SUPREME COURT OF FLORIDA

JIM ERIC CHANDLER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

Case No. 69,708

INITIAL BRIEF OF APPELLANT

On appeal from the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida (on Change of Venue from Nineteenth Circuit, Indian River County, Florida).

JEFFREY H. GARLAND
MICHAEL J. KESSLER
Counsel for Appellant
8507 S. U.S. 1, Suite 7
Port St. Lucie, FL 34952
(305) 878-6500

(served 1 day late)

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
POINTS INVOLVED	10a
SUMMARY OF ARGUMENT	11
POINT I	13
A	13
B	15
C	16
D	23
E	24
POINT II	31
POINT III	34
POINT IV	36
A	36
B	39
C	42
CONCLUSION	44
CERTIFICATE OF SERVICE	44

TABLE OF CITATIONS

	PAGE
Barber v. Page, 390 U.S. 719, 20 L.Ed. 2d 255, 88 S.Ct. 1318 (1986)	24
Bates v. State, 78 Fla. 672, 84 So. 373 (1919).	32
Berger v. California, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed. 2d 508 (1969)	24
Bunn v. State, 363 So. 2d 16 (Fla. 3rd DCA 1978).	31,32
California v. Green, 399 U.S. 149, 26 L.Ed. 2d 489 90 S.Ct. 1930 (1970).	20,23,24,28
Canada v. State, 472 So. 2d 1296 (Fla. 2d DCA 1985).	22
Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973).	20
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967).	43
Davis v. Alaska, 415 U.S. 308, 39 L.Ed. 2d 347, 94 S.Ct. 1105 (1974).	20
Delgado-Santos v. State, 471 So. 2d 74 (Fla. 3d DCA 1985), approved 497 So. 2d 1199 (Fla. 1986).	22
Delaware v. Fensterer, 474 U.S. ____, 88 L.Ed. 2d 15, 106 S.Ct. ____ (1985).	25
Delaware v. Van Arsdall, 475 U.S. ____, 89 L.Ed. 2d 673, 106 S.Ct. ___(1986).	26,27,29,42
Engle v. State, 438 So. 2d 803 (Fla. 1983), cert. den. 465 U.S. 1074 (1984).	13,19,20
Francis v. Franklin, ___U.S.___, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985).	35,36,37
Francis v. State, 413 So. 2d 1175 (Fla. 1982).	36
Franklin v. State, 403 So. 2d 975 (Fla. 1981).	33
Garcia v. State, 492 So. 2d 360 (Fla. 1986).	42
Gardner v. Florida, 430 U.S. 349, 51 L.Ed. 2d 393, 97 S. Ct. 1197 (1977).	13,19,20

	PAGE
Green v. Georgia, 442 U.S. 95, 60 L.Ed. 2d 738, 90 S.Ct. 2150 (1979)	20
Harrison v. State, 149 Fla. 365, 5 So. 2d. 703 (1942).	32
Jennings v. State, 413 So. 2d 24 (Fla. 1982), appeal after remand 453 So. 2d 1109, cert. granted and vacated 470 U.S. 1002, 84 L.Ed. 2d 374, 105 S.Ct. 1351, on remand 473 So. 2d 204 (Fla. 1985).	21,26
Johnson v. Zerbst, 304 U.S. 4058, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)	38
Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L. Ed. 1011 (1892).	36
Mattox v. U.S., 156 U.S. 237, 39 L.Ed. 2d 409, 15 S.Ct. 337 (1895).	24,28
Miller v. Norvell, 773 F.2d 1572 (11th Cir. 1985)	35
Moore v. State, 452 So. 2d 559 (Fla. 1984), appeal after remand 473 So. 2d 686 (Fla. 4th DCA 1984), approved 485 So. 2d 1279 (Fla. 1986).	21,26
Morris v. State, 483 So. 2d 525 (Fla. 5th DCA 1986).	22
Ohio v. Roberts, 448 U.S. 56, 65 L.Ed. 2nd 537, 100 S.Ct. 2531.	25,26
Olivera v. State, 494 So. 2d 298 (Fla. 1st DCA 1986)	22
Peede v. State, 474 So. 2d 808 (Fla. 1985).	40,41
Pointer v. Texas, 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065 (1965).	13,25,36
Proffit v. Wainwright, 685 F.2d 1227 (11th Cr. 1983), cert. denied, ___ U.S. ___, ___S.Ct.____, 78 L.Ed. 2d 697 (1983).	41
Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d (1979)	35
Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854 (1973)	37
Scott v. State, 431 So. 2d 733 (Fla. 4th DCA 1983), aff'd. in part, quashed in part 453 So. 2d 798	32

	PAGE
Specht v. Patterson, 386 U.S. 605, 18 L.Ed. 2d 326, 87 S.Ct. 1209 (1967).	14
State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).	34
State v. Moore, 485 So. 2d 1279 (Fla. 1986)	22
Taylor v. State, 320 So. 2d 428 (Fla. 2d DCA 1975)	33
U.S. v. Corporale, 806 F. 2d 1487 (11th Cir. 1986)	20
U.S. v. Hastings, 461 US. 499, 103 S.Ct. 1974, 76 L. Ed. 2d 96 (1983)	43
U.S. v. Orrico, 599 F. 2d 113 (6th Cir. 1979)	22
Walker v. State, 438 So. 2d 969 (2d DCA 1983)	38,43
Walston v. State, 481 So. 2d 1187 (Fla. 1985)	19
STATUTES	
Section 90.801 (2)(a), Florida Statutes (1981)	21
Section 921.141, Florida Statutes (1985)	13,14,19,20,22 23,34
RULES	
Rule 3.350, Florida Rules of Criminal Procedure	39
Rule 3.180(a)(4), Florida Rules of Criminal Procedure	36
Rule 3.390(d), Florida Rules of Criminal Procedure	31
CONSTITUTIONS	
Amend. VI, U.S. Constitution	13,19,22,36
Amend XIV, U.S. Constitution	13,36
Art. I, Section 9, Florida Constitution (1968)	34
Art. I, Section 16, Florida Constitution (1968).	19
OTHER AUTHORITY	
81 Am Jur 2d, Witnesses §30	22
Black's Law Dictionary (1910)	22
Bouvier's Law Dictionary, Vol. 1&2	22
George Orwell, 1984 (1948)	28
Lewis Carroll, Alice's Adventures in Wonderland (1865)	28

PRELIMINARY STATEMENT

Appellant was the defendant in the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. Appellant will be referred to, additionally, by name and as defendant.

Appellee was the prosecution and will be referred to, additionally, as the State of Florida.

The symbol "R" will refer to that portion of the record on appeal which includes motions, memoranda, orders, jury instructions, judicial findings and the like. The symbol "T" will refer to the motion and trial proceedings contained in volumes I through VI. The symbol "JT" will refer to the jury selection portion of the trial which is contained, separately, in volumes I through V.

STATEMENT OF THE CASE

Appellant's sentence of death, on two counts, was reversed and remanded for a new penalty phase proceeding before a jury. Chandler v. State, 442 So. 2d 171(Fla. 1983).

After remand, the parties stipulated to a change of venue from Indian River County (the site of the original trial) to St. Lucie County. The penalty proceeding was conducted before a jury in September, 1986. The jury returned an advisory verdict of death, in both counts, on September 17, 1986.

