IN THE SUPREME COURT OF FLORIDA

BARRY GILBERT O'CONNELL,

Appellant,

v. CASE NO. 64,565

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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III ARGUMENT - ISSUE I

The state says that jurors McAnally, Burmeister, and Lindsay expressed "nothing more than a general tendency in favor of the death penalty" (AB 19, 22,24). The record says otherwise. McANALLY (after another juror stated that he believed that anyone convicted of premeditated murder should automatically get the death penalty, and after defense counsel asked if anyone else shared that belief): "I feel the same way. [Q] All right. [A] If he's convicted. [Q] Does it make any difference whether its a finding of guilt for one or two people? [A] About the same to me" (R 162-63). McANALLY again: "[Q] 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. [A] If he's guilty, I do think so; yes, sir" (R 175). BURMEISTER: "[Q] . . . [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? [A] I feel that the death penalty is what they deserve. [Q] Okay. Can you tell me what has caused you to come to feel that way? [A] 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). LINDSAY: "[Q] . . . [How] would you describe your own feelings about the death penalty? When do you think it should be used? [A] I believe if somebody commits a murder. [Q] Can you give me any kind of idea about what you mean in that area? [A] I mean, if you plan a murder or not just in anger, something like that. [Q] Do you think it should be given in all cases like that, regardless of what may have gone into it? [A] I believe so." (R 348).

These three jurors clearly and unequivocally expressed the view that the death penalty should be imposed automatically in cases of planned or premeditated murder. The refusal to grant a challenge for cause to an "automatic death penalty" juror violates the accused's right to an impartial jury, guaranteed by the federal and Florida Constitutions. See e.g. Thomas v. State, 403 So.2d 371, 375-76 (Fla.1981); Crawford v. Bounds, 395 F.2d 297, 303-04 (4th Cir. 1968); Cuevas v. State, 575 S.W.2d 543 (Tex. Cr. App. 1978); Pierce v. State, 604 S.W.2d 185 (Tex. Cr. App. 1980). Therefore, unless those jurors' subsequent responses showed beyond a reasonable doubt [see Singer v. State, 109 So.2d 7, 73 (Fla.1959); Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981)] that they could be impartial as to penalty as well as guilt and would not automatically vote for the death penalty, the trial court's failure to grant appellant's challenges for cause was an abuse of discretion. See Thomas v. State, supra; Singer v. State, supra; Leon v. State, supra.

Of the three "automatic death penalty" jurors in question, McAnally was arguably "rehabilitated" after further questioning, but Burmeister and Lindsay clearly were not. With regard to McAnally, it is appellant's posi-

tion that his subsequent responses were insufficient 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.[1]

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[1] In the following exchange, inadvertently omitted from appellant's initial brief, Mr. McAnally alternated about every other sentence between reaffirming and denying the belief that anyone convicted of premeditated murder should get the death penalty:

> DEFENSE COUNSEL: Okay. And, Mr. McAnally, how about you, sir? You, as I recall, indicated before that you had some view that you thought the death penalty should be used automatically where a person was convicted?
>
> MR. McANALLY: Not automatically. I just believe in the death penalty, if a man is guilty.
>
> DEFENSE COUNSEL: You remember ustalking about these alternative kinds of first degree murder? You think that the death penalty should be used anytime anybody is convicted of first degree murder, depending on which or which kind of first degree murder they are convicted of?
>
> MR. McANALLY: Well, it might -- there might be some difference there; I don't know.
>
> DEFENSE COUNSEL: You know the two kinds of premeditated murder, and then this felony murder idea; you understand those a little bit?
>
> MR. McANALLY: Right.
>
> DEFENSE COUNSEL: There will be more explaining to you, more fully, as we go along here. Do you see any difference between the two in you view of whether a person convicted of one kind of first degree murder or the other should get the death penalty?
>
> MR. McANALLY: Yes. Where a man has premeditated. That's the kind I feel is guilty, and should get the death sentence.
>
> DEFENSE COUNSEL: Okay. Taking that into account, and I gather you are using the new understanding of what premeditated means; is that right?
>
> MR. McANALLY: Right.
>
> DEFENSE COUNSEL: So, under any premeditated killing, when you have made that determination that the person did premeditatedly kill another, you think the death penalty is proper in that case?
>
> MR. McANALLY: Sure do.
>
> DEFENSE COUNSEL: Do you think there could be any showing made to you that would get you to vote for a life sentence for a person convicted of premeditated murder?
>
> MR. McANALLY: Sure. If after the evidence is weighed.
>
> DEFENSE COUNSEL: What have you decided or thought in your own mind it might take?
>
> MR. McANALLY: No, sir.

(R 406-07).

See Leon v. State, supra; Cuevas v. State, 575 S.W.2d 543 (Tex.Cr.App. 1978); Smith v. State, 573 S.W.2d 763 (Tex.Cr.App. 1977); Martin v. Commonwealth, 271 S.E.2d 123, 129 (Va. 1980). Further, it is appellant's position that the trial court's readiness to accept Mr. McAnally's having "seen the light" provides a telling counterpoint to his later refusal to allow defense counsel any opportunity to rehabilitate or even to initially question the "automatic life jurors" Poniatowski and Caristi, on the ground that "they would not be heard to change their minds."

As to jurors Burmeister and Lindsay, the issue is much simpler; the state, despite having every opportunity to attempt to rehabilitate them, failed to do so. The portions of the examination of Ms. Burmeister quoted on pages 13-14 of the state's brief concern the definition of premeditation, and burden of proof. At no point therein did Ms. Burmeister retract her previous statement that anyone convicted of premeditated murder should automatically get the death penalty. At most, it might be inferred that she modified her automatic death penalty views to apply only to "planned" murders, as opposed to spur-of-the-moment situations such as "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). However, whether Ms. Burmeister's belief was that anyone convicted of premeditated murder should automatically be sentenced to death, or that anyone convicted of a planned murder should automatically be sentenced to death, either view is incompatible with Florida law[2]

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[2] Fla. Stat. §921.141(2) requires the jury to consider mitigating as well as aggravating factors in recommending the death penalty or life imprisonment. The fact that a murder was planned does not necessarily preclude a life sentence; it still depends on a weighing of the aggravating and mitigating circumstances. See e.g. Odom v. State, 403 So.2d 936 (Fla.1981); Smith v. State, 403 So.2d 933 (Fla.1981); Welty v. State, 402 So.2d 1159 (Fla.1981); Barfield v. State, 402 So.2d 377 (Fla.1981); Phippen v. State, 389 So.2d 991 (Fla.1980); Williams v. State, 386 So.2d 538 (Fla.1980); Brown v. State, 367 So.2d 616 (Fla. 1979)(Each of these cases involve a planned murder in which the jury's recommendation of life imprisonment was reinstated by this Court on appeal of the trial court's override. Presumably there are many other such cases in which the trial judge followed the jury's life recommendation).

