IN THE SUPREME COURT OF FLORIDA

JOHN EDWARDS,	:	
Appellant,	:	
vs.	:	Case No. 70,004
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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I. PRELIMINARY STATEMENT

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

II. STATEMENT OF THE CASE

On May 4, 1986, John Edwards was arrested on charges of first degree murder and criminal conspiracy (R1354-1360). The next day, May 5, 1986, appellant was taken before a judicial officer (County Judge Becky A. Titus) for a first appearance hearing pursuant to Fla.R.Cr.P. 3.130 and 3.131 (R1361, see R1356,1359.) Appellant requested that a lawyer be appointed to represent him (R1356,1359,1361,1364). Tobey Hockett (an Assistant Public Defender) was initially designated as appellant's counsel (R1361). Because of a conflict of interest (arising from the Public Defender's office's representation of the alleged co-conspirator, Mary Boyd (see R1534,853-854)), attorney Michael Mosca was substituted as counsel by special appointment on May 13, 1986 (R1364).

On July 29, 1986, a Sarasota County grand jury returned an indictment against appellant for first degree murder and conspiracy to commit first degree murder (R1377). A plea of not guilty was entered (R1378). The case proceeded to trial on November 17-21, 1986, before Circuit Judge Andrew D. Owens, Jr.,

and a jury. Immediately prior to jury selection, it was put on the record that appellant had elected not to accept the state's offer to waive the death penalty in exchange for a guilty plea (R107-108).

The state's key witnesses at trial were Mary Boyd (who claimed that she solicited appellant to kill her abusive husband, Ireland Boyd) and Jeffrey Walters (who purported to identify appellant as the person he saw in the company of the victim at a Quick Stop gas station around midnight on the night of the crime [See Issue I, infra]).

Two hours into the jurors' deliberations in the guilt-or-innocence phase of the trial, they submitted the following written request: "Could we review the testimony of Jeff Walters and Mary Boyd?" (R1523,1270, see R1267). The trial court discussed the matter with counsel for both sides, and expressed the concern that it would take a great deal of time to prepare a transcript of these two witnesses' testimony and then to read it back to the jury (R1270-1276). The trial court observed that neither Boyd nor Walters was what he would consider an ideal witness; "they made many inconsistent statements" (R1275), and "it was very difficult to get a direct answer from either one of them on many questions" (R1272). Eventually, with the consent of both counsel, the trial court informed the jury that it would take a total of six hours to comply with their request, and this would likely mean they would have to be sequestered in a hotel overnight (R1276-1277). Therefore, the court suggested that the jurors try to reach a verdict based on their recollection of the testimony, but if they

could not do it, transcripts of the two witnesses' testimony could be prepared (R1277). After the jury resumed its deliberations, the judge said:

> They may be very close, but quite frankly that's the crux of the whole case. Those two witnesses. So I would have to say that they must be a real stumbling block at this point. I mean, that was really the two witnesses that was the crux of the case.

(R1278)

After another two hours of deliberations, the jury returned a verdict finding appellant guilty as charged of first degree murder and conspiracy to commit first degree murder (R1280,1524).

The penalty phase of the trial was held the next day. The evidence introduced at the proceeding included documents showing that Mary Boyd had pled guilty to second degree murder in exchange for her testimony against appellant, and had received a sentence of twelve years, while the conspiracy charge against her was nolle prossed (R1315,1531-1539). The jury, by a vote of 8-4, recommended that appellant be sentenced to death (R1343,1530). Immediately thereafter, the trial judge announced the imposition of the death penalty, finding three aggravating circumstances[1] and making no mention of mitigating circumstances (R1348-1350). A sentence of 22 years imprisonment was imposed on the conspiracy count (R1348, 1577). On December 4, 1986, the trial judge entered a written order

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1/The aggravating circumstances found by the trial court were (1) that the crime was committed while appellant was under sentence of imprisonment, (2) that appellant had previously been convicted of a violent felony, and (3) that the crime was committed in a cold, calculated and premeditated manner (R1349,1486).

in support of the death sentence, finding the same three aggravating circumstances and finding no mitigating circumstances (R1586-1587).

Appellant's motion for new trial was heard and denied on December 10, 1986 (R1582-1585,1589,1607-1625). Notice of appeal was filed on December 22, 1986 (R1590).

III. STATEMENT OF THE FACTS

A. The In-Court Identification Made by Jeffrey Walters

At the hearing on November 12, 1986 (the day before the jury was selected), the defense moved to exclude any in-court identification of appellant by Jeffrey Walters, a.k.a. Jeffrey Burrell, on the ground, inter alia, that the witness had been shown a lineup on May 6, 1986; that the lineup was (a) unnecessarily suggestive, and (b) conducted in violation of appellant's right to counsel as established by the Florida Constitution and Fla.R.Cr.P. 3.111(a) and 3.130; and that, under the totality of the circumstances, the state could not show that Walters' in-court identification of appellant was reliable notwithstanding the illegal pre-trial confrontation (R45-55, see R805-808,857-864).[2] The trial court, on the authority of Sobczak v. State, 462 So.2d 1172 (Fla.4th DCA 1984), rev.den. 469 So.2d 750 (1985) (on the right to counsel issue), granted the defense's motion as to the threshhold issue concerning the illegality of the lineup (R48, see R46-55,805-807). In order to determine the ultimate issue - i.e., whether Walters' identification could be shown to be independently based upon his observations

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[2] In addition, the defense asserted a violation of Brady v. Maryland, 373 US 83 (1963), based on the state's failure to timely disclose to defense counsel that the lineup had taken place (R35-44).

at the Quick Stop gas station on the night of the crime (and thus admissible notwithstanding the lineup)- a hearing outside the presence of the jury was held on the second day of the trial.