On September 18, 1986, the court imposed a sentence of death in both counts. On the same day the trial court entered its findings in support of the death sentence.

The defendant took this timely appeal.

STATEMENT OF FACTS

I. VOIR DIRE

During voir dire, potential jurors Bergstrom, Mellin and Ruggirello admitted to having heard or read about the case before. (263,326,355). The Court retired to the jury room with counsel to question these potential jurors individually. (JT 383-84). The defendant expressly waived his presence at this questioning. (JT 384-385). After the questioning was completed, the Court entertained challenges for cause as to these potential jurors. The defendant was not informed that cause challenges would be heard at that time. The defendant did not expressly waive his presence at the hearing of these cause challenges. Defense counsel did not consult with the defendant prior to challenging any of these potential jurors for cause. Defense counsel moved to excuse each of these potential jurors for cause. The Court denied each motion. (404-09) Counsel later peremptorily challenged potential jurors Mellin, Bergstrom and Ruggirello. (JT 415) Later, the defendant exhausted his allotment of peremptory challenges and the Court declined to allot additional peremptory challenges. (JT 896)

II. THE TRIAL

On September 23, 1980, Harold and Rachel Steinberger were found dead approximately 150 feet behind their home in Sebastian, Florida. (T.187,194). The victims had been murdered with a heavy blunt instrument and each victim suffered mutiple post-mortum knife wounds. (T.427,393-394).

Mr. and Mrs. Steinberger's bodies were first found and reported by Jim Chandler who said that he found them while mowing and cleaning up the Steinberger's yard. The bodies were discovered on Wednesday, July 23, 1980. Two days before this date, Chandler acknowledged first meeting Mr. and Mrs. Steinberger, going to their house and agreeing to mow their yard on the following day. Chandler stated that he didn't get around to mowing the yard until Wednesday. The defendant acknowledged that he had lived in the same house approximately five or six months before the homicides occurred. (T.202-205).

Detective Phil Redstone testified that Chandler made a series of unrecorded, unwitnessed statements beginning shortly after the bodies were discovered and continuing for several days. These statements, as reported by Detective Redstone, were enigmatic, but damaging.

There was no sign of forced entry into the home. (T.213). Mrs. Steinberger was dressed in a housecoat and slippers. Mr. Steinberger was casually dressed, but his hands were bound behind his back with a dog leash. (T. 195-196). The crime scene was processed with fingerprint powder with no result. (216 - 217). A pair of rubber gloves were found on the kitchen

counter. (T.217). Marlboro brand cigarette buts were found in the living room area in a paper grocery bag. (T. 220). Other items seized from the house during the crime scene search include a calculator box, calculator warranty papers and a calculator tape. (T.218). Detective Redstone described a conversation that occurred on Friday, July 25 at 11:52 A.M. during which Chandler denied doing the murder. Chandler did, according to Detective Redstone, state "if it was me I woulda' used the gloves like the ones that were on the kitchen counter so as not to leave any fingerprints." (T.229). It is never established, that he, could not have seen the gloves on the counter after the homicides were reported.

On Friday, July 25, at approximately 2:30 P.M., Detective Redstone had another unwitnessed, unrecorded conversation with Chandler. During the course of this conversation, Chandler offered an explanation for why there was no evidence of a struggle. According to Detective Redstone, Chandler said there was no sign of a struggle because "if your wife had a knife to her throat you wouldn't do anything either." (T. 232).

On Saturday, July 26, Detective Redstone initiated another unwitnessed, unrecorded conversation with the defendant. Detective Redstone broached the subject of the location of the murder weapon. Detective Redstone testified that Chandler said "The knife was in the river and he said the bat was in a body of water that had no tide and current." (T. 233). On cross-examination, however, Detective Redstone testified that he first

learned about the baseball bat on Friday, July 25 while the defendant was in a car with Chief Cummings and Detective Redstone was following in a separate car. Chief Cummings stopped his car, got out, ran back and told Detective Redstone something about a baseball bat. (T. 320-321).

Detective Redstone described another unwitnessed, unrecorded, undated conversation with the defendant. During the course of this conversation, the defendant said "he picked up the boy... for an alibi." (T.235-236). When the defendant had first reported finding the bodies, he was with a fifteen year old youngster named Tibbets.

The evidence fails to show how or why or where certain personal property was found except that it was found in a canal containing water hyacinths. Detective Redstone testified that identification and a wallet belonging to Mr. Steinberger were found in the canal close to where a baseball bat was found. The evidence failed to show <u>when</u> these items were found or, indeed, that they were even found in the same county. (T.239-240).

There were other items of evidence directly linked to the defendant. These items can be described as follows:

1. Defendant was expected to go to work for Lynn Meyers on Monday, July 21, 1987, but failed to appear. (T. 453). There was no evidence to establish that the time of death was on Monday, July 21.

2. Nancy Doyle saw the defendant at the Shedhous Tavern

at 12:00 P.M. noon on Tuesday, July 22, where he sold two rings to Ms. Doyle. (T. 459). The initials on these rings linked them to the victims. See testimony of John Karasek (T. 520-521). There was, however, no testimony from a testifying medical expert that the time of death was on Tuesday, July 22.

3. Morell Copp testified that the defendant offered certain items for sale at the Sportsmans Lounge on Tuesday, July 22 between 1:00 P.m. and 2:00 P.M. in the afternoon. The items shown included a calculator, television and clock radio. Mr. Copp was unable to identify the clock radio in trial as being the same one offered for sale. He was likewise unable to positively indentify the television. Mr. Copp did positively identify the calculator which is definitely linked to the Steinberger home by the serial numbers on the warranty card. (T. 470). Copp purchased the calculator from Chandler.

4. Dave Dunham testified that he was present when Morell Copp inspected various items in the defendant's trunk on the early afternoon of Tuesday, July 22. (T.482). Dunham also saw the television, calculator and a "few odds and ends." Dunham was able to positively identify state's exhibit 7P and 15P. as items that were in the trunk. Dunham witnessed Morell Copp purchase the calculator from the defendant. Dunham testified that the defendant was trying to sell these things to raise money to bail his brother out of jail. (T. 488-489). Dunham saw the same items, less the calculator, at Bridget Morelli's

apartment on the evening of Tuesday, July 22. (T. 490). Dunham purchased the T.V. from Chandler for $15.00 the next day (T. 491).

5. Bridget Morelli saw the defendant on Saturday or Sunday preceding the homicides. This meeting the defendant told Ms. Morelli that he was going to Fort Lauderdale for a couple of days. On Monday, July 21, at approximately 5:00 P.M., Morelli received a telephone call from Chandler where he stated that he was leaving for Fort Lauderdale. (T. 503). On the afternoon of Tuesday, July 22, Morelli received another phone call from the defendant stating that he had returned early from Fort Lauderdale. The defendant came to the Shedhous for a few drinks at 3:00 P.M. (T. 502). Chandler and Morelli went to dinner early in the evening. (T.504). Chandler stored several items at Morelli's apartment, including a television and a clock radio. (T.505-506).

6. John Karasek testified that he was a next door neighbor of the Steinbergers for nineteen years in Fort Lauderdale. (T.514). He testified that the Steinbergers were notsociable people and that Mrs. Steinberger was very ill. (T. 514-515). Karasek was unable to positively identify the clock radio. (T. 520). He did positively identify the television as belonging to the Steinbergers. (T.519-520). Karasek also testified that Rachel Steinberger's maiden name was"Muchler." (T. 521).