and the U. S. Constitution[3], and either view rendered her incapable of being an impartial penalty juror in this case. See also Cuevas v. State, 575 S.W. 2d 543 (Tex.Cr.App. 1978) (juror would automatically vote for death penalty in all cases of intentional murder unless insanity was proven); Pierce v. State, 604 S.W.2d 185 (Tex.Cr.App. 1980) (juror would automatically vote for death penalty in all cases of robbery-murder); compare Magill v. State, 386 So.2d 1188 (Fla.1980) (juror was properly excused on motion of state because of her bias against inflicting the death penalty on those under twenty-one years of age).

The state further contends that Ms. Burmeister "answered no to the defense question of whether her belief in the death penalty would enter into her judgment" (AB 22). What she actually said was that she believed there was a probability that the death sentence, if imposed, might never be carried out, but that would not enter into her judgment (R 275-76, see AB 15). The sum total of Ms. Burmeister's responses demonstrates her belief that anyone convicted of a planned or premeditated murder should automatically receive the death penalty; that death is what they deserve, and the alternative of life imprisonment is a burden on society; that death sentences, when imposed, should certainly be carried out; and that, while she recognized that, in practice, death sentences may or may not ultimately be carried out, she would not let that factor enter into her judgement. She clearly lacked the ability to be an impartial juror, and the trial court abused its discretion in refusing to excuse her for cause.

The state says that the third juror in question, Lindsay, "indicated that she could obey the law and weigh the circumstances, and that she could determine guilt or innocence based on the evidence alone" (AB 23). When

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[3] The Eighth and Fourteenth Amendments require consideration of mitigating as well as aggravating circumstances [Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982)], and prohibit mandatory death sentences [Woodson v. North Carolina, 428 U.S. 280 (1976)].

discussing burden of proof in the guilt phase, Ms. Lindsay indeed answered that she understood that the accused is not required to prove his innocence (R 348-49). When defense counsel referred to the legal obligation that requires the prosecutor to prove guilt, Ms. Lindsay replied, "Well, I think you have to listen to all the evidence and then decide." (R 349, see AB 23). That statement tends to indicate that Lindsay would be an impartial juror as to guilt, but it is entirely irrelevant to her previous affirmation that she believed the death penalty should be imposed in all cases of planned murder, regardless of what may have gone into it (R 348). The trial court's refusal to excuse her for cause, as with jurors McAnally and Burmeister, was an abuse of discretion requiring reversal of appellant's conviction [see Thomas v. State, supra; Smith v. State, supra; Cuevas v. State, supra; Pierce v. State, supra] and sentence.

The state agrees that "some courts" (AB 26) have recognized the general rule that "it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise peremptory challenges." United States v. Nell, 526 F.2d 1223 (5th Cir. 1976); Williams v. State, 440 So.2d 404 (Fla. 1st DCA 1983); Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981) (AB 26). The state, correctly, says "However, there can be no error in the trial court's exercise of its lawful discretion unless appellant first shows that his peremptory challenges were used on persons who should have been excused for cause" (AB 26). Then, making a quantum leap in logic and law, the state says "In other words, appellant must show that a sitting juror was unqualified and should have been excused for cause upon motion of appellant" (AB 26). Those are not only other words, it is a whole other statement of law, and this one is dead wrong. If appellant were required to show that a sitting juror was unqualified as a matter of law, that is tantamount to saying that a party has no recourse when his valid challenge

for cause is erroneously denied but to waste a peremptory challenge; if it happens again he must waste another peremptory until he runs out of them; and if he exhausts his peremptories and is therefore required to go to trial with one or more jurors who are objectionable to him, tough luck. That is not only unfair, it is not the law. The applicable principle is that 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. United States v. Nell, supra; Williams v. State, supra; Leon v. State, supra; Peek v. State, 413 So.2d 1225 (Fla. 3d DCA 1982). "The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. . . . It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose." Francis v. State, 413 So.2d 1175, 1178-79 (Fla.1982). See also Meade v. State, 85 So.2d 613, 615-16 (Fla.1956)(emphasizing the fundamental purpose of peremptory challenges and their special importance in capital cases); Carroll v. State, 139 Fla. 233, 190 So. 437 (Fla.1939)(to effectuate state and federal guarantee of an impartial jury, defendant in a criminal case may exercise peremptory challenges and "by this means . . . escape the judgment of those whom he may consider prejudiced against him but whom he may not be able to show disqualified for causes defined by statute"). In Mathis v. State, 31 Fla. 291, 12 So. 681 (1893), this Court reversed for a new trial and said:

> The defendant having exhausted his peremptory challenges before the special venire was gone over, and a timely objection having been made by him to the swearing of the twelfth juror, it can not be said that he is in no condition to complain by reason of having been tried by a jury of his own selection. It is of the first importance that the fairness and purity of jury trials should be preserved, and among the many rules adopted to accomplish such ends

> the right to challenge jurors has been given. Under our statute both the State and the accused stand upon an equal footing in this respect. In order to protect this right, as well as to guard against an abuse of it, it seems to us an erroneous decision in matter of law should be the subject of correction.

In other words, the erroneous denial of a challenge for cause which forces a party to exhaust his peremptory challenges is an entirely separate issue from one claiming that a sitting juror should have been disqualified for cause; either error requires reversal because of its impact on the accused's rights to an impartial jury and to fundamental fairness in the jury selection process. It has been held that any error which impairs the exercise of peremptory challenges is reversible error, and no showing of prejudice is required. See Swain v. Alabama, 380 U.S. 202, 219 (1965); United States v. Mobley, 656 F.2d 988, 989-90 (5th Cir. 1981); United States v. Brooklier, 685 F.2d 1208, 1223 (9th Cir. 1982); Carr v. Watts, 597 F.2d 830 (2d Cir. 1979); United States v. Turner, 558 F.2d 535 (9th Cir. 1977); Worthen v. State, 399 A.2d 272, 278 n. 3 (Md.App. 1979). The involuntary exhaustion of peremptory challenges is in and of itself prejudicial, and more specific prejudice than that would be impossible to show, due to the subjective nature of the kinds of juror bias which peremptory challenges are uniquely suited to eliminate. See Francis v. State, supra, at 1179.

