodies were fired by the same firearm, a Colt .357 Magnum revolver (R.727, see R.712-50, 764-67). Up to the point when Hubert Smith identified appellant as the man who sold him a car on the afternoon of January 27, 1983, not a single witness had so much as mentioned appellant (see R.607-772). After Hubert Smith, the state called no fewer than six Escambia County sheriff's deputies who testified concerning a BOLO for a white male in a three piece suit driving a maroon late model Cadillac, and their efforts to apprehend the suspect (R.786-819). The jury heard in detail how appellant eluded a fleet of police cruisers over a considerable time and distance; how speeds in excess of a hundred miles an hour were reached; how appellant would go off the side of the road onto the grassy portion, missing mailboxes and going over the edges of driveways (see R.799); how appellant, heading south,

crossed into the northbound lane, with cars running off both sides of the road in his wake (see R.800); and how appellant deliberately tried to ram Officer Gray head-on, causing a collision between Gray's cruiser and another police cruiser driven by Officer Lewis. As a coup de grace, a seventh officer, Jones, gratuitously informed the jury that the Cadillac had been reported stolen. Only after all of this irrelevant and grossly prejudicial information had been imparted to the jury, did the prosecution begin to present its testimony circumstantially linking appellant to the convenience store murders (see R.820-1074). The improperly admitted evidence clearly indicated to the jury that appellant was a person of bad character, with no regard for the law, or for the life or limb of innocent motorists or pedestrians much less the police. To the extent that the jury could infer from appellant's desperate attempt to elude the police that he must have been involved in some other serious criminal activity, this is a classic violation of the Williams rule and is presumptively harmful error. See Straight v. State, supra, at 908. On the other hand, to the extent that the jury might not draw this inference, then the evidence of the wild car chase would give rise to the misleading and devastating inference that appellant was fleeing the police out of consciousness of guilt of the convenience store murders (since, as far as the jury would be aware, there would be no other apparent motivation).[16] See Perper v. Edell, 44 So.2d 78, 80 (Fla. 1949) ("[If] the introduction of the evidence tends in actual operation to produce a confusion in the minds of the jurors in excess of the legitimate probative effect of such evidence - if it tends to obscure rather than illuminate the true issue before the jury - then such evidence should be excluded").

[16] Cf. United States v. Beahm, supra, at 420 (recognizing that it would be an "unconscionable burden" on a defendant to require him to "[offer] not only an innocent explanation for his departure but guilty ones as well in order to dispel the inference to which the government would apparently be entitled that an investigation calling upon defendant could have but one purpose, namely, his apprehension for the crime for which he is ultimately charged").

See also Fla. Stat. §90.403; Tafero v. State, 403 So.2d 355,360 n. 3 (Fla. 1981); Aho v. State, 393 So.2d 30,31 (Fla. 2d DCA 1981)(recognizing that even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury).

The evidence linking appellant to the two convenience store murders was entirely circumstantial. While appellant does not dispute that the circumstantial evidence was legally sufficient to overcome a motion for judgement of acquittal, it was a far cry from amounting to the "overwhelming evidence" necessary to properly invoke the harmless error doctrine. Contrast Chapman v. California, 386 U.S. 18,25-26 (1967)(although the state presented a "reasonably strong 'circumstantial web of evidence'" against defendants, evidence was not so overwhelming as to permit application of harmless error rule) with Harrington v. California, 395 U.S. 250,254 (1969)(distinguishing Chapman and noting that the case against Harrington "was not woven from circumstantial evidence"; evidence, which included defendant's inculpatory statements, admissible testimony of a co-defendant, and testimony of several eyewitnesses, was overwhelming and error was harmless).