Matthew McCormick, Jr. testified, generally, that the defendant was on parole for the offense of kidnapping at the

time of these murders. (T.525).

Lillian Messer testified that her youngest son (and only other son) was not jailed in Fort Lauderdale in July, 1980. (T.529). Mrs. Messer has earlier testified that she had purchased Jim Chandler a fillet knife for Christmas, 1979. (T. 405). Mrs. Messer could not positively identify the fillet knife in evidence and Dr. Cox described the knife in evidence as a "square back" and inconsistent with the wounds he observed. (T.431).

Lowell Wolfe testified, generally, as to similar fact crimes which occurred in the State of Texas on September 11, 1973.

Detective Redstone testified as to hearsay statements of three witnesses who did not testify. In addition, Detective Redstone testified as to what the estimated time of death was, but there was no testimony of estimated time of death from Dr. Cox. The hearsay declarations are:

1. Detective Redstone testified as to the results of an expert examination performed by Dan Nippes, a criminalist at the Indian River Crime Laboratory.

2. Detective Redstone described information obtained purely second-hand from another officer:

> Detective Hamilton displayed his blue light and attempted to stop the defendant. A chase ensued down towards Sebastian. A roadblock was set up during the chase. Chandler picked up a .22 rifle from in the cab of the vehicle... and pointed it in the direction of Detective Hamilton and threatened him with it during the chase.

Detective Redstone identified Exhibit 19P as being "in fact the rifle that he (the defendant) pointed at Detective Hamilton." (T.339-340).

3. Detective Redstone testified that Chief Cummings said that the bodies had not been disturbed in any way. (T.195).

4. Detective Redstone testified that "the time of death was on the 22nd, on Tuesday between 10:00 A.M. and 2:00 P.M. (T.218-220). It should be noted that time of death was never established by Dr. Cox during the course of his testimony.

Appellant called Dr. Rifkin (a clinical psychologist), Jerald Minor (the defendant's sister), Jeff Chandler (the defendant's brother), Ernest Messer (the defendant's step-father), and Lillian Messer (the defendant's mother).

The jury returned an advisory verdict of death, voting 12 to 0. (R.298).

The trial court imposed a sentence of death, on both counts. (R.301-302). The trial court found the existence of six (6) aggravating factors. (R.327-330). The trial court found existence of no mitigating factors. (R.330).

POINTS INVOLVED

I. THE COURT COMMITTED FUNDAMENTAL ERROR, AND DENIED APPELLANT THE RIGHT OF CONFRONTATION, BY ADMITTING HEARSAY STATEMENTS WHERE THE HEARSAY DECLARANTS NEVER APPEARED BEFORE THE PENALTY PHASE JUDGE AND JURY.

A. The right to confrontation is a fundamental right which attaches to the penalty phase under Florida Statute 921.141.

B. The complained of hearsay was material, persuasively argued, and prejudicial.

C. Florida Statutes 921.141 is facially unconstitutional to the extent that it denies all confrontation and any opportunity for cross-examination.

D. Assuming, arguendo, the constitutionality of Florida Statute 921.141, even under the specific facts of this case and the relaxed evidence rules contained therein, appellant was denied entirely the fundamental right of confrontation and cross-examination.

E. The harmless rule does not apply where there has been a complete denial of confrontation and cross-examination of material witnesses.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE A VOLUNTARINESS JURY INSTRUCTION.

III. THE STATE IMPERMISSABLY COMMENTED ON THE DEFENDANT'S RIGHT TO REMAIN SILENT.

IV. THE TRIAL COURT ERRED IN HEARING AND RULING ON CHALLENGES FOR CAUSE AS TO POTENTIAL JURORS RUGGRIRELLO, MELLIN AND BERGSTROM IN THE APPELLANT'S ABSENCE.

A. The right to be present during all critical stages attaches to the exercise of cause challenges to potential jurors.

B. The appellant's waiver of presence was limited in scope and did not extend to the exercise of cause challenges.

C. The prejudice to appellant cannot be measured.

SUMMARY OF ARGUMENT

POINT I

The trial court erroneously admitted hearsay where either the declarant was not shown to be unavailable or the declaration did not fall into a firmly rooted hearsay exception. Appellant submits that Florida Statute 921.141 is unconstitutional on its face, and under the facts of this case, to the extent it authorized admission of hearsay in violation of the Sixth Amendment and Article I, Section 16. Appellant submits that the complained of hearsay was "prejudicial" and, therefore, not subject to the harmless-error rule. Appellant argues that the harmless-error rule does not apply where there is a complete denial of all opportunity for confrontation and cross-examination.

POINT II

The trial court comitted fundamental error in not allowing appellant to explain the circumstances surrounding his statements. Although the previous "law of the case" precluded relitigation of the legal admissability of statements, appellant was entitled to a jury instruction on voluntariness and to argue the appropriate supporting facts to the jury on the issue of factual voluntariness.

POINT III

The prosecutor's improper comment, under the facts of this case, denied appellant a fair trial. As detailed in Point I, there was extensive hearsay admitted without any opportunity to confront or cross-examine it. The effect of the comment was to highlight the appellant's lack of "explanation" for

this hearsay. Florida Statute 921.141 effectively shifts the burden of going forward to the accused in violation of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2nd 39 (1979).

POINT IV

The trial court improperly entertained and decided three challenges for cause as to potential jurors in the involuntary absence of the appellant. Appellant submits that challenges for cause are a critical stage of the prosecution and appellant was entitled to be present. Appellant contends that his waiver of presence did not extend to the exercise of challenges. Appellant argues that the State cannot prove beyond a reasonable doubt that appellant was not prejudiced by this error.

POINT I

THE COURT COMMITTED FUNDAMENTAL ERROR, AND DENIED APPELLANT THE RIGHT OF CONFRONTATION, BY ADMITTING HEARSAY STATEMENTS WHERE THE HEARSAY DECLARANTS NEVER APPEARED BEFORE THE PENALTY PHASE JUDGE AND JURY.

A) THE RIGHT TO CONFRONTATION IS A FUNDAMENTAL RIGHT WHICH ATTACHES TO THE PENALTY PHASE UNDER FLORIDA STATUTE 921.141

In Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed. 2nd 923 (1965), the United States Supreme Court held that "the Sixth Amendment right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the states by the Fourteenth Amendment." Id. at 403. In Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2nd 393 (1977), this principal was extended to the penalty phase under Florida's capital penalty sentencing procedure. The Gardner court held:

> We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

430 U.S. at 362, 51 L.Ed. 2d at 404.

The Florida Supreme Court in Engle v. State, 438 So. 2d 803 (Fla. 1983), cert. den., 465 U.S. 1074 (1984), adopted the foregoing principals of constitutional law and held:

> The requirement of due process of law apply to all three phases of a capital case in the trial court: 1) The trial

> in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the Judge. Although the defendant has no substantive right to a prticular sentence within the range authorized by statute, sentencing is a critical stage in the criminal proceeding.
>
> The Sixth Amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the state by the due process of law clause of the Fourteenth Amendment to the United States Constitution. The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process (citations omitted).

Id. at 813-814.

In Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed. 2nd 326 (1967), the United States Supreme Court addressed the right of confrontation in the context of an habitual offender proceeding. The court stated:

> Due process, in other words, requires that he (the defendant) be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own.