A representative sample of appellate decisions, in addition to Nell, Williams, and Leon, which recognize that the erroneous denial of a challenge for cause requires reversal where the defendant exhausted his peremptories before the jury was sworn (without any claim that a sitting juror should have been disqualified) are Martin v. Commonwealth, 271 S.E.2d 123,129 (Va.1980); State v. Sugar, 408 So.2d 1329, 1331 (La. 1982); State v. Wilcox, 386 So.2d 257, 258-59 (W.Va. 1982); Commonwealth v. Jones, 383 A.2d 874, 876 (Pa. 1978); State v. Ternes, 259 N.W.2d 296, 197 (N.D. 1977). See also, Jones v. Cloud, 168 S.E.2d 598, 605-06 (Ga. 1969)("Parties should not be required to use their strikes in an effort to remove disquali-

fied jurors [citations omitted]. Let there be no thumb on the scale when the jury weighs the evidence"); Wasko v. Frankel, 569 P.2d 230, 232 (Ariz. 1977); State v. Munson, 631 P.2d 1099, 1100 (Ariz. App. 1981); Crawford v. Manning, 542 P.2d 1091, 1093 (Utah 1975); State v. Bailey, 605 P.2d 765, 768 (Utah 1980)(party is entitled to exercise his peremptory challenges on impartial prospective jurors, and he should not be compelled to waste one in order to accomplish that which the trial judge should have done). Conversely, the general rule appears to be that a party waives any right to relief for the erroneous denial of a challenge for cause if he fails to exhaust his peremptory challenges. See e.g. Lusk v. State, 446 So.2d 1038, 1041 (Fla.1984); State v. Hardee, 308 S.E.2d 521, 524 (S.C. 1983); State v. Pelletier, 434 A.2d 52, 55 (Maine 1981); Monserrate v. State, 352 N.E.2d 721, 723 (Ind. 1976); State v. Patriarca, 308 A.2d 300, 309-10 (R.I. 1973). In State v. Eaton, 249 N.E.2d 897, 900 (Ohio 1969) the appellate court explained "A party cannot complain of prejudicial error in the overruling of a challenge for cause if it does not force him to exhaust his peremptory challenges. If there was error . . . in the trial court's ruling on this challenge for cause, it is deemed waived by the acceptance of the jury where the number of peremptory challenges remains unexhausted"). A minority position, clearly adhered to by the courts of Missouri, and apparently followed in Arizona and Utah as well, holds that the right to free exercise of peremptory challenges upon impartial jurors is so fundamental that the impairment of this right by the erroneous denial of a challenge for cause requires reversal, even if counsel has chosen to conserve rather than exhaust his remaining peremptories. State v. Morrison, 557 S.W.2d 445, 446-47 (Mo. 1977); see Wasko v. Frankel, supra; Crawford v. Manning, supra.

The decisions relied on by the state in support of its unfair and illogical position that appellant must show that a sitting juror should have been disqualified for cause, Lusk v. State, supra; Rollins v. State, 148

So.2d 274 (Fla.1963); and Wheeler v. State, 362 So.2d 377 (Fla. 1st DCA 1978), do not establish any such requirement. In Lusk, this Court held that the defendant's challenge for cause was properly denied, and moreover Lusk did not exhaust his peremptories. Therefore, while the Court did observe that no sitting juror appeared unqualified, that is dicta about three steps removed from the holding. Similarly, in Wheeler the challenge for cause was held to have been properly denied, and the appellate court continued "Finally, appellant has not demonstrated that as a result of his exhaustion of peremptory challenges, a juror served who would otherwise have been stricken by appellant. See Rollins v. State, 148 So.2d 274, 275-76 (Fla.1963)." Wheeler v. State, supra, at 378. It is appellant's position that for the reasons and based on the authorities previously discussed, he need only show that (1) one or more of his challenges for cause was erroneously denied, and (2) he exhausted his peremptory challenges. But even assuming arguendo that he were further required to show that a juror served whom he would otherwise have stricken had he not been forced to exhaust his peremptories, appellant has clearly made such a showing. After being forced to spend peremptories on Burmeister and Lindsay, and after being forced to spend his last peremptory on McAnally, defense counsel unsuccessfully renewed his request for additional peremptories. [He had initially requested additional peremptories just prior to the jury selection proceeding; the court took the request under advisement but said he would not be inclined to give more "unless something suggests it is appropriate" (R 16-17)]. 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 challenges. The trial court again refused. As a result, appellant had no peremptory challenges remaining with which to remove Keyes, who ultimately became foreman of the jury. Appellant was also unable to

exercise peremptory challenges on two jurors whom he had earlier unsuccessfully challenged for cause, Wester (who said he would lean toward the death penalty for a planned murder[4]) and Landsgaard (a 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 police officer witnesses might not be candid), and they also served on the jury. Thus, three jurors who defense counsel considered objectionable actually served on the jury, as a result of the exhaustion of appellant's peremptory challenges. See Williams v. State, 440 So.2d 404, 405-06 (Fla. 1st DCA 1983); Pierce v. State, 604 S.W.2d 185, 186 (Tex. Cr. App. 1980). The state's argument, at p. 27-29 of its brief, that the trial court did not abuse his discretion in refusing to exclude Wester and Landsgaard for cause is completely irrelevant. Appellant had excellent reasons, objective as well as subjective ones, to perceive that Wester, Landsgaard, and Keyes[5] would be unfavorable jurors. This is precisely the situation for which peremptory challenges are designed:

> Under the Constitution of the United States and the State of Florida the defendant in a criminal case is guaranteed the right to a trial by an impartial jury and it is to effectuate this guaranty that he may reject a certain number of those who are called to the jury box without giving his reason for not wishing them to pass upon his guilt or innocence. By this means he may escape the judgment of those whom he may consider prejudiced against him but whom he may not be able to show disqualified

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[4] Wester is a perfect example of a juror with a "general tendency in favor of the death penalty" (see AB 19,22,24), as opposed to McAnally, Burmeister, and Lindsay, who expressed the view that anyone convicted of a planned or premeditated murder should automatically get the death penalty.

[5] Keyes acknowledged some prior exposure to the facts of the case, indicated that he would more firmly believe that the death penalty was appropriate where (as here) more than one person was killed, and said that, while he did not feel it was an "absolute necessity" for a defendant to testify in his own behalf ". . . if 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 455,512,520-21,538-39). Appellant did not testify at trial.

for causes defined by statute.