In the instant case, the state obviously believed that it needed to present the evidence of the car chase, because both assistant state attorneys virtually badgered the trial judge to modify his initial ruling and let it in (R.557-66). One of the prosecutors actually told the trial court that the state needed the collateral crime and flight evidence to bolster its circumstantial case:

> . . . the evidence would show that this Defendant approached a local car lot, went for a test drive with the car saleswoman, produced a revolver from a valise carried with him, and put in that car by that Defendnat. He ordered her into the trunk, and she ran across the parking lot fleeing for her life. She notified the authorities. They put out a description of he and the vehicle. And in essence, what we have then were several law enforcement officers who made an attempt to apprehend him. We will have testimony showing he attempted to elude several officers, a high speed chase, went through road blocks, and was finally apprehended fleeing across a field with a valise in one hand and that loaded .357 in the other, and that is the gun that is the only evidence we have, circumstantially, to link the Defendant to the case. We have got some other witnesses to help link him, but is a key part of the testimony, and the key part of the State's case.

(R.558).

After the trial court initially granted the motion in limine, the state asked him if he would reconsider his ruling as to the flight evidence at the time it was sought to be introduced (R.562). Assistant State Attorney Johnson suggested that the state might submit a brief on the matter of the flight evidence (R.563). Assistant State Attorney Hensel complained:

> The evidence of his flight from officers after they were alerted that he had committed an offense, none of that is going to be admissible? I have got him running road blocks, going over a hundred miles down the road, police officers in hot pursuit, trying to ram officers head-on, patrol cars running into each other --

(R.564).

Even after the trial court permitted the state to introduce the flight evidence, the state continued to insist that it should be allowed to present all of the evidence of the robbery and attempted kidnapping of Carolyn Ward (see R.993-94,1000-05). When the defense objected to the testimony of Hubert Smith, the prosecutor stated that he intended to elicit from Smith not only that he bought a car from appellant but also that, after the purchase was completed, appellant was heading toward the Cadillac dealership (R.777-78). The court excluded the latter part of the proffered testimony because "all you are going to be doing is suggesting great inference" that appellant stole a brand new Cadillac (R.779). Then, when Officer Jones, in violation of the ruling in limine, mentioned before the jury that the Cadillac was reported stolen, the prosecutor blithely requested that a "curative instruction" be given instead of a mistrial (R.826).

The introduction of misleading and prejudicial evidence in this case was no accident; the prosecutors made an aggressive and persistent effort to get as much of it as they could before the jury. They did so, as Mr. Hensel told the trial court, for the purpose of bolstering their circumstantial case (R.558). The challenged evidence, as Mr. Hensel further asserted, was "a key part of the testimony, and [a] key part of the State's case" (R.558). The inevitable effect of the improperly admitted evidence was to portray appellant, in the eyes of the jury, as a person of bad character, to strongly suggest that he was involved in other

serious criminal activity, and to create a misleading inference that his attempt to elude the police showed consciousness of guilt of the charged convenience store murders. The admission of the "flight evidence" was harmful error, and the state should not be heard to contend otherwise. Appellant's constitutional right to a fundamentally fair trial was irreparably damaged; his conviction and death sentence must be reversed and the case remanded for a new trial. Cf. Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981)(admission of evidence of a prior conviction which was irrelevant to the main charge was so prejudicial that it impaired defendant's right to a fundamentally fair trial). See also Vazquez v. State, 419 So.2d 1088,1090 (Fla. 1982); Walker v. State, 403 So.2d 1109,1110-11 (Fla. 2d DCA 1981); Duncan v. State, __So.2d__ (Fla. 1st DCA 1984)(case no. AT-446, opinion filed April 13, 1984).

C. The Trial Court Erred in Denying Appellant's Motion for Mistrial when a State Witness, in Violation of the Court's Order in Limine, Testified that the Cadillac in which Appellant Attempted to Elude the Police had been Reported Stolen.

Under the peculiar circumstances of this case as related in Issue II-A, supra, and for the reasons stated in Issue II-B, supra, the trial court's instruction to disregard was woefully inadequate. What might under other circumstances have been an isolated and gratuitous remark, and might therefore have been curable by an instruction, was in this case a risk which the state assumed, and could reasonably have foreseen, when it insisted on introducing all of the other prejudicial evidence of the car chase which culminated in Officer Jones' remark. While the granting or denial of a mistrial is largely within the discretion of the trial court [see e.g. San Fratello v. State, 154 So.2d 327,330 (Fla. 2d DCA 1963)], under certain circumstances, where an instruction will not suffice to alleviate the prejudice caused by the improper testimony, failure to grant a mistrial is reversible error. See e.g. Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1973); Smith v. State, 340 So.2d 117 (Fla. 3d DCA 1976); Russell v. State, __So.2d__ (Fla. 3d DCA

1984)(case no. 82-1530, opinion filed February 28, 1984)(1984 FLW 473). This is one of those cases.