Jeffrey Walters testified that on Saturday evening, April 26, 1986, he and James Norman went to the Quick Stop at Orange and 3rd or Orange and 4th to get gas (R809). Walters pumped the gas, and James Norman went inside to pay (R809-810). A big brown car appeared; the man in the passenger side was Hillbilly Boyd, and the man driving the car was a dark complected black male with short dark hair, dark eyes, and a round large face (R810). Hillbilly Boyd yelled something out to James Norman, and at that point, Walters glanced over at the car for about three or four seconds, dividing his glance between the passenger and the driver (R810,813-814).

> MR. MOSCA [defense counsel]: Now, when you looked at the two people in the car you really weren't being very attentive, were you?
>
> JEFFREY WALTERS: No, I wasn't.
>
> Q. I mean, there was no reason to pay much attention to them, was there?
>
> A. No, there wasn't.

(R813).

Walters acknowledged that the only thing that stood out in his mind about the driver, aside from the fact that he was a black man, was that he had a round face (R814).

> MR. MOSCA: In fact, the only recollection you have of that person is the outline of his face; isn't that right?

> JEFFREY WALTERS: Yes.
>
> Q. And you never saw or paid the least bit of attention to his features, such as his mouth, his nose, his chin, or anything like that, did you?
>
> A. No, I didn't.

(R814)

Two or three days after the encounter at the Quick Stop, Walters spoke with Detective Marquiss and gave him the following description of the black man he saw in the car: a round, almost chubby face; short, dark hair; dark eyes (R810,818, see R825-826, 872-873). Also, "his cheeks were a little darker as in sideburns, but I did not see sideburns, it's just that he may have sideburns" (R818). On May 6, 1986, Walters was transported to the police station for a lineup (R811). He was placed in a room, where he looked through a window as six or seven men were brought in (R811).

> MR. WHITAKER [prosecutor]: Can you recall the descriptions of these men?
>
> JEFFREY WALTERS: Just one.
>
> Q. Okay, and why do you recall that particular description?
>
> A. Because I had seen him somewhere before.
>
> Q. And are you talking about--did you realize where you had seen him before?
>
> A. Not at first, and then the thought, as I was leaving the thought occurred to me that I had seen him at the Quick Stop.

(R811)

Walters testified that no one had suggested to him that this person was somebody he had seen before (R811), and that, other than the fact that he had seen him before, there was nothing about

appellant that made him stand out from the other people in the lineup (R812). However, Walters also testified that the only thing he recognized about appellant when he saw him in the lineup was the outline of his face (R818).

Walters told the police he didn't recognize anyone in the lineup (R814-815,816-817). His subsequent explanation was that he was violating his New York probation by being in Florida, and he was afraid he would be arrested if he got involved (R816-817).

On direct examination, Walters stated that his remembrance of the person he saw at the Quick Stop was actually from his observations at the Quick Stop, and not from his observations at the lineup (R812). On cross-examination, Walters acknowledged that later on the day of the lineup, or the day after, he saw a photograph of appellant in the newspaper (R815, see R812).

> MR. MOSCA [defense counsel]: ---And do you recognize the man sitting here today as the man you saw in the mug shot?
>
> JEFFREY WALTERS: Yes, I do.
>
> Q. Do you recognize the man sitting here today as the man you saw in the lineup?
>
> A. Yes, I do.
>
> Q. One of the men that you saw?
>
> A. Yes, I do.
>
> Q. Mr. Walters, you can't possibly recognize this man as the man you saw in the big brown car that night, can you?
>
> A. Just his facial features.
>
> Q. Well, you just told me you didn't see his features. Now, are you talking about the outline of his face?
>
> A. Yes.
>
> Q. And that is all you're talking about?
>
> A. Yes.

(R815-816)

On re-direct, Walters stated that he saw the length of the man's hair (short) (R816,810), and his eyes ("They were dark") (R816). On re-cross, Walters acknowledged that almost all black men have dark eyes (R817).

Sgt. William Fleeman of the Sarasota County Sheriff's office testified that he conducted the lineup on May 6, 1986 (R819-820). Fleeman had been only peripherally involved in the investigation; he did not know how Jeff Walters and James Norman had been developed as witnesses, and he was not familiar with Walters' description of the man he saw at the Quick Stop (R821-823). Neither Fleeman nor Detective Marquiss had anything to do with picking out the participants in the lineup; "that's done by the jail personnel" (R823).