Carroll v. State, 139 Fla. 233,234-35, 190 So. 437 (1939).

As a result of having wasted peremptory challenges on jurors who should have been excused for cause by the trial court, at least three jurors (including the foreman) served whom appellant considered prejudiced against him but was unable to show disqualified for cause. Based on the clear weight of authority as previously discussed, appellant submits that the forced exhaustion of his peremptory challenges is in itself sufficient prejudice to require reversal. But even if appellant were required to show specific prejudice, i.e. that one or more jurors served who would otherwise have been stricken by appellant [see Wheeler v. State, supra], he has done so.

With regard to the trial court's premature granting of the state's challenges for cause to jurors Poniatowski and Caristi, the state advances a manipulative and nearly incomprehensible "procedural default" argument, notwithstanding the fact that defense counsel sought to do exactly what Florida case law says he has to do to preserve a Witherspoon issue and was prevented from doing so by the trial court's refusal to even let him examine the jurors[6], and notwithstanding the fact that defense counsel sought to do exactly what the state says the lawyer in Raymond Leon Koon's case[7] should have done. In Koon, defense counsel objected to the excusal for cause of an anti-death penalty juror. The judge asked two questions of the juror, and then excused the juror. The state, at oral argument on appeal, argued

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[6] This clearly violated, among other things, Fla.R.Cr.P. 3.300(b), which guarantees the right of counsel for both the state and the defendant to examine each prospective juror orally on voir dire. The state in its brief not only fails to respond to the violation of the rule, it fails to even mention it.

[7] Florida Supreme Court case no. 63,322.

that defense counsel had an obligation to attempt to rehabilitate the juror, and that his failure to do so waived his previously made objection. In the present case, the trial judge announced in advance that he would not permit any rehabilitation (notwithstanding the fact that defense counsel had had no opportunity to examine these jurors at all), and invited the state to raise any challenges for cause it might have (R 484). The state challenged Poniatowski and Caristi, the judge granted the challenges, and defense counsel objected on the ground that he had had no opportunity to voir dire or rehabilitate (R 485). The judge noted the objection, and repeated that he would not allow rehabilitation because "they would not be heard to change their minds in an hour" (R 485). Florida law requires that, in order to preserve a Witherspoon issue for appellate review, defense counsel must object to the excusal of the juror and attempt to qualify the juror for service. Paramore v. State, 229 So.2d 855 (Fla.1969); Brown v. State, 381 So.2d 690 (Fla.1980); Maggard v. State, 399 So.2d 973 (Fla.1981). See also O'Bryan v. Estelle, 714 F.2d 365, 376-78 (5th Cir. 1983)(where the state established the juror's unequivocal opposition to the death penalty, it was then incumbent upon defense counsel, if he wished to rehabilitate the juror, to ask enough questions to demonstrate that the juror could obey the law regardless of his opposition to the death penalty). Comparing the state's "procedural default" arguments in the instant case and in Koon, it is clear that the state's real position is "Whatever the defense lawyer does, he should have done something different." Quite simply, the state is asking for a manipulative finding of procedural default, in order to deprive appellant of his right to appellate review of rulings which, individually and in combination, operated to deprive him of his constitutional rights to an impartial jury and to fundamental fairness in the jury selection process. See Silverstein v. Henderson, 706 F.2d 361, 367-68, n. 11 (2d Cir. 1983). See also NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 301 (1964)(novelty

in procedural requirements cannot be permitted to thwart review applied for by those who, in justified reliance on prior decisions, seek vindication in state courts of their federal constitutional rights); Breest v. Perrin, 655 F.2d 1, 2-3 (1st Cir. 1981).

It is worth noting that the state, when it challenged juror Caristi for cause, did not specify the ground of the objection, in technical violation of Fla.R.Cr.P. 3.320, which states that "[w]hen a juror is challenged for cause the ground of the challenge shall be stated." The judge, in granting the challenge announced the ground for the state, "Opposed to the death penalty and would not impose it under any circumstances. Granted" (R 485). Defense counsel said "Note my objection, Judge. I haven't had an opportunity to Voir Dire", and the court replied, "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). When they got to Poniatowski, the state again failed to state the grounds of its challenge for cause. The judge helped out "Same basis? She said she could not recommend the death penalty under any circumstances, and she was religiously and morally opposed to it." (R 485). The prosecutor agreed, and the court granted the challenge. Defense counsel, in compliance with Paramore v. State, Brown v. State, and Maggard v. State (in order to preserve the issue for appeal since by now he must have realized that the trial court would not allow it) again objected and pointed out that he had not had an opportunityto voir dire or rehabilitate (R 485). The court noted the objection. Now, on appeal, the state has the temerity to claim that appellant waived his right to appellate review, both of the premature excusal of the jurors and of the refusal to permit any rehabilitation or examination of the jurors by the defense, for defense counsel's failure to say "Witherspoon!" when he made his objection (see AB 29-30,32,35-36). What does counsel for

the state think they were talking about in the bench conference? If defense counsel didn't specifically refer to Witherspoon in making his objection, it was for the same reason that the prosecutor didn't specifically refer to it in making his challenge -- everyone concerned and especially the trial judge was well aware that that was the issue. See Burns v. Estelle, 592 F.2d 1297, 1302 (5th Cir. 1979)("More, much of the voir dire concerned the Witherspoon problem; the trial judge's comments and questions . . . clearly indicate that his attention was focused upon it during the entire process of cutting the panel"). If there was a technical violation of any established rule requiring a statement of grounds, it was committed by the state. Defense counsel stated his ground; he had been denied any opportunity to examine or rehabilitate the jurors. The state seems to think that counsel should have "disagree[d] with the trial judge's characterizations" (AB 31) of the jurors as being opposed to the death penalty, and would not impose it under any circumstances. How was he supposed to do that? Given the fact that they had only responded to the prosecutor's leading questions, and that defense counsel had been denied any opportunity to develop the matter any further, that's pretty much what they said. In order to be able to make a meaningful Witherspoon objection, defense counsel had a need and a right to question the jurors to discover whether their stance on the death penalty was equivocal or ironclad, and whether they could follow the law or not. Then perhaps he could have framed his objection in the precise terms which the state faults him for not doing.[8] As matters stood, however, the proper ground for the objection to the premature excusal of the jurors was the denial of an opportunity for the defense to examine or rehabilitate them. Paramore v.