386 U.S. at 610, 18 L.Ed. 2d at 330.

It is, therefore, clear beyond all doubt that the confrontation clause continues to apply in the penalty phase under Florida Statute 921.141.

B. THE COMPLAINED OF HEARSAY WAS MATERIAL, PERSUASIVELY ARGUED, AND PREJUDICIAL.

The Sixth Amendment to the United States Constitution requires that an accused be allowed to confront the witnesses against him at trial, to cross-examine these witnesses at trial, and to object to the introduction of hearsay---except to the extent that the hearsay falls within certain well recognized exceptions to the hearsay rule. Over the adequate and repeated objection of appellant, the trial court allowed the instroduciton of hearsay testimony through the lead detective. Although a number of the declarants did testify during the penalty phase proceedings, and were subject to cross-examination, several other witnesses did not testify at all during the penalty phase proceeding. The admission of these non-testifying witnesses' statements was, under the circumstances of this penalty proceeding, reversible error.

The record shows that appellant did timely object to the admission of hearsay through the course of the trial. (T. 167-169, 171, 175, 193-195, 219, 222, 224, 225, 226, 230, 233, 238, 241, 243, 244, 331, 339, 340, 343, 345, 355). Many of these objections were subsequently cured by the actual testimony of the hearsay declarant during the penalty phase proceeding. Objection is being made, at this point, to the admission hearsay statements during the penalty phase proceeding where the declarant

did not appear before the court and was not subject to cross-examination.

The following hearsay declarations were admitted through Detective Phil Redstone by state examination and over defense objection:

1. Dan Nippes, a criminalist at the Indian River Crime Laboratory in Fort Pierce, Florida. Detective Redstone testified that Nippes had examined the knives contained in state's exhibit #85P. [1/] According to Detective Redstone, Mr. Nippes compared "the holes in the shirt worn by the victim" with the knives. Detective Redstone went on to testify that "his opinion was that none of the knives submitted caused the wounds that were inflicted through the shirt." (T. 342-343).

2. Detective Hamilton. Detective Redstone testified that he gave orders to Detective Hamilton to arrest appellant. Detective Redstone described the following incident:

> Detective Hamilton displayed his blue light and attempted to stop the defendant. A chase ensued down towards Sebastian. A roadblock was set up during the chase. Chandler picked up a 22 rifle from in the cab of the vehicle... and pointed it in the direction of Detective Hamilton and threatened him with it during the chase.

Detective Redstone acknowledged that his knowledge of this incident was purely second-hand in that he "took a statement from Detective Hamilton, Detective Brandees, and the other deputies that were involved in the chase and the roadblock

---

[1/] Exhibit #85P consisted of knives taken from the victims' kitchen.

in Sebastian."

Detective Redstone was requested by the state to identify Exhibit 19P as being "in fact the rifle that he (the defendant) pointed at Detective Hamilton." Detective Redstone did identify the rifle as being the same one that was pointed at Detective Hamilton. (T. 339-340).

3. Chief Cummings. Detective Redstone testified that Chief Cummings has told him that "none of the officers or Chandler who was there at the scene had disturbed the bodies." (T.195). This information was essential to Dr. Cox's testimony regarding the size of the knife wounds. Dr. Cox acknowledged that both width and depth of a wound can be affected by movement of the body after death. (T. 426-427). Thus, Chief Cumming's testimony was critical to the issue whether a suspect knife could be excluded. 2/

2/ Detective Redstone testified that "the time of death was on the 22nd, on Tuesday between 10:00 and 2:00 P.M." (T. 218-220). Detective Redstone failed to describe how he was able to pinpoint the time of death with such precision. Although Assistant Medical Examiner Franklin H. Cox did testify during the penalty phase proceeding, he did not pinpoint a time of death. It should be noted that Dr. Schofield was the chief medical examiner who was in charge of the Steinberger autopsies and the author of the autopsy protocol. (T.385,387). The relative importance of Dr. Schofield's observation and opinions is demonstrated by the fact that Dr. Cox was not even present when the autopsy began (T.437). The inference is, therefore that Detective Redstone had some hearsay knowledge which would pinpoint the time of death, presumably the autopsy protocol of Dr. Schofield. There was no other evidence to establish the time of death with this degree of precision. It is extremely damaging that hearsay testimony was used to establish that the defendant was in possession of stolen property soon after the murders. It is even more damaging that testimony as to a time of death was allowed when it was based on nothing more than hearsay.

It is obvious that the foregoing hearsay is not merely incidental, or even cumulative, to the proof in appellant's penalty proceeding. The criminalist's hearsay testimony excluded the theory that the knife was obtained from the Steinbergers' kitchen. The inference is that the appellant brought the knife specifically to use force. The prosecutor argued this point persuasively in his closing:

> The knife I submit to you that he used to stab with and we're gonna get to that in a minute was his knife. The knives that were taken from the Steinbergers' house were not the knives, any of those knives were not the ones used.
>
> ***
>
> Now Mr. Udell is probably gonna' get up here and say to you that it wasn't premeditated. If it was premeditated he wouldn't have by chance found the bat, he would have taken the club with him to the house that he was going to use to kill them. He'll also might argue to you well that knife could have come from the house. The state hasn't proved it was the fillet knife. And we cannot show you beyond every doubt that it was the fillet knife. I submit to you that circumstantially we've proved to you that it was the fillet knife that his mother bought him. (T. 840-841) (emphasis supplied.

With respect to the hearsay testimony of Detective Hamilton, the prosecutor argued in closing:

> I wonder if it...if it was a condition of his parole that he be allowed to carry around this rifle with him and point it at a sheriff's detective. This man who was worried about a guy selling marijuana cigarettes in a gas station where he worked didn't worry about carrying this rifle in his car with him. (T.853).

The prosecutor argued in closing that the size characteristics of the knife wounds were consistent with a fillet knife and inconsistent with the knives taken from the victim's kitchen. (T. 840-841). The strength of this argument is predicated upon Chief Cumming's hearsay statement that the bodies had not been moved before Detective Redstone's arrival. See, testimony of Dr. Cox, re: "gaping". (T.425-427).

C. FLORIDA STATUTES 921.141 IS FACIALLY UNCONSTITUTIONAL TO THE EXTENT THAT IT DENIES ALL CONFRONTATION AND ANY OPPORTUNITY FOR CROSS-EXAMINATION.

Florida Statute 921.141, Florida Statutes (1985) provides, in part, as follows:

> Any such evidence which the court deems to have probative value may be received, regardless of its admissability under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Appellant submits that this provision is directly contrary to Article I, Section 16 of the Florida Constitution and the Sixth Amendment to the United States Constitution.

In Walton v. State, 481 So. 2d 1187 (Fla. 1985), the Florida Supreme Court reiterated the rule set out in Engle, supra:

> The Sixth Amendment right of an accused to confront the witnesses against him is a fundamental right which is applicable not only in the guilt phase, but in the penalty and sentencing phase as well.