Sgt. Fleeman testified that no photograph was taken of the lineup [3], since one of the witnesses (Walters) could not identify anyone, while the other (Norman) "said he knew him, knew the suspect, and therefore he would be able to pick him out anyway, so we didn't show it [the lineup] to him" (R820-821). Sgt. Fleeman acknowledged that it was "possible" that he told James Norman that Bud Edwards was in the lineup (R821). In response to the trial court's question whether he told Jeff Walters that the suspect was in the lineup, Sgt. Fleeman replied, "I just asked him to view it and see if he could determine if the individual in the lineup was the one he saw at the convenience store" (R821) After

3 / The trial judge asked Sgt. Fleeman whether they keep a record at the jail of the people they put in a lineup; Fleeman replied that he wasn't sure whether they did or not (R823). Subsequently, it was learned that the jail did indeed have a list of the names of the participants in the May 6 lineup, and the trial court asked Sgt. Fleeman to compile a photospread, using mug shots of the participants (R835,842). This was done, and the photographs were viewed by the trial court at the hearing, and made part of the record on appeal (R853-856, see R835,842,847-856,861-862,902-906).

viewing the lineup, Walters said he didn't know, he couldn't pick out the individual (R820).

Detective Russell Marquiss of the Sheriff's office interviewed Jeffrey Walters on April 29, 1986 (three days after the Quick Stop, and a week before the lineup)(R825-826). "There were two people that we discussed being at the Quick Stop on the night in question. Of course, he [Walters] knew the victim Ireland Boyd, and he described the subject with Ireland as being a black male, dark complexion, with a round face, and hair approximately one inch to the scalp" (R825-826). Detective Marquiss testified that he had nothing to do with, and knew nothing about, the lineup conducted on May 6, 1986 (R826).

James Norman testified that he knew both Ireland Boyd and appellant from having worked with them at Murphy's Roofing (R829). Norman had worked with appellant, whom he knew as Bud Edwards, during the week before was arrested (R833,836-838). Norman testified that, to the best of his recollection, appellant had started working with them a day or two before the Quick Stop encounter, but he was not certain (R832,836-837).

On the night of April 26, 1986, Norman and Jeff Walters went out to pick up a television set (R829). Norman had been drinking that night, and had had a few six packs of beer (R830). They stopped at the Quick Stop to get gas (R830). While they were there, Norman saw Ireland Boyd in an old brown or gold Cadillac (R831). Boyd, who was in the passenger seat, said hi to him (R831). In the driver's seat was a black man, heavy set with a round face (R831,837). Norman was leaning on the car talking to Ireland Boyd, and paid little attention to the black man (R831-833,837).

A few days before the May 6 lineup, James Norman and Jeff Walters were interviewed by the police (R839-841). They talked to Norman for about 45 minutes to an hour, and Walters was in there for a considerably longer time than that (R841). Norman was upset, because Detective Marquiss was making him feel like he was under suspicion (R840-841). The police officers, especially Marquiss, were talking to him about appellant (R834,839); "[it] was like common knowledge of who we were talking about then, you know, and that's who I figured they were talking about" (R834).

A few days later, Norman and Walters were brought back for the lineup (R833,839-840). Norman knew that appellant was going to be in the lineup, becuase "[t]hey told me he was", and they asked whether he could pick him out of a lineup (R833-834). Norman said yeah, because he knew appellant from having worked with him at Murphy's Roofing all that week (R833). He said, "I'm not going to be any good anyway because I can tell you right away who he is" (R833). Consequently, the lineup was not shown to Norman (R833).

Norman testified that the black man who was in the car with Ireland Boyd could have been appellant or could not have been appellant, since he only glanced at him in the car (R832-833). However, it seemed to Norman that the person in the car was heavier than appellant, and had a rounder face (R838). Norman had described the man in the car to a detective as a "big fat slob" (R837-838). Norman testified that appellant is not a big fat slob (R838).

MR. MOSCA [defense counsel]: ... [A]fter you saw the guy in the car that Saturday night, of course, you worked with Bud some more the next week, and you never thought the guy you were working with on the roof was the same guy you saw in the car, did you?

JAMES NORMAN: No. Bud always seemed like a mellow type guy. I mean, he didn't say much to anybody, just did his work.

Q. But you didn't recognize him?

A. No.

(R838)

After hearing the arguments of counsel, the trial court denied appellant's motion to exclude Jeffrey Walters' in-court identification (R863, see R905-906).

When the jury was brought back in, Jeffrey Walters gave testimony which was substantially consistent with his testimony before the trial court (R866-882). On direct examination by the prosecutor, Walters acknowledged that he "barely" looked at the black male in the driver's seat; "I just glanced over" (R872). Walters further testified on direct, "I just noticed the outline of his face. He had a large face, had dark eyes, short, dark hair" (R872).[4/] On cross, Walters again

4/ At the hearing on appellant's motion for new trial held December 10, 1986, three witnesses testified with regard to remarks made by Jeffrey Walters in the witness room (R1608,1610,1612-1613). Walters was complaining about having been brought down from New York state, because all he saw in the car was a shape, and he used his hands to outline a human form (R1610, see R1608,1612-1613). In response to defense counsel's argument that this constituted newly discovered evidence, the prosecutor replied "I gather he [Walters] was upset because he was brought so far away to give what testimony he had to give and he did not understand the significance of it. This testimony at trial under cross-examination was, yes, all I identified the guy from was from the outline of the face. The statements made in the witness room are no different in substance than what he said on cross-examination, and this cannot qualify as newly [discovered] evidence" (R1615).

acknowledged that he never saw the black man's facial features, aside from the roundness of the face (R876). Nevertheless, Walters identified appellant in court as the person he saw in the car with Ireland Boyd at the Quick Stop on the night of April 26-27, 1986, between midnight and 12:30 a.m. (R874-876, see 870).