ISSUE III

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH; IN FINDING AN AGGRAVATING CIRCUMSTANCE WHICH WAS NOT SUPPORTED BY THE EVIDENCE; IN FAILING TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES; AND IN REJECTING APPELLANT'S CONSTITUTIONAL CHALLENGES TO FLORIDA'S DEATH PENALTY STATUTE.

The trial court apparently found, in support of the death sentences he imposed on appellant, that the murders were committed for the purpose of avoiding or preventing a lawful arrest. (R.1590). This finding was invalid, as there is no evidence in the record that witness elimination was the sole or dominant motive for either killing (see R.1628). See Menendez v. State, 368 So.2d 1278,1282 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978). The state will presumably counter by arguing that there was no other apparent motive; that is at best a "logical inference", see Clark v. State, __So.2d__ (Fla. 1983)(case no. 62,126, opinion filed December 22, 1983)(1984 FLW 1), and does not satisfy the standard of proof beyond a reasonable doubt.

The trial court, in his findings of fact, stated "Although the defendant had some emotional confusion in his life and was separated from his family, there is no evidence that he was under the influence of extreme mental or emotional disturbance" (R.1591). In the penalty phase of the trial a psychologist, Dr. Dan Overlade, testified that in his opinion appellant suffered from an emotional disturbance at the time of the offense charged, and that appellant found his ability to conform his conduct to the requirements of law impaired (R.1200-01). However, Dr. Overlade was unable to say that appellant's ability to conform his conduct to the requirements of law was substantially impaired; he could only say that it was impaired (R.1211). Similarly, Dr. Overlade testified that while appellant suffered from an emotional disturbance, he could not say that it was an extreme

emotional disturbance (R.1214). The statutory mitigating circumstances enumerated in Fla. Stat. §921.141(6)(b) and (f) require, respectively, that the defendant's mental or emotional disturbance be extreme, and that the impairment of his capacity to conform his conduct be substantial. However, under the principles expressed in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), the mitigating circumstances which are available to a capital defendant, if established by the evidence, cannot constitutionally be limited to those in the statute. See Songer v. State, 365 So.2d 696, 700 (Fla. 1978). Thus, if the evidence showed any mental or emotional disturbance, whether extreme or not, or if the evidence showed any impairment of appellant's capacity to conform his conduct to the requirements of law, whether substantial or not, that evidence should have been considered in mitigation. The weight to be accorded these circumstances is largely within the discretion of the trial court, but he is not free to ignore them altogether.

The improper consideration by the trial court of an unproven aggravating circumstance, coupled with his failure to accord any weight to non-statutory mitigating factors, requires reversal of appellant's death sentence. In addition, appellant (reasserting by reference the arguments made in his motions filed in the trial court) contends that Florida's death penalty statutes are unconstitutional (see R.1300-15,1318-20,1327-33,1344-69,1505-07).

IV CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court grant the following relief:

As to Issue I: reverse the conviction and death sentence and remand for a new trial, or in the alternative, reverse the death sentence and remand for a new trial, with an advisory jury, on the issue of penalty.

As to Issue II: reverse the conviction and death sentence and remand for a new trial.

As to Issue III: reverse the death sentence and remand for imposition of a life sentence without possibility of parole for twenty-five years, or in the alternative, reverse the death sentence and remand for resentencing by the trial judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Andrea Hillyer, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to appellant, Barry Gilbert O'Connell, #091830, Florida State Prison, Post Office Box 747, Starke, Florida 32091 on this 24th day of April, 1984.

Steven L Bolotin

STEVEN L. BOLOTIN