481 So. 2nd at 1200.

Engle cited with approval the case of Specht v. Patterson, supra, and Gardener v. Florida, supra, "for the proposition

that the 'right of confrontation protected by cross-examination is a right that has been applied to the sentencing process'". 438 So. 2d at 813. Engle also approved the decisions in Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed. 2nd 207 (1978); Gardner v. Florida; Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed. 2nd 738 (1979) for the proposition that due process of law applies to all three phases of a capital trial under Florida's capital sentencing procedure contained in 921.141. [3]

Section 921.141 violates both the Florida and Federal Constitutions to the extent that it allows the following:

1. Admission of hearsay testimony without either requiring the presence of the declarant or the predicate for admissibiltiy of a recognized exception to the hearsay rule.[4] See e.g., California v. Green, 399 U.S. 149, 26 L.Ed. 2nd 489, 90 S. Ct. 1930 (1970).

2. A complete denial of all opportunity for cross-examination. See e.g., Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2nd 347, 94 S.Ct. 1105 (1974); Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed. 2nd 297, 93 S.Ct. 1038 (1973).

The Florida Supreme Court has previously addressed situations involving a material witness' presence for confrontation and

---

[3] Supra, Point IA.

[4] The state never proved, or even suggested, that Mr. Nippes, Detective Hamilton and Mr. Copp were unavailable for trial. Therefore, the state has waived this argument. See e.g., U.S. v. Corporale, 806 F.2d 1487 (11th Cir. 1986).

involving a complete denial of confrontation.

In Jennings v. State, 413 So. 2d 24 (Fla. 1982), appeal after remand 453 So. 2d 1109, cert. granted and vacated 470 U.S. 1002, 105 S.Ct. 1351, 84 L.Ed. 2d 374, on remand 473 So. 2d 204 (Fla. 1985), the defense lawyer refused to cross-examine a crucial witness. It was held:

> Thus, Jennings was deprived of the benefit of cross-examination of a vital and material witness. The opportunity for full and complete cross-examination of critical witnesses is fundamental to a fair trial, which Jennings did not receive (citations omitted).

413 So. 2d at 26.

In Moore v. State, 452 So. 2d 559 (Fla. 1984), appeal after remand 473 So. 2d 686 (Fla. 4th DCA 1984), approved 485 So. 2d 1279 (Fla. 1986), the trial court ruled that prior sworn grand jury testimony would not be admissable as substantive evidence under Section 90.801(2)(a), Florida Statutes (1981). The intermediate court reversed and, on discretionary appeal, the Florida Supreme Court underscored the necessity of the declarant's presence:

> We believe that the constitutional right of the accused to confront the witnesses against him requires that the declarant testify at the trial or hearing at which the state seeks to introduce the prior statement as substantive evidence. Section 90.801(2)(a) safeguards this right by requiring that the declarant appear as a witness and be available for cross-

examination. [5]

452 So. 2d at 562.

Thus, any procedure which could routinely admit hearsay testimony without allowing any confrontation runs aground on the twin prongs of the Sixth Amendment confrontation requirement. Such a result would cause a death penalty proceeding to more resemble the star chamber [6] than an American court. Taken to its logical conclusion, there was no requirement that any witness other than Detective Redstone testify during the penalty proceeding before a sentence of death could be imposed.[7] This

---

[5] Appeal courts have traditionally viewed out of court testimony with a jaundiced eye. For example, Moore was tried by the state and convicted of second degree murder where the state relied completely upon the recanted grand jury testimony of two witnesses. The case went, once again, up to the Florida Supreme Court which stated that "the risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements." State v. Moore, 485 So. 2d 1279, 1281 (Fla. 1986). See also, United States v. Orrico, 599 F. 2d 113 (6th Cir. 1979). The concerns set forth in Moore were reapplied recently to give a restrictive reading to the current version of Section 90.801(2)(a). Delgado-Santos v. State, 471 So. 2d 74 (Fla. 3rd DCA 1985), approved 497 So. 2d 1199 (Fla. 1986) (The word "proceeding" does not include statement made under oath to police officers).

[7] The paradox is that the more serious the penalty the less the procedural safeguard. In contrast to the hearsay admissable under Section 921.141, Fla. R.Cr.P. 3.720 allows a persons convicted of a non-capital offense to challenge the truth of hearsay statements contained in a pre-sentence investigation report, assert his right of cross-examination, and require that the state produce corroborating evidence. Canada v. State, 472 So. 2d 1296 (Fla. 2nd DCA 1985); Olivera v. State, 494 So. 2d 298 (Fla. 1st DCA 1986) (The state failed to corroborate and so points could not be added to the guideline score sheet for two factors); Morris v. State, 483 So. 2d 525 (Fla. 5th DCA 1986).

[6] Bouvier's Law Dictionary, Vol. 1, p.714, Vol 2, p.1378; 81 Am. Jr. 2d, Witnesses §30; Black's Dictionary of Law (1910); A History of the Modern World (Knopf. 1971). pp. 71, 177, 179.

result would be terrifying and antithetical to any ordered concept of liberty and any remotely fair sentencing procedure.

Since the extension of the right of confrontation to a death penalty proceeding, it is illogical and incompatible to routinely admit hearsay which does not cut constitutional mustard. To the extent that Section 921.141 denies confrontation it is facially unconstitutional. This court should remand for a new and fair sentencing proceeding before a jury at which proceeding the appellant would be allowed to confront the witnesses and evidence against him.

> D. ASSUMING, ARGUENDO, THE CONSTITUTIONALITY OF FLORIDA STATUTE 921.141, EVEN UNDER THE SPECIFIC FACTS OF THIS CASE AND THE RELAXED EVIDENCE RULES CONTAINED THEREIN, APPELLANT WAS DENIED ENTIRELY THE FUNDAMENTAL RIGHT OF CONFRONTATION AND CROSS-EXAMINATION.

The complete denial or unreasonable restriction of this right is fundamental error and, therefore, reversible error.

Confrontation serves multiple objectives. In California v. Green, they were described:

> Confrontation: (1) Insures that the witness will give his statements under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty perjury; (2) Forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) Permits the jury that it is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

399 U.S. at 158, 26 L.Ed. 2nd at 497.

The California v. Green court approved much earlier language describing the objective of confrontation:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. Mattox v. United States, 156 U.S. 237, 242-243, 39 L.Ed. 409, 411, 15 S. Ct. 337 (1895).

399 U.S. at 157-158 26 L. Ed. 2nd at 496-497.

It has previously been held that prior sworn testimony at a preliminary hearing could be admitted as substantive evidence. California v. Green, (admissable where declarant appears at trial, claims memory lapse, and is subject to cross-examination). However, such prior sworn testimony from a preliminary hearing has been held inadmissable where the declarant is "available", but does not testify. See e.g., Barber v. Page, 390 U.S. 719, 20 L.Ed 2nd 255, 88 S.Ct. 1318 (1968) ("unavailability" exception would not justify denial of confrontation where state has not made a good-faith effort to obtain the presence of the allegedly unavailable witness); Berger v. California, 393 U.S. 314 89 S.Ct. 540, 21 L.Ed. 508 (1969). Even if the hearsay declarant is unavailable, the admission of prior sworn preliminary hearing testimony has been held unconstitutional where there was not

an "adequate opportunity to cross-examine." Pointer v. Texas, 380 U.S. at 407, 13 L.Ed. 2nd at 928. [8]

In direct contrast to the foregoing cases, the hearsay declarations admitted against Jim Chandler were not taken under oath, not made during a judicial proceeding, and not subject to any form of cross-examination of the hearsay declarant. There was no showing that the hearsay declarants were "unavailable" for trial.[9]

With respect to the witness who does not testify at trial upon personal knowledge subject to cross-examinations, the admissability of the witnesses hearsay statement is governed by Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2nd 597 (1980):

> In sum when a hearsay declarant is not present for cross-examination at trial, the confrontation clause normally requires a showing that he is unavailable. Even then, his statement is admissable only if it bears adequate "indicia of reliability". Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent showing of particularized guarantees of trustworthiness.