B. The Trial [5/]

On the morning of April 27, 1986, two fishermen discovered a body in a drainage ditch off Palmer Road in Sarasota County (R660-671). The decesased was subsequently identified as Ireland Boyd, sometimes known as Hillbilly (R675, see R654-655). An autopsy was conducted by Dr. James Robert Spencer, who determined that death was caused by brain injury due to skull fracture due to blunt trauma (R679). Dr. Spencer was of the opinion that at least five blows were struck (R680, see R676-677). The deceased's blood alcohol level was .207 (R684).

The state's main witness was Ireland Boyd's widow, Mary Catherine Boyd. On April 26, 1986, she was living on Oregon Court [6/] with her husband and two children (R727,729). Mary and Ireland had been together for nine years and had been married the last five years;

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5 / As appellant is not raising the legal sufficiency of the evidence as an issue on appeal, and in order to keep the brief from exceeding the page limits of Fla.R.App.P. 9.210(a)(5) by any more than necessary, appellant will forego presentation of a complete witness-by-witness recitation of the trial testimony. It is necessary, however, to set forth the testimony of Mary Boyd in some detail. Jeffrey Walters' testimony before the jury was substantially consistent with his testimony before the trial judge, which is set forth at p.5-8 (see also p.11-12) of this brief.

6 / As indicated by the testimony of various state and defense witnesses, Oregon Court is a racially-mixed, lower income, residential area, composed of apartments and trailers.

they had lived in Kentucky, Indiana, Ohio, and Texas before coming to Florida (R729). About her relationship with Ireland, Mary said "When he wasn't drinking he wasn't too bad, but he drank most of the time and he used to mess us up quite a bit. Like I ended up in the hospital a couple times, and he'd hit the kids and stuff like just when he was drinking, which was most of the time" (R729-730). Ireland also abused her sexually (R730). He did not work, except when Mary would run out of money between paychecks; he then would work for a day or two "so he could get himself a bottle" (R730). The situation got worse after they moved to Florida, particularly in the last year or so (R730-731). Mary became angry enough to wish he was dead (R731). "I mean, my friends they knew, you know. But I didn't actually talk to anybody till just a little before he ended up dead" (R731).

Mary Boyd testified that, a couple of weeks before April 26, she had a conversation with a neighbor of hers, Bud Edwards (appellant), about her wishing Ireland was dead (R731-732, 736). According to her:

> I don't know how we got started talking, but I just said that sometimes I wish he was dead, and Bud said that he knew people that got rid of people, but I said I didn't have that kind of money, I didn't, and he said I wouldn't need money.

(R736)

On April 26, at around 7:30 or 8:00 p.m., Ireland arrived home, drunk, with another neighbor, Frank Achorn [7] (R737).

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7 / Achorn testified that he had spent the better part of the day drinking with Ireland Boyd (R41-48).

Mary put the kids to bed as soon as he got home, "because when he was drunk like that if they just made one little noise or something he didn't like he would just get onto them, so I tried to put them to bed before he got hold of them" (R737). After a while, Frank Achorn left, and appellant and his girlfriend (Sharon Brown) came by (R737-738). They were sitting there talking, and Ireland was drinking; a Kirk Douglas movie was on the TV (R738-739). Ireland made a comment to the effect that he had a dimple on his chin like Kirk Douglas, but you couldn't see it because of his beard (R739).

> And one thing led to another. And he tried to pull my pajamas off 'cause he was going to show Bud and Sherry how a real man done it. Right in front of company he was going to do it to me. And Sharon, she got up, she said she wasn't going to stay there and watch me be humiliated like that. He wouldn't quit, and I tried to hang on, I really did, I tried to hang onto my pajamas, and he just kept pulling them and pulling them.

(R739).

Finally, Ireland kind of staggered, and he stopped (R739). Mary testified that she was "more than upset" (R740).

Ireland then started saying that he wanted to go to the Water Hole (a bar) in Oneco (R740). When Mary said she wasn't going, Ireland tried to get appellant and some of the other neighbors to take him, but nobody wanted to go (R740). "And he come back and he told me I had five minutes to get my clothes on and get the kids in the car or he was going to take the kids and just go. I couldn't let my kids go out the door with him and him drunk. He could have killed them" (R740).