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[8] "Magic words" are not needed to make a proper objection. See e.g. Williams v. State, 414 So.2d 509, 512 (Fla.1982); Thomas v. State, 419 So.2d 634, 636 (Fla.1982); Spurlock v. State, 420 So.2d 875, 875 (Fla. 1982); see also Jackson v. State, __So.2d__ (Fla.1984)(case no. 62,723, opinion filed May 10, 1984)(9 F.L.W. 175, 176).

State, supra; Brown v. State, supra; O'Bryan v. Estelle, supra. See also State v. Claiborne, 397 So.2d 486, 487 (La. 1981) (recognizing the right of the accused to examine a prospective juror challenged for cause by the prosecution in order to attempt to show that he is qualified to serve).

Finally, the main arguments on appeal with regard to the excusal of Caristi and Poniatowski are that they were excused prematurely in violation of Witherspoon, and that defense counsel was denied the opportunity to examine them, in violation of Fla.R.Cr.P. 3.300(b), in violation of the principles of Witherspoon and the right to an impartial jury, and in violation of due process, equal treatment, and the essential demands of fairness in the manner of jury selection. [See appellant's initial brief, p. 9,26,27-37,39-40]. The question of whether the judge was correct or incorrect in characterizing their responses to the prosecutor's questions was raised only briefly, and only as to Caristi [see initial brief, p. 37-38]. But even if a juror appears to be unequivocally committed to voting against the death penalty at the close of the state's examination, his exclusion is constitutionally permissible under Witherspoon only if he remains unequivocally committed to voting against the death penalty after the defense has had an opportunity to explore his views on the subject. See O'Bryan v. Estelle, supra, at 376-78; Mead v. State, 645 S.W.2d 279,283 (Tex. Cr. App. 1983); State v. Claiborne, supra, at 487,489-90. It is fundamentally unfair to allow the prosecutor to use leading questions to pin the juror down to a Witherspoon-excludable position, while refusing the defense any input in the ascertainment of the juror's views, or his ability to follow the law notwithstanding those views. State v. Claiborne, supra; see also O'Bryan v. Estelle, supra; Crawford v. Bounds, supra; Fla.R.Cr.P. 3.300(b); Barker v. Randolph, 239 So.2d 110 (Fla. 1st DCA 1970).

Here, the state's omnibus "procedural default" argument takes an even more bizarre twist. The state says "[t]he record clearly shows that

defense counsel objected to the lack of opportunity to voir dire the challenged jurors; defense counsel did not object on the basis that he felt the jurors' responses were insufficient to justify exclusion under Witherspoon" (AB 30). [For the multitude of reasons previously discussed, this hair-splitting argument is devoid of merit; defense counsel attempted to do exactly what Florida law requires to preserve his objection to the excusal of the jurors, and was thwarted by the court's refusal to allow him to examine or rehabilitate the jurors]. According to the state, defense counsel thereby not only waived his objection to the excusal of the jurors on the ground that their answers (up to that point) were insufficient to justify exclusion under Witherspoon, but also waived his objection to the exclusion of the jurors on the ground that he had not yet had an opportunity to examine or rehabilitate them (AB 30,35-36); the very ground which the state agrees that defense counsel asserted in making his objection. The state complains "If defense counsel had truly wanted to examine those jurors he would have disagreed with the trial judge's characterizations of the jurors' responses concerning the death penalty . . ." (AB 30). The innuendo that defense counsel may not have "truly wanted" to examine the jurors is completely unsupported by the record. The transcript reveals that both defense counsel and the prosecutor were acutely aware of the significance of the "death-qualification" process, and both of them used every opportunity offered them to fully explore the views of the prospective jurors as to the death penalty (see R 4-552). As the record in this and other cases demonstrate, Mr. Terrell is an experienced, conscientious, and competent trial attorney. It is completely clear from the record that had his objection been sustained and had he been given the opportunity to examine the jurors, he would have explored the possibility that they could follow the law and were not irrevocably committed to voting against the death penalty regardless of the evidence developed at trial. Depending

upon their responses, he might have successfully rehabilitated them. The state's mendacious suggestion that Mr. Terrell didn't "truly want" to question the jurors rings as false as the suggestion that Virgil Hawkins didn't "truly want" a legal education in the 1950s because he asserted his right to attend the all-white University of Florida Law School and declined the "opportunity" to attend the segregated and virtually non-existent FAMU Law School. See State ex rel. Hawkins v. Board of Control, 93 So.2d 354, 358 (Fla.1957).

The state also asserts [emphasis supplied by appellant] "[a]gain, if defense counsel had informed the trial judge that defense counsel believed the excusal [of the jurors] to constitute a violation of Witherspoon, the trial judge would probably have allowed defense counsel to further examine the two jurors, or perhaps the trial judge would have examined the two jurors. It is pure speculation to assume what the court would have done had the objection stated the claim now raised on appeal." (AB 35-36). "Had the objection stated the claim now raised on appeal?" It did -- lack of an opportunity to voir dire or rehabilitate. "To further examine?" Defense counsel was given no opportunity at any time to examine jurors Poniatowski and Caristi, in violation of, inter alia, Fla.R.Cr.P. 3.300(b).[9] "Would probably?" The trial court announced in advance that

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[9] In the same vein, at p. 32-33 of its brief, the state says:

> Indeed, further questioning as to the jurors' views on the death penalty would have been unreasonably repetitious and argumentative. Once it became evident that jurors Poniatowski and Caristi were subject to exclusion under Witherspoon . . . the court acted within its discretion in excusing them without allowing defense counsel an opportunity to question them further.

How about an opportunity to question them at all? What about Rule 3.300(b)? What about defense counsel's obligation under Paramore et al to make an effort to qualify the jurors for service? Of the numerous definite or possible "automatic death" jurors, the state was allowed to question them initially and then given another opportunity to rehabilitate them -- in the case of McAnally the judge concluded that the state's effort was successful -- why wasn't that "unreasonably repetitious and argumentative"? The essential demands of fairness require that the defense be given the same chance at rebuttal and rehabilitation as given the state. State v. Claiborne, supra; Crawford v. Bounds, supra. They have not been met in this case.

he was not going to allow any rehabilitation (R 484). See e.g. Birge v. State, 92 So.2d 819, 822 (Fla.1957); Brown v. State, 206 So.2d 377, 384 (Fla.1968); Thomas v. State, 419 So.2d 634, 635 (Fla.1982) (lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless). Yet when the court granted the state's challenge for cause to Caristi, defense counsel objected on the ground that he had had no opportunity to voir dire. The court replied "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). When the court granted the state's challenge to Poniatowski, defense counsel again objected on the ground of lack of an opportunity to voir dire or rehabilitate; the court noted the objection before defense counsel had even finished making it (R 485). How the state now has the gall to say the judge "would probably" have allowed rehabilitation, if only defense counsel had framed his objection in terms of the inadequacy of the jurors' responses to justify their exclusion under Witherspoon (which he was effectively precluded from doing by the very absence of an opportunity to rehabilitate), defies comprehension. "Pure speculation?" Absolutely, but is is the state, not appellant, whose entire argument rests on the quicksand of speculation. If defense counsel's objection to the excusal of the jurors had been granted or if ruling had been deferred until he'd had an opportunity to examine them (as he had a right and a duty to do), then perhaps we could be debating the merits of the Witherspoon rulings per se, rather than the denial of appellant's right to examine the jurors on their voir dire and the fundamental unfairness of the jury selection proceeding itself.