The hearsay testimony against Jim Chandler fails the twin

---

[8] The confrontation clause is satified when an expert witness is unable to recall the basis of his opinion where the expert testifies and is subject to cross-examination. Delaware v. Fensterer, 474 U.S. _____, 88 L.Ed 2d 15, 106 S. Ct. _____ (1985).

[9] The state made no attempt to introduce the testimony of Mr. Nippes, Detective Hamilton and/or Mr. Copp from the previous trial.

test of unavailability and reliability established in Ohio v. Roberts. The hearsay evidence was damaging and, therefore, prejudicial. Moore v. State, supra; Jenning v. State, supra.

Having been entirely denied the opportunity to confront at trial and to cross-examine three extremely damaging hearsay declarants, appellant was denied due process of law and the right of confrontation. The remedy is to reverse and to remand for a new and fair sentencing hearing.

E. THE HARMLESS ERROR RULE DOES NOT APPLY WHERE THERE HAS BEEN A COMPLETE DENIAL OF CONFRONTATION AND CROSS-EXAMINATION OF MATERIAL WITNESSES.

In Delaware v. Van Arsdall, 475 U.S. ____, 106 S.Ct., ___, 89 L.Ed. 2nd 674 (1986), restrictions on the scope of cross-examination of a testifying witness were held subject to the harmless-error analysis. Appellant submits that Van Arsdall did not extend the harmless-error analysis to complete denials of confrontation and cross-examination such as occurred in Chandler's penalty proceeding.

In Van Arsdall, the trial court refused to allow cross-examination of a key prosecution witness regarding the circumstances surrounding the dismissal of criminal charges against this witness. The cross-examination of this witness was not restricted in any other way. In many respects the witness' testimony was cumulative to and corroborated by the testimony of other witnesses. The Van Arsdall court stated:

> Accordingly, we hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other confrontation clause errors, is subject to Chapman harmless--error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony is the prosecutions case, whether the testimony cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. (citations omitted).

89 L.Ed. 2nd at 686-687.

The Van Arsdall court attempted to distinguish "fundamental" constitutional error from other types of constitutional error:

> At the same time, we have observed that some constitutional errors - such as denying a defendant the assistance of counsel at trial, or compelling him to stand trial before a trier of fact with a financial stake in the outcome - are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case. (citations omitted).

89 L.Ed. 2nd at 685.

Appellant submits that the confrontation clause requires, at a minimum, that available adverse witnesses be required to appear at the trial of a criminal accused unless the proffered hearsay statement either falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. The alternative to requiring live testimony, where the witness is available, is to allow a trial by affidavit, by deposition,

and by hearsay assertions. Such a result would be directly contrary to the primary objection of confrontation which was to compel the adverse witness to "stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gave his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-243, 39 L.Ed. 409, 411, 15 S. Ct. 337 (1895), cited in California v. Green, supra.

Should this court determine that confrontation no longer requires live testimony by available material witnesses, there is nothing to prevent the State of Florida from seeking to obtain recommendations of death upon nothing more than the hearsay assertions of a lead detective. Given the number of capital cases remanded for resentencing hearings before a jury, there will be recurring instances where the penalty phase jury will not have sat through the guilt phase evidence. Without confrontation a man would be subject to a "trial" without witnesses and the jury asked to recommend death without seeing any evidence. 10/

10/ To sanction the conduct of trials without witnesses would require redefining the very word "trial." George Orwell would have referred to this technique of restricting political liberty as "newspeak". George Orwell, 1984 (1948). Once confrontation is defined to allow trial without witnesses even where the death penalty is to be applied, what principaled difference would preclude hearsay either during the guilt phase or during a non-capital trial? If confrontation does not mean confrontation:

> "Then you should say what you mean", the March Hare went on.
> "I do," Alice hastily replied; "at least -- at least I mean what I say -- that's the same thing, you know."
> "Not the same thing a bit!" Said the Hatter.
> "Why, you might just as well say that 'I see what I eat' is the same thing as 'I eat what I see!'"

Lewis Carroll, Alice's Adventures in Wonderland (1865), p. 7.

While the language used in Van Arsdall is expansive, the holding goes far beyond the facts of that case. Having recognized that some constitutional rights are so "fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case", it would be incongruous for the court to declare that assistance of counsel is mandatory, but that the appearance of available witnesses is only suggested. Put another way, the trial without witnesses might be "bad manners" but not reversible error. This result was clearly not intended by the United States Supreme Court. Even if Van Arsdall means what it says, the Florida Supreme Court can look independently to the authority of Article 1, Section 16 of the Florida Constitution.

Appellant suggests that Van Arsdall applies only to a situation involving a limited denial of an opportunity for impeachment. Jim Chandler was, in contrast, denied any opportunity not only to impeach, but to even see three prejudicial witnesses appear in the same court room. The criminal justice system was denied the appearance of fairness.

Even under an harmless-error analysis, the error was not harmless beyond a reasonable doubt. As described in Section IB above, the hearsay testimony was material, persuasively argued by the state, and highly prejudicial. The hearsay evidence specifically supported the following aggravating factors:

1. That the crime was committed for the purpose of avoiding or preventing a lawful arrest.

2. That the crime was committed for financial gain.

3. That the crime was especially wicked, evil, atrocious or cruel.

4. That the crime was committed in a cold, calculated and premeditated manner without any pretence of moral or legal justification.

Findings in support of death sentence (R. 327-330).

The remedy for this complete denial of all confrontation and cross-examination is to reverse the sentence and to remand for the purpose of conducting a new and fair penalty phase proceeding before a jury.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE A VOLUNTARINESS JURY INSTRUCTION.

The trial court denied appellant's request for a voluntariness instruction pursuant to Florida Standard Jury Instruction 2.04(E). (T.786-789, R. 311). Appellant submits that the refusal to give this instruction is reversible error.

Appellant's trial counsel perfected this error when, pursuant to Rule 3.390(d), he renewed this objection prior to deliberation by the jury. (T.914).

In opposition to Appellant's requested jury instruction on voluntariness, the state argued: (1) The voluntariness of a statement made by an accused is relevant only to the guilt phase of a capital trial. (2) That "There was no showing in this case of any miranda warnings being read or anything of that nature because the volunariness of these statements had already been established" in the guilt phase. (3) That "there was no effort made on behalf of the state to show voluntariness of the statements and to show that he understood his rights... and so forth before...he gave any statements." (T.786-787).

Although the legal admissability of the appellant's statements was established during the guilt phase and as the "law of the case" after the first appeal, the penalty phase jury must independently evaluate the factual voluntariness and reliability of the admitted statements. In Bunn v. State, 363 So. 2d 16 (Fla. 3rd DCA 1978), the court stated:

> Where, as here, the prosecution introduces an inculpatory statement of an accused into evidence, the accused is entitled to have the jury consider the circumstances under which the statement was given to determine the weight or lack of weight to be given to the statement. Normally, the jury must be provided with adequate instruction with which to evaluate the statement.