Mary got dressed, wrapped the kids in a blanket, and put them in the car, a sand-colored 1975 Cadillac (R741). She drove Ireland to the Water Hole (R741). After about five minutes, he came back out and said they wouldn't allow kids in there after eight o'clock (R742). They cut across to the ABC Liquor Store in Bradenton, where Ireland bought another bottle of liquor and a bottle of 7-Up (R742). On the way back, Ireland wanted something to eat, so they went through the drive-through of McDonald's, where they were told their order would take five minutes (R742). "And he cussed that lady out something awful, and he said he'd just go on home and I could cook, and that's fine, I wanted to go home" (R742).

It was probably around 11:00 or 11:30 when they got back (R743). Ireland was out of cigarettes, so he told Mary to walk over to the Ecol Station to get him some more (R743). He gave her a $20 bill; she went up through the alley to the Ecol Station, and returned with the cigarettes and his $18 cahnge (R743-744). When she got back, appellant was in the apartment (R744-745). Ireland wanted to go out again (R744-745). "He got in his head he wanted to go again, and I said I wasn't going, but he just kept right on, and he said he could go without me because he had a key, but he dropped it down the side of the couch, he didn't have a key ring on it or nothing, and he just kept on and on and on" (R745). Mary was visibly upset and angry (R745). Finally, she "just threw [the keys] at him and I said, just go, just get out, go, wherever. But he wanted Bud to go with him" (R746). Mary recalled that appellant had earlier said that he

didn't want to go with Ireland, but finally she [Mary] said to appellant that this would be a good time to get rid of somebody (R746). Appellant didn't say much right then, "but Ireland started up again, and finally [Bud] said he would take him, but he had to go put his shoes on first" (R746). When appellant got up to leave, to get his shoes, Ireland called him a liar, and said he wouldn't come back (R746). Ireland followed appellant out the door, and Mary followed Ireland (R746). Ireland and appellant stopped at B.J. [Young's] house, where a party was going on (R746-747). Mary went back to her apartment, and Ireland and appellant returned shortly thereafter.

> [Ireland] told me to fix him a drink, so I did, and then he started about wanting to go again, and he got up and kind of staggered a little bit, I kind of caught him, I got used to that. One time I caught him and I fell over with him. He was a lot bigger than I am. But he went out the front door, the one towards the road, that's where the car was. He told me to help him to the car, so I did, and by the time we got to the car he was mad at me again and he said he would do it himself, and I opened the car and he got in, and I shut the car door and I gave him his glass, I think. No, I gave him a bottle. He left his glass, he didn't want it. He said he was going to drink it straight.

(R747)

Appellant asked if he could have another drink in his glass, so Mary went inside and fixed him one (R747). She brought it out and gave it to appellant, who was sitting on the hood of the car (R747). Appellant did not get in the car; instead, he walked around the side of the structure in the

direction of his own apartment (R747-748). Mary went back to her apartment; as she was standing at the door, she could hear Ireland yelling for appellant to come on (R748). She heard the car door shut, but did not recall whether she heard it start (R748). She went inside her apartment, shut the door, and put the chain lock on it (R748). She then laid down on the couch, and might have dozed off (R749).

Something woke her up, and she went to the door (R749). Appellant handed her her car keys (R749). Appellant "said I didn't have to worry about it, that he wouldn't bother me anymore, and then it was time for me to pay off my part of the bargain" (R750). Mary Boyd testified that she knew what he meant, but she didn't want to do that (R750). "I think I was scared by that time, and so I just, I did what he wanted" (R750). According to Mary, she and appellant had sex on the couch for just a few minutes; "after it was over with he left" (R751).

The next day, Mary Boyd identified Ireland's body at the hospital (R748-749). Mary told the police that Ireland had left in a truck (R753). She testified that she told this to the police because she was scared; "... I was afraid I would end up dead or worse, or my kids would. I don't know just what I was afraid of. I just thought it was a good idea at the time, but it don't work that way" (R752).

Before she left for Kentucky (for Ireland's funeral), Mary Boyd told the police she would call them as soon as she got back (R754). While she was in Kentucky, Detective Marquiss was

there, "and I talked to him for a while and I asked him then if I did get arrested, I asked him if I was going to be arrested right then, and he said not right then"(R753). When she got back to Sarasota, Det. Marquiss wasn't back yet, as his plane was delayed in Atlanta (R754). She talked with other police officers, and when Marquiss eventually arrived she talked with him, and she was arrested at around 11:30 that night (R754). At some point before she was arrested, she told the officers the version of events which (according to her testimony) was the truth (R754).

On cross-examination, Mary Boyd testified that she learned of Ireland's death on Sunday, April 27 from Det. Marquiss (R759). She did not believe him, or did not want to believe him (R759-760,762-763). It was not unusual for Ireland to stay out all night drinking, and it was not unusual for him to leave with people she didn't know (R762-763). So when he did not show up Sunday morning she wasn't worried because "he always found his way home again" (R763). When Marquiss told her she needed to go to the hospital, Mary went and got Sharon Brown and asked her to drive her there (R760). When she saw Ireland's body, it came as quite a shock to her (R760).