In its superficial response to appellant's "cumulative error" argument that 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, the state implies that it is not enough to show that the jury selection procedure was consistently skewed in the state's favor and to appellant's detriment, but that appellant must specifically show that one or more sitting juror was unqualified. Such a requirement would not only create a virtually impossible standard, it would effectively leave the accused in a criminal case with no recourse or remedy for serious violations of constitutional and procedural rights. Obviously, even among jurors who are legally qualified, some will appear more predisposed in favor of the prosecution and some will appear more predisposed in favor of the defendant; these attitudes may be revealed in their responses or subjectively sensed. See e.g. Francis v. State, supra; Meade v. State, supra; Carroll v. State, supra; State v. Morrison, supra. It is for this reason, to protect the accused's right to an impartial jury, that the selection procedure must be scrupulously fair. Where it is not, reversal of any ensuing conviction and sentence is the only adequate remedy; there is no requirement that a sitting juror be disqualified. See (in addition to the cases set forth at page 8-9 of this reply brief) e.g. Davis v. Georgia, 429 U.S. 122 (1977); Chandler v. State, 422 So.2d 171 (Fla.1983); Mathis v. State, 31 Fla. 291, 319, 12 So. 681 (Fla.1893); Poole v. State, 194 So.2d 903, 905 (Fla.1967); Francis v. State, 413 So.2d 1175, 1178-79 (Fla.1982); Barker v. Randolph, 239 So.2d 110 (Fla. 1st DCA 1970); Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981); Peek v. State, 413 So.2d 1225 (Fla. 3d DCA 1982); Williams v. State, 424 So.2d 148 (Fla. 5th DCA 1982); Peri v. State, 426 So.2d 1021 (Fla. 3d DCA 1983); Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1967); United States v. Davis, 583 F.2d 190 (5th Cir. 1978); Burns v. Estelle, 592 F.2d 1297, 1299 (5th Cir. 1979); United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981); State v. Claiborne, 397 So.2d 486 (La. 1981).

The state's argument in this appeal boils down to nothing more than "Heads I win, tails you lose." As to the "automatic death penalty" jurors -- where the state questioned the jurors first; the defense established that they believed that anyone convicted of a premeditated or planned murder should automatically get the death penalty; and the state then had another opportunity to rehabilitate them[10] -- the state repeatedly argues on appeal that defense counsel "did not ask enough questions" (AB 24, see AB 19,21,22, 23) to demonstrate their bias as to penalty. As to the apparent "automatic life" jurors -- where the state, through leading questions, elicited responses which arguably would disqualify them under Witherspoon, and the defense had no input into the development or clarification of their views on the death penalty and, for that matter, no chance to talk with them at all -- the state argues that "further" questioning by the defense would have been "unreasonably repetitious and argumentative" (AB 32-33). If Mr. McAnally could be rehabilitated, as the trial court believed he had been, then it was entirely possible that Ms. Poniatowski and Ms. Caristi could have been rehabilitated, had appellant not been deprived of his right to try. The state is, deservedly, in the uncomfortable position of playing both ends against the middle. Appellant is entitled, by rule of procedure and by the Florida and federal constitutions to a new trial and (if necessary) penalty hearing before an impartial jury, fairly selected.

ISSUE II

Despite the fact that, of the seven Escambia County sheriff's deputies who testified in narrative detail with regard to the high speed chase following the Carolyn Ward incident, only the last two so much as mentioned the seizure of appellant's handgun, the state insists that, since the jury

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[10] Unsuccessfully, as to Burmeister and Lindsay; arguably with some success as to McAnally.

was not given a flight instruction, it must have considered all of this superfluous and highly prejudicial testimony as nothing other than proof of possession of the gun (AB 39-40,43-44). Since when is the introduction of prejudicial evidence rendered harmless by the absence of a specific instruction telling the jury they can consider it for its prejudicial value? When collateral crime evidence inadmissible under the Williams Rule comes in, is the prejudicial effect dissipated by the lack of a jury instruction that "You may consider the testimony about other crimes as evidence of bad character and propensity to commit crime"? Of course not. The issue in this point on appeal concerns the admissibility of irrelevant and highly prejudicial evidence, and is governed by the principle set forth in Fla. Stat. §90.403[11]; it is not a "flight instruction" issue. [However, the flight instruction cases are useful for the purpose of discerning those circumstances in which evidence of flight has probative value from the circumstances, as in the instant case, where it does not]. The improperly admitted evidence portrayed appellant (whose guilt the state sought to establish by circumstantial evidence) as a person of bad character, with contempt for law enforcement and utter disregard for the life and limb of innocent motorists or pedestrians, much less the police. Appellant's vigorous efforts to elude the police strongly implied that he must be involved in some pretty serious criminal activity. This, in fact, was true; he had just tried to kidnap a saleswoman by forcing her at gunpoint into the trunk of the Cadillac they were test driving. She escaped and called the police; appellant took off in the now-stolen Cadillac; the police spotted the Cadillac on the Interstate; and the rest is history. The record clearly demonstrates that