Id. at 17. The Bunn court held that it was reversible error not to give a voluntariness instruction even though Bunn failed to make an objection to the lack of such a charge, and failed to request that one be given, until after the jury had been instructed.

A criminal accused in Florida has long been entitled to a jury instruction on voluntariness despite a previous determination that a defendant's statement was admissable. See e.g., Bates v. State, 78 Fla. 672, 84 So. 373 (1919); Harrison v. State, 149 Fla. 365, 5 So. 2d 703 (1942).

Although the harmless error has been applied in instances where there has been a failure to give a voluntariness instruction, appellant submits that a very large portion of the evidence against him rests upon out-of-court statements that were admitted through Detective Redstone. Scott v. State, 431 So. 2d 733 (Fla. 4th DCA 1983), aff'd in part, quashed in part 453 So. 2d 798. Absent reliance upon his out of court statements, appellant submits that the remaining evidence is insufficient to prove the aggravating factors beyond a reasonable doubt. Therefore, the failure to give a voluntariness instruction cannot be said to be harmless beyond a reasonable doubt. See,

Taylor v. State, 320 So. 2d 428 (Fla. 2d DCA 1975).

It should be noted that the penalty phase jury did not have the benefit of hearing all of the evidence from the guilt phase; it did not hear any of the jury instructions from the guilt phase. Consequently, the jury was given no guidelines by which to evaluate appellant's extra judicial statements.[11/] In view of this failure to give a voluntariness instruction, this reviewing court cannot say that there has been a factual determination that the advisory verdict was based upon free, voluntary and uncoerced statements. Franklin v. State, 403 So. 2d 975 (Fla. 1981) (instructions must be sufficiently clear to assure a fair trial).

The remedy for this failure to give an essential jury instruction is to reverse and remand for a new sentencing hearing before a jury.

11/ Appellant submits that the trial court's repeated refusal to allow exploration of issues related to voluntariness and the extent of reliability of his statements precluded a fair sentencing hearing. (T. 163-166, 174-175, 813-814).

POINT III

THE STATE IMPERMISSABLY COMMENTED ON THE DEFENDANT'S RIGHT TO REMAIN SILENT.

In front of the jury prosecutor Morgan directly commented on the defendant's right to remain silent:

> Your Honor, Mr. Udell asked him if this was, you know, consistent from behind, you know, what evidence is there that he was hit from behind, I mean, no one knows at this point except for Mr. Chandler. (T. 434-435).

A timely objection was made to this improper comment and Chandler moved for a mistrial. (T. 435-436). The trial court denied these motions and failed to give a contemporaneous curative instruction. After a break in the trial proceedings, the trial court belatedly gave the following "curative" instruction:

> In an abundance of caution to correct any error that could have been made I will ask the jury to disregard the statement that only the defendant would know. (T.443).

Appellant would submit that the foregoing comment on his right to remain silent constitutes reversible error under the Fifth Amendment to the United States Constitution and Article 1, Section 9 of the Florida Constitution. Appellant submits that the harmless-error rule adopted in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) does not apply because of the cumulative impact of error in this case.

Under the perculiar facts of this case, the trial court, it is submitted, erroneously admitted a large amount of hearsay under the permissive authority of Florida Statute 921.141.

The effect of allowing this hearsay testimony into evidence is to shift the burden of proof to the defendant to explain away, if possible, the impact of this testimony. When the prosecutor impermissably commented upon the defendant's failure to testify, this comment must be taken in light of the lack of rebuttal to the hearsay declarations described in Section IB above.

Shifting the state's burden of proof to the defendant has been held to be reversible error. Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); Francis v. Franklin, ____ U.S. _____, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985); Miller v. Norvell, 773 F. 2d 1572 (11 Cir. 1985).

The effect of allowing the damaging hearsay testimony into evidence in this case was aggravated by the improper comment on the defendant's right to remain silent. The effect was to illegally shift the burden of coming forward with evidence to the defendant in direct violation of due process of law. The remedy is to reverse the sentences of death and to remand for a new and fair penalty phase hearing.

POINT IV

THE TRIAL COURT ERRED IN HEARING AND RULING ON CHALLENGES FOR CAUSE AS TO POTENTIAL JURORS RUGGIRELLO, MELLIN AND BERGSTROM IN THE APPELLANT"S ABSENCE.

A) THE RIGHT TO BE PRSENT DURING ALL CRITICAL STAGES ATTACHES TO THE EXERCISE OF CAUSE CHALLENGES TO POTENTIAL JURORS

As discussed above, the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." This confrontation clause, which is applicable to the state's via the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), encompasses the very basic right of a defendant to be present at every critical stage of his trial, Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892), or at every stage "where fundamental fairness might thwarted by his absence." Francis v. State, 413 So. 2d 1175 (Fla. 1982).

Florida Rule of Criminal Procedure 3.180 (a)(4) specifically guarantees the right of the defendant to be present "at the beginning of the trial during the examination, challenging, impanelling and swearing of the jury." In Francis v. State, supra, this Court recognized that jury selection was one of the essential stages of criminal trial where a defendant's presence is mandated. This Court held that the exercise of peremptory challenges was a crucial stage of the proceeding.

> "The exercise of peremptory challenges has been held to be essential to the fairness of the 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. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare habits or associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Francis at 1178, 1179.

In Francis, the defendant was excused by the court to go to the restroom. Upon Francis' return to the courtroom, his attorney accompanied the prosecutor, the judge and court reporter to the jury room for the exercise of peremptory challenges. The defendant had not given his expressed consent to his attorney to peremptorily challenge potential jurors in his absence. The record did not affirmatively demonstrate that Francis knowingly waived his right to be present or that Francis acquiesced in his counsel's action upon his counsel's return to the courtroom following the exercise of the peremptory challenges.

The court held that the defendant's silence when his counsel and the others retired to the jury room or when they returned from it did not constitute a waiver of his right to be present. The Court held that the defendant's silence when his counsel and the others retired to the jury room or when they returned from it did not constitute a waiver of his right to be present. The Court further held that the State had failed to show that Francis had made a knowing and intelligent waiver of his right to be present, citing Schneckloth v. Bustamonte, 412 U.S. 218,

93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) and Johnson v. Zerbst, 304 U.S. 4058, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Determining that Francis' absence was not voluntary, the court reversed his first degree murder conviction, vacated his death sentence and remanded the cause for a new trial.

Not only must the defendant be allowed to be present to discuss with his counsel the exercise of peremptory challenges, but he must also be allowed to be present when the challenges are exercised. Walker v. State, 438 So. 2d 969 (Fla. 2d DCA 1983.) In Walker, the trial judge, prosecutor and defense attorney retired to another room, out of the jury's presence, for the exercise of peremptory challenges. Defense counsel conveyed to the judge the defendant's request that he be allowed to be present at that time. After ascertaining that the defendant had been consulted as to the challenges, the judge denied the request. On appeal, the Walker court rejected the state's contention that the exercise of peremptory challenges was a "mechanical function" rather than a critical stage.

> It may involve the formulation of on-the-spot strategy decisions which may be influenced by the actions of the state at that time. ... On the other hand, the exercise of peremptory challenges is "essential to the fairness of trial by jury," and we cannot approve the erroneous exclusion of defendant unless we are satisfied beyond a reasonable doubt that the error was harmless.