Duirng the next few days, Sharon Brown was at Mary's house most of the time, cooking meals and taking care of the kids, because Mary was shaken up and really needed the help (R761). Mary saw appellant on Sunday afternoon, working on his car with another neighbor (R761). Since Sharon was fixing meals for Mary's

family, appellant would come over to eat with them, and then would go home (R762). When Mary drove to Kentucky for Ireland's funeral, she was accompanied by Sharon Brown and another friend, Kenney Hall (R773).

Upon her return from Kentucky, Mary went straight to the Sheriff's Department, as she had promised Det. Marquiss (R765). When she got there, Marquiss was not back from Kentucky yet, so she spoke with Det. Fleeman and another detective (R765). They began to tape record her statement at about 7:30 p.m. (R766). While Mary did not specifically recall this, the transcript of the tape indicated that one of the detectives had said "We left something out of this, I think. What did Bud say when he came back that night? Didn't he tell you you wouldn't have to worry about Ireland any more?" (R766). Mary said "No" (R767). The detective followed it up by asking "He didn't say that?", and Mary answered "No, he just told me he left him somewhere" (R767). To the question "He didn't say that you wouldn't have to worry about him anymore", Mary replied "Why would he have said that. I would

have known something was wrong" (R769) [8]

Mary Boyd testified that there were a lot of people who knew - because she had told them - that she wished Ireland was dead (R778). She thought she "would be so much better off if he was dead because divorcing him wouldn't have helped, he would just take the kids" (R779). But, according to Mary, she never intended for anyone to actually kill Ireland (R779). Therefore, when he turned up dead, Mary was afraid that the police would think that she killed him (R779-780). In fact, when she

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8 / Since Mary Boyd claimed not to recall these statements (R766-769), Detective Fleeman was subsequently called as a defense witness. He confirmed that the above statements were made in the taped interview (R1054-1057). Det. Fleeman testified that, prior to that interview, Mary Boyd had never told him that appellant had said anything to the effect of "You won't have to worry about Ireland anymore", so he acknowledged that that thought could have been something that he "threw in there" - i.e., suggested - himself (R1057). Fleeman testified that Mary Boyd is an emotional person, and that she appeared somewhat confused at the time (R1057).

The taped statement lasted about 30-45 minutes (R1057). The police officers then spoke with her, off the tape, for at least a couple of hours (R1058). At about 10:30, they took another taped statement (R1058).

> Q. [by Mr. Mosca]: And in that taped statement do you recall whether or not Mary Boyd incorporated statements attributed to Mr. Edwards about, you won't have to worry about Ireland anymore?
>
> A. I believe she made that statement, yes.
>
> Q. To the best of your recollection did she repeat that statement verbatim, the way you had read it to her in the 7:46 statement.
>
> A. Best of my recollection she did.

(R1058)

spoke with Detective Skeens a couple of days after Ireland's death, Skeens had her almost convinced that she had killed him, and had blocked it out (R783). She went home and checked under her sofa to see if there was a lug wrench there, to see if maybe she really did it (R783). When she checked under the sofa, she knew she didn't do it (R783).

Mary Boyd acknowledged that in July, 1986, while she was in the Sarasota County Jail, she made a statement to defense investigator Keith Steele to the effect that if Mr. Edwards walks "they're going to fry me, I'm the only one left, whether I did it or not" (R789, see R785-789). She also said to Steele "They've got to name somebody and they haven't got anybody else, they're running out of people" (R789). Mary testified that that was the way she felt at the time (R789).

Mary testified that when Ireland was drunk, "you know what was good for you you didn't say no to him" (R780). She had said "no" to him a few times in the past, and had paid the price for it (R780). He hurt her real bad sometimes, and she learned that it was easier to agree with him than to fight with him (R780). Friends and neighbors sometimes also had to just say "yeah, okay, Ireland, whatever you say", just to get him off their back (R780).

Mary Boyd acknowledged that she initially told the police that Ireland had left in a pickup truck at about 1:30 or 2:00 in the morning (R789-790). She testified that she "made up" the story about the truck (R790). According to her testimony, she was kind of scared of appellant when he first came back that night

with the car keys, but "then he just acted like he always did", so she was not afraid of him on the days that followed (R783-784).

The main defense witnesses at trial were Glen VanWormer, an eleven year old boy who lived in a trailer on Oregon Court, and his mother, Paula VanWormer. [9] Paula testified that, after the card game at B.J.'s broke up, she went back to her trailer, when she heard Hillbilly Boyd screaming and cursing at appellant (R981-984). When she looked outside, she saw Hillbilly, and she saw appellant walking through the alley toward his own apartment (R982). Paula testified "Evidently Bud had promised to take him to the Water Hole and he was saying, you blah, blah, blah, you blah, blah, blah, you're a liar. Look at that. You're locking the door. You're going in. You're not taking me anywhere" (R984). When Hillbilly got done cursing, he threw up his hands and walked back toward his house, so Paula felt safe enough to walk from her trailer to talk to appellant (R985). Appellant "was upset and he's not used to that, you know, Bud was always the one that stopped the fighting around the Court. You know, everbody was always fistfighting and getting drunk, and he always stopped it" (R985). She talked with appellant for about fifteen minutes, and then appellant went back inside his house. (R986).

Glen VanWormer testified that the night before Hillbilly Boyd's death, at around 2:00 in the morning, he was lying on the couch (which was his bed) in his trailer (R952-956). Through

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9 / As with the key state witnesses, Mary Boyd and Jeff Walters, there was significant impeachment of the defense witnesses as well.

the window opening (see R955), Glen saw a truck pull out, and heard somebody say "Come on, Hillbilly" or something like that (R954). Hillbilly then got in the back of the truck (R955-956). When he saw Hillbilly leave in the truck, Glen did not think anything of it at the time (R959). He did not recall the color of the truck, but he did notice that it had a roll bar on the back (R963-967).

SUMMARY OF ARGUMENT

Where there has been an illegal pre-trial lineup (or other improper confrontation), the state cannot introduce before the jury a subsequent in-court identification made by the witness, unless it can show by clear and convincing evidence that the in-court identification is (a) reliable and (b) based solely on the witness' observations at the scene of the crime (or encounter), and uninfluenced by the intervening confrontation. See e.g. United States v. Wade, infra; Manson v. Brathwaite, infra. The reliability of the in-court identification is determined under the totality of the circumstances, with reference to the factors set forth in Manson v. Brathwaite and Neil v. Biggers, infra. In the present case, the trial court agreed with the defense's contention that the lineup (which took place after appellant requested and was appointed counsel at his first appearance hearing, see Fla.R.Cr.P. 3.111(a) and 3.130) was illegal, on the authority of Sobczak v. State, infra. However, the state was permitted to introduce Jeffrey Walters' in-court identification before the jury. Appellant submits that this was constitutional error, under the test set forth in Wade, Manson, and Neil, as the state clearly failed to establish either the reliability or the independence of Walters' identification. By his own admission, Walters "barely" looked at the black driver at the Quick Stop, and had no reason to (and did not) pay any attention to him. Walters acknowledged that he did not notice any of the man's facial features. The only thing that Walters really recalled

about the man was the outline or shape of his face (round) and the length of his hair (short). As will be explained in the body of the argument, the factors of (1) opportunity to observe and (2) degree of attention weigh strongly in the direction of unreliability; and the factors of (3) the witness' level of certainty at the confrontation and (4) the suggestiveness of the lineup itself weigh at least somewhat in the direction of unreliability. The factors of (5) accuracy of the description and (6) length of time are essentially neutral under the circumstances of this case, particularly in light of the generality of the description. Under the totality of the circumstances, Walters' identification was plainly unreliable. Moreover, the evidence does not show that Walters' 1-2 second glance at the black driver at the Quick Stop provided an independent basis for his in-court i.d., uninfluenced by his much longer, more focused, and better motivated observation of appellant in the lineup; and uninfluenced by his seeing (the same day as, or the day after, the lineup) a newspaper mugshot of appellant as the suspect in this crime.[10] The state clearly failed to meet its burden of overcoming by clear and convincing evidence the presumption that the in-court identification was tainted by the

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10/ Walters, although he later claimed to have recognized appellant in the lineup, told the police at the time that he did not recognize anyone. Thus, prior to the time he said he could identify appellant, Walters had seen him not only in the lineup, but also in the front-page newspaper photo. The suggestiveness of this scenario, and the danger of misidentification, is obvious. See People v. Prast, *infra*.

illegal pre-trial confrontation. See e.g. Hearns v. State, infra; Cribbs v. State, infra; State v. Sepulvado, infra; M.J.S. v. State, infra; Howard v. State, infra.

The erroneous admission of Walters' in-court identification cannot be written off as "harmless" under the standard set forth in Chapman v. California and State v. DiGuilio, especially in light of the jury's (unfulfilled) request during deliberations to have read back to them the testimony of Jeff Walters and Mary Boyd, and in light of the trial court's express recognition that these two state witnesses were "the crux of the whole case." The trial court also recognized that neither Ms. Boyd nor Walters was an ideal witness; that both were evasive on many questions, and both made many inconsistent statements. In view of these observations by the trial court (who observed the witnesses' demeanor), this reviewing Court cannot say beyond a reasonable doubt that the jury would necessarily have convicted appellant based on Mary Boyd's testimony alone. State v. DiGuilio, infra; see also Simons v. State, infra. Nor can it say that Walters' identification of appellant played no part in the jury's deliberations, or that it did not contribute to his conviction. Chapman; DiGuilio.

As to Issue II, appellant contends that the trial court's arbitrary and unnecessary pre-emption of the subject matter about which counsel could question the jurors on voir dire violated appellant's rights preserved by Fla.R.Cr.P. 3.300(b), and impaired his ability to intelligently exercise his peremptory challenges. The present Rule 3.300(b) (which became effective January 1, 1981) specifically

and emphatically preserves the right of a defendant through counsel to orally examine each prospective juror on voir dire. 11 / See Lavado v. State, infra; O'Connell v. State, infra; Williams v. State, infra. See also Barker v. Randolph, infra (construing Florida's civil rule, which has long afforded counsel that right); DeLaRosa v. State, infra (construing the equivalent right under Texas law); State v. Dolphin, infra (under Connecticut law).

In the present case, the trial judge placed an absolute prohibition on any voir dire examination by counsel with regard to the jurors' understanding of, or their attitudes toward, the legal principles of the state's burden of proof beyond a reasonable doubt, the presumption of innocence, and the accused's right not to testify. The lines of questioning which were declared off limits to counsel were not improper [see Lavado], nor were they repetitious (at least not on counsel's part)[see O'Connell; Williams]. The trial court's announced justification for the curtailment was simply that he had "covered" these areas in his own preliminary, collective examination of the jurors. However, even apart from this "pre-emption" being inconsistent with the preservation of appellant's rights under Rule 3.300(b), the fact also remains that the purpose and scope of the trial court's preliminary inquiry was very different from the examination which defense counsel was unfairly forbidden to pursue. The judge's questioning was collective, while counsel's would have been directed to each juror individually [see Rule 3.300(b)("The right of the parties to

11 / Prior to 1981, the Florida criminal rules placed the primary responsibility for conducting voir dire examination on the trial court, comparable to (for example) the federal system. The significant difference between the two approaches is discussed in Underwood v. State, infra.

conduct an examination of <u>each</u> juror orally shall be preserved). The judge's questioning was aimed only toward determining whether any jurors were excludable <u>for cause</u> because of their inability to follow his instructions, while counsel's proposed inquiry was directed to obtaining information about the jurors' views and attitudes toward these legal principles, which would enable him to intelligently exercise his <u>peremptory challenges</u>. See <u>Lavado v. State</u>, <u>infra</u>; <u>Barker v. Randolph</u>, <u>infra</u>; <u>Ritter v. Jiminez</u>, <u>infra</u>. The judge's collective inquiry did not necessarily assure that a juror who harbored subtle bias or prejudice concerning these legal doctrines would even respond [see <u>DeLaRosa</u>; <u>Dolphin</u>], and it certainly "[did] not reveal the ...thoughts, prejudices, or feelings of the individual jurors." <u>State v. Dolphin</u>, <u>infra</u>. What counsel wanted to do, and had a right to do, "is ask [the] jury how they feel about those things. I want them to tell me what they think" (R417). The trial court's unreasonable curtailment of counsel's voir dire examination was a clear abuse of discretion - and an infringement of the rights preserved by Rule 3.300(b), which impaired appellant's ability to intelligently exercise his peremptory challenges. Reversal is required. <u>Lavado</u>; <u>O'Connell</u>; <u>Williams</u>; <u>Barker</u>; <u>DeLaRosa</u>; <u>Dolphin</u>.

Appellant also contends that the trial court's repeated comments during voir dire to the effect that the jury's penalty verdict would be "only a recommendation" or "merely a recommendation", and that "it is my job to determine what the appropriate sentence would be", clearly violated the constitutional principles of <u>Caldwell v. Mississippi</u>, <u>Adams v. Wainwright</u>, and <u>Mann v. Dugger</u> [Issue III]. Also, the court erred in refusing to instruct the jury on the mitigating factor of extreme emotional disturbance [Issue IV].

ISSUE I.

THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE THE IN-COURT IDENTIFICATION TESTIMONY OF JEFFREY WALTERS, WHERE THE TOTALITY OF THE CIRCUMSTANCES (AS ASSESSED IN TERMS OF THE FACTORS ENUMERATED IN NEIL v. BIGGERS, 409 U.S. 188 (1972) AND ITS PROGENY) DEMONSTRATED THE UNRELIABILITY OF WALTERS' PURPORTED ABILITY TO IDENTIFY APPELLANT IN COURT, AND FAILED TO OVERCOME THE PRESUMPTION THAT THE IN-COURT IDENTIFICATION WAS TAINTED BY THE ILLEGAL LINEUP.

A. Introduction

Reliability is the linchpin in determining the admissibility of identification testimony. Manson v. Brathwaite, 432 U.S. 98 (1977). See Johnson v. State, 438 So.2d 774, 777 (Fla.1983) (recognizing that reliability is the most important concern, and that it should be determined on the totality of the circumstances). In Manson v. Brathwaite, supra, at 111-112, the United States Supreme Court, in adopting the totality of the circumstances approach, noted that the driving force behind the Wade-Gilbert-Stovall [12] trilogy of cases:

> ... all decided on the same day, was the Court's concern with the problems of eyewitness identification. Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police. Thus, Wade and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability.

12 / United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

The factors to be considered in evaluating the reliability of an in-court identification which has been preceeded by an improper pre-trial confrontation include the following:

> (1) [T]he opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Johnson v. State, 438 So.2d 774, 777 (Fla.1983)(citing Neil v. Biggers, 409 U.S. 188, 199 (1972) and Manson v. Brathwaite, 432 U.S. 98, 114 (1977)). See also United States v. Wade, 388 U.S. 218, 241 (1967); United States v. Crews, 445 U.S. 463, 473 n.18 (1980); Grant v. State, 390 So.2d 341, 343 (Fla.1980).

Appellant recognizes, of course, that an illegal lineup does not automatically require exclusion of the witness' in-court identification. To the contrary, notwithstanding the occurrence of an improper pre-trial confrontation, the state must be afforded an opportunity to show