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[11] Fla. Stat. §90.403 states, inter alia:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

not only was the Carolyn Ward incident an alternative reasonable explanation for appellant's flight; it was by far the most reasonable explanation. Appellant had no reason to believe he was a suspect in two unrelated convenience store murders which had occurred three weeks earlier, and in point of fact he was not a suspect. The police were chasing him because of Carolyn Ward's call, and that was the only reason. The trial court correctly ruled that the robbery and attempted kidnapping of Carolyn Ward and the theft of the Cadillac were irrelevant and inadmissible, but, after considerable urging by the prosecutors, he let in the ensuing chase. As a result, there were two reasonable inferences for the jury to choose from, one of them inadmissible and the other misleading. Either the jury would assume, correctly, that appellant must have committed another serious crime about which they were not being told, or else they would assume that his attempt to elude the police must be motivated by consciousness of guilt of the charged crimes, i.e. the convenience store robbery-murders. The state purports to believe that, in the absence of a specific instruction to the contrary, the jury must have considered all of the testimony relating to the chase only as evidence that appellant possessed the gun. This suggestion is belied by the observation made in Paramore v. State, 229 So.2d 855, 860 (Fla.1969) ("The law requires that juries be composed of persons of sound judgment and intelligence . . ."). Defense counsel was not seeking to exclude evidence of appellant's possession of the gun, only the circumstances of the chase (see R 556-57). If the state was only seeking to show appellant's possession of the gun, why did they need to call Officers Chavers, Rowland, Lewis, Davis, and Gray? Why did the jury need to know that the chase reached speeds of over a hundred miles an hour; that appellant was driving off the side of the road onto the grassy portion, missing mailboxes and going over the edges of driveways; that appellant crossed into the opposite lane of traffic, running cars off the road in his wake; that appellant deliberately tried to ram Officer Gray head-on, causing a collision

between Gray's cruiser and another police cruiser driven by Officer Lewis? To show possession of the gun?

The prosecutor specifically argued the admissibility of flight as being relevant to consciousness of guilt (R 559). Before the trial judge changed his ruling to allow in the testimony concerning the chase, the prosecutor complained:

> The evidence of his flight from officers after they were alerted that he had committed an offense[12], 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 --
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> * * * * * *
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> . . . I have got six or seven officers to testify about his activity.
>
> (R 564).

If the jury was supposed to consider this entire "Smokey and the Bandit" scene only as evidence showing possession of the gun (to which the defense did not object and the admissibility of which was never in question), what is all the fuss about? In Gunn v. State, 78 Fla. 599, 604-05 (1919), another case involving improper admission of flight evidence, this Court observed:

> It is contended [by the state] that as the prisoner had already testified that he had made trips away from his home, that no harm could have been done him by the admission of the Sheriff's testimony. Then why was if offered by the State, and admitted by the Court? Surely not merely to consume time, and swell the record? The State's attorney must have believed that the Sheriff's testimony would tend to establish the guilt of the prisoner, and the court in admitting it considered it competent for that purpose. Having gotten it before the jury over the objection of the defendant, and a conviction obtained, the State cannot be heard to say it was harmless error. Who can say that the testimony that the court on the offer

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[12] That offense being the robbery and attempted kidnapping of Ms. Ward and the theft of the Cadillac.

> of the State's Attorney over the objection of the defendant, permitted to go to the jury for consideration in determining the guilt of the defendant, did not and could not have the effect that the State's Attorney intended?

Two decisions cited by the state require some comment, and one not cited requires more extensive discussion. In Straight v. State, 397 So.2d 903 (Fla.1981), Straight fled from Jacksonville to California the day after the charged murder; subsequently, while being arrested in California, apparently for the charged murder, Straight again attempted to avoid arrest by fleeing and shooting at a police officer. In the instant case, appellant did not attempt to flee after the December 31, 1982 and January 2, 1983 convenience store robbery murders (assuming arguendo that he is the one who committed them). Despite having no ties in Pensacola, he was still there nearly a month later. If the police had any suspects in the convenience store cases, appellant was not among them. Appellant had no reason to believe he was a suspect in those cases. In contrast to Straight, where the attempts to elude the police were apparently motivated by consciousness of guilt of the charged crime -- in contrast even to Bundy v. State, infra, where the defense contended that the defendant "may have been" avoiding prosecution for a different crime -- in the present case the record clearly shows that the intervening, collateral, inadmissible criminal episode was the immediate, and by far the most reasonable, explanation for appellant's flight.

A second case relied on by the state, Heiney v. State, 447 So.2d 210 (Fla.1984)(AB 39-40) is even further off base. In Heiney, the defendant shot and wounded his roommate in Texas. Upon learning that the roommate was in critical condition and that the police wanted to talk to him about the shooting, Heiney asked for a ride out of town, telling the driver that he planned to hitchhike to Florida. Heiney was next seen in Mississippi in the company of Francis May. Subsequently, May's body was found off I-10 in Florida. He

had apparently been beaten to death with a claw hammer, his pocket had been turned inside out, and he had no identification. Heiney, meanwhile, was driving around the country in May's car, and using May's credit card. He was ultimately arrested in Ohio. On appeal, Heiney challenged the admission of evidence of the Texas shooting incident; the state countered that it was relevant to show the motive for the charged crime, i.e. the murder of Francis May. This Court agreed with the state, concluding that "[the] evidence is relevant to show that Heiney's desire to avoid apprehension for the shooting in Texas motivated him to commit robbery and murder in Florida so that he could obtain money and a car in order to continue his flight from Texas." Heiney v. State, supra, at 214. Note first that Heiney (1) was aware that he was suspect in the Texas shooting, that the victim might die, that those involved could identify him, and that the incident had been reported to the police, who wanted to talk to him, and (2) Heiney immediately fled from Texas after he recieved the foregoing information. These facts alone provide a marked contrast with the circumstances of the instant case. Moreover, in order for Heiney to be even remotely applicable to the instant case, it would have to be argued that the collateral crimes (i.e. the robbery and attempted kidnapping of Carolyn Ward and the theft of the Cadillac) are relevant to show the motive for the charged crimes (the convenience store robbery-murders) which occurred nearly four weeks earlier! To state this proposition is to demonstrate its absurdity. The state instead inverts its own argument and says that the challenged evidence "was relevant to show that appellant's desire to avoid apprehension for the convenience store murders motivated him to sell his Barracuda convertible, steal a Cadillac and abduct Carolyn Ward, so that he could obtain a different car and continue his flight" (AB 39-40) [emphasis supplied]. Continue what flight? Unlike Heiney, appellant had no reason to fear that he was a suspect in the convenience store murders. Unlike Heiney, appellant did not flee after the convenience store murders; here he was in Pensacola, still staying

at a motel on the beach, three to four weeks later. Unlike Heiney, who was broke and had to borrow $4.00 when he left Texas, appellant (according to the state's witnesses) was certainly not hurting for money (see R 965-68, 974-75,979-80,1043-44,1046). The state has suggested no reason why appellant should suddenly feel a need to flee, when he didn't for nearly a month. If appellant wished to leave Pensacola, he did not need to steal a Cadillac and abduct Carolyn Ward in order to do so (AB 40). If he was concerned about avoiding arrest in the convenience store cases, that would not exactly be a low-profile way to do it. Finally, if, as the state theorizes, appellant committed the convenience store murders and was so concerned about being apprehended that he waited around for three-plus weeks before feeling a need to "steal a Cadillac and abduct Carolyn Ward, so he could obtain a different car and continue his flight", then why on earth would not have disposed of the gun? The state's theory that the robbery and kidnapping of Carolyn Ward were motivated by appellant's desire to "continue" a flight which he never started is not only unsupported by any evidence in the record, it is so far-fetched as to be ludicrous. Most robberies and thefts are motivated by a desire to obtain property without working for it; presumably the Carolyn Ward incident was motivated by appellant's desire to obtain a Cadillac. As to why he may have wanted a Cadillac, there is simply no evidence.

Besides, even if there were any basis in the record for the state's convoluted "evidence of motive" theory, this would have a bearing only on the state's argument that the entire Carolyn Ward incident should have been admitted under the Williams Rule -- the trial court ruled adversely to the state on this contention, and the state has not cross-appealed. The effect of admitting the evidence of the ensuing chase in an evidentiary vacuum had only three inevitable effects -- to prejudice appellant, to confuse the issues, and to mislead the jury. See Fla. Stat. §90.403; Perper v. Edell,

44 So.2d 78, 80 (Fla.1949); Aho v. State, 393 So.2d 30 (Fla. 2d DCA 1981).

Although the state has not yet done so, it may cite as additional authority this Court's recent decision in Bundy v. State, __So.2d__ (Fla. 1984)(case no. 57,772, opinion filed June 21, 1984)(9 F.L.W. 257, 264). Bundy, however, involves only a question of the propriety of a flight instruction; Bundy did not argue that the evidence of flight was improperly admitted in the first place. See Bundy v. State, supra, 9 F.L.W. at 264; Initial Brief of Appellant Theodore Robert Bundy, case no. 57,772, at p. 117-119. Moreover, Bundy argued only that his motivation for fleeing "may have been" avoidance of prosecution for a different crime [Bundy v. State, supra, 9 F.L.W. at 264], specifically referring to a prior Utah kidnapping, and to the fact that, when apprehended, Bundy had possession of stolen credit cards and a stolen license tag on his car [See Initial Brief of Appellant Bundy, supra, at 117]. The motivation for Bundy's flight, then, was perhaps ambiguous, and, as previously noted, there was no objection (on appeal at least) to the admission of the flight evidence itself. Arguably then, under Florida law, the giving of a flight instruction may not have been error. See e.g. Mackiewicz v. State, 114 So.2d 684 (Fla.1959); Proffitt v. State, 315 So.2d 461 (Fla.1975); Batey v. State, 355 So.2d 1271 (Fla. 1st DCA 1978). In the instant case, in contrast, the objection at trial and on appeal goes only to the admissibility of irrelevant and prejudicial evidence, whether characterized as "flight evidence", "collateral crime evidence", "evidence of bad character", "confusing or misleading evidence", or what have you. Bundy relied primarily on the decision of the Fifth Circuit Court of Appeal in United States v. Myers, 550 F.2d 1036 (5th Cir. 1977); this Court noted correctly that the holding in Myers was modified in United States v. Kalish, 690 F.2d 1114, 1156 (5th Cir. 1982). Appellant's argument, it should be emphasized, does not stand or fall with Myers; among the other decisions which, in their holdings or in their anal-

ysis, support his position include United States v. Beahm, 664 F.2d 414, 419-20 (4th Cir. 1981); United States v. Howze, 668 F.2d 322,324-25 (7th Cir. 1982); United States v. Borders, 693 F.2d 1318,1325-27 (11th Cir. 1982); United States v. Ramon-Perez, 703 F.2d 1231,1233 (11th Cir. 1983); Fentis v. State, 582 S.W.2d 779,780-81 (Tex.Cr.App. 1976); and especially Hines v. State, 646 S.W.2d 469 (Tex.App. 1 Dist. 1982), which is astonishingly similar to the instant case, as discussed in pages 60-64 of appellant's initial brief, and about which the state has literally nothing to say in its answer brief. But returning to Myers and Kalish -- Myers observes that "Analytically, flight is an admission by conduct . . . It's 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, supra, at 1049. Other decisions, before and after Kalish, recognize the validity of this common-sense observation [see United States v. Beahm, supra; United States v. Howze, supra; United States v. Borders, supra; Turner v. McKaskle, 721 F.2d 999, 1002 (5th Cir. 1983)]. The Kalish decision does not disagree with Myers insofar as its statement that the probative value of flight evidence is dependent upon the degree of confidence with which the four inferences can be drawn. Rather, Kalish simply expresses the view that Myers does not establish the test for admissibility of flight evidence. Instead, the court in Kalish chose to use the standard set forth in Fed.R.Evid. 403, which requires a determination of whether the probative value of the evidence outweighs the danger of unfair prejudice. Using that standard, and concluding that under the facts of the case, Kalish's behavior did indicate consciousness of the charged crime and not merely the unrelated crime, the court held that the admission of the complained-of evi-

dence satisfied Rule 403 and was not reversible error. Lest there be any doubt that the Fifth Circuit continues after Kalish to adhere to the Myers criteria for assessing the probative value of flight evidence, see Turner v. McKaskle, 721 F.2d 999, 1002 (5th Cir. 1983).

So the import of Kalish is that in federal courts the admissibility of flight evidence is to be determined under the rule which calls for weighing probative value against the danger of unfair prejudice. Florida's equivalent evidentiary rule, Fla. Stat. §90.403 prohibits the introduction even of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. Here, for the reasons discussed in Myers, Beahm, Howze, Borders, Fentis, and Hines, the probative value of appellant's flight from police officers after he tried unsuccessfully to kidnap Carolyn Ward and stole the Cadillac, as bearing on his consciousness of guilt for the charged convenience store robbery-murders which occurred 3-4 weeks earlier, is zero -- actually less than zero if the misleading effect of the evidence can be counted as negative probative value. There was far more than a danger of unfair prejudice and confusion, there was a certainty of it. Appellant is entitled to a new trial untainted by such evidence.

ISSUE II-C and III

Appellant will rely on the arguments advanced in his initial brief as to these issues.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant requests 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 SMITH 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 23rd day of July, 1984.

Steven L Bolotin

STEVEN L. BOLOTIN