The Walker court held that the involuntary absence of the defendant without waiver by consent or subsequent ratification was reversible error, and the court ordered a new trial.

Florida Rule of Criminal Procedure 3.350 limits the number of potential jurors that a defendant may excuse peremptorily. This limit makes the challenge for cause that much more critical. Ordinarily, when a party unsuccessfully challenges a juror for cause, the party will challenge that juror peremptorily. If the challenge for cause is not exercised on legally sufficient grounds, a precious peremptory challenge must be expended. In the case sub judice, the appellant used peremptory challenges to excuse jurors Ruggriello, Bergstrom and Mellin after the cause challenges made in his absence were denied.

If the exercise of peremptory challenges is not a "mere mechanical function", but rather, is a critical stage of the more critical. The challenge for cause is a tool designed to remove from the jury a potential juror who could not be fair and impartial as a matter of law. Far from being "arbitrary and capricious" or "exercised on the basis of sudden impressions and unaccountable prejudices", the challenge for cause is grounded on demonstrable prejudice or inability to follow the law.

B) THE APPELLANT'S WAIVER OF PRESENCE WAS LIMITED IN SCOPE AND DID NOT EXTEND TO THE EXERCISE OF CAUSE CHALLENGES

It is clear that the appellant waived his right to be present during individual questioning of the jurors at issue. However, the record demonstrates that he did not waive his right to be present during the consideration and exercising of cause challenges. Immediately prior to the individual questioning of the three jurors at issue, the following conversation

occurred among the court, Mr. Chandler and his attorney, Mr. Udell:

MR. UDELL: May we, Mr. Chandler and I, approach the bench? There's something we would put on the record. Before we go back into the jury room Mr. Chandler has advised me that he does not desire to be back there. The State would like you to require Mr. Chandler, that he's waiving his rights to be back there.

THE COURT: You understand you have the right to be back there?

MR. CHANDLER: Yes, sir.

THE COURT: It's the selection of the jury and the defendant has the right to be present at each stage of that selection. As you know I can not question them out here individually--

MR. CHANDLER: I understand.

THE COURT: --Because it would disrupt the thinking process, perhaps, of the remaining venire panel. Do you see what I am saying to you?

MR. CHANDLER: Yes, sir.

THE COURT: It would not be to your advantage that that would be discussed openly. You understand, then, you have the right to be back there. You want to waive that right?

MR. CHANDLER: Yes, sir, I'll waive it.

THE COURT: O.K. Then, you'll have a seat there, back in that chair. And I thank you.

(JT 384-385)

The presence requirement is for the defendant's protection. Just as he can knowingly and voluntarily waive any other constitutional right, a defendant can waive his right to be present at stages of his capital trial if he personally chooses to voluntarily absent himself. Peede v. State, 474 So. 2d 808 (Fla. 1985).

But see, Proffitt v. Wainwright, 685 F. 2d 1227 (11th Cir. 1983), cert. denied, _____ U.S. ____, _____ S. Ct. _____, 78 L. Ed. 2d 697 (1983).

In Peede, the trial court took every precaution to ensure that Peede's waiver was knowing and voluntary and not due to illness or coercion of any nature. The court extensively questioned Peede as to whether he was knowingly and voluntarily waiving his presence at trial. Peede made it abundantly clear that he fully understood the significance of his waiver and that his absence was voluntary. After making a full and adequate inquiry of Peede, the trial concluded:

> ...I'm satisfied that his decision not to be present for further proceedings in this case is a consideration or a decision that's made after weighing the consequences; it's a free and voluntary decision on his part, and it's not prompted by any illness that he may have or any outside factors being exerted upon him. He has indicated on two or three prior occasions during the jury selection process and the trial proceedings in this case that he simply does not wish to be present any further.
>
> There is no indication this is a temporary desire on his part or that a continuance would lead to a different decision, or if the case were continued for a while he would change his mind. As indicated he does realize the trial will go forward without his presence, and he does understand that. Peede, at 811.

In the case at bar, there is every indication that this was a temporary desire on the appellant's part. There was never any indication that the appellant wished to be absent for the remainder of the hearing. The only indication is that the appellant did not wish to be present in the jury room with individual potential jurors. There was no discussion on the

record of when or whether challenges for cause might be made as to any of these potential jurors. The appellant was not informed that cause challenges would be considered by the court at the conclusion of the individual voir dire before returning to the courtroom. There is no indication on the record that the appellant was aware that such would be the case. There is no indication on the record that the appellant intended to be absent during the consideration and exercise of challenges for cause. The only instruction given by the court as to the proceeding expected to take place in the jury room:.

> THE COURT: Let us excuse the proposed panel to the jury room. The other members of the panel can stand at ease for at least ten minutes and then will resume. I propose then we ask the jury panel to come out and we speak to those that may have some knowledge about something that may effect the case out of the hearing of the other members so that we won't discuss the case in there presence?
>
> MR. MORGAN: Yes, sir.
>
> MR. UDELL: Yes, sir.
>
> THE COURT: Thank you.

C) PREJUDICE TO THE APPELLANT CANNOT BE MEASURED

When the defendant is involuntarily absent during a crucial stage of adversary proceedings, the burden is on the State to show beyond a reasonable doubt that the error (absence) was not prejudicial. Garcia v. State, 492 So. 2d 360 (Fla. 1983); Delaware v. Van Arsdall, 475 U.S. _____, 106 S. Ct. _____,

89 L. Ed. 2d 674 (1986); United States v. Hasting, 461, U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983); Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Had the appellant been allowed to be present to discuss with his counsel whether or not to challenge particular jurors for cause, and if so, upon what legal grounds, one or more of the challenges made in his absence might have been successful. It is clear that, had those cause challenges been granted, the appellant would not have needed to expend three of his peremptory challenges to excuse potential jurors Ruggriello, Bergstrom and Mellin. Inasmuch as the appellant exhausted his supply of peremptory challenges, and had that request denied, it is clear that the appellant would have put to other use the three challenges that he felt compelled to use on jurors Ruggriello, Bergstrom, and Mellin, and the composition of this jury would have been different.

After attempting to assess the prejudice to the defendant caused by the denial of his right to be present, the Second District Court of Appeals in Walker concluded:

> Our position is substantially the same as that of the Florida Supreme Court in Francis where it was said that "(W)e are unable assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised. (Walker, at 970. quoting Francis, at 1178.)

The appellant submits that in the case at bar, as in Walker and Francis, this court is unable to assess the extent of prejudice that he sustained, and should therefore order a new sentencing hearing before a jury.

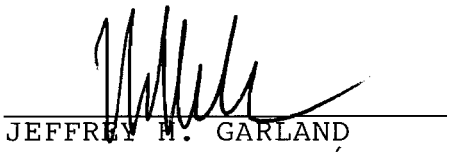
CONCLUSION

Based upon the foregoing citation of authority and legal argument, appellant submits that this court should vacate the sentences and remand for a new and fair penalty phase proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to Robert Jaegers, Assistant Attorney General, Palm Beach County Regional Service Center, Room 204, 111 Georgia Ave., West Palm Beach, FL 33401, this 14th day of July, 1987.

Respectfully submitted,



JEFFREY M. GARLAND

MICHAEL J. KESSLER
Attorneys for Appellant
8507 S. U.S. 1 Suite 7
Port St. Lucie, FL 33452
(305)878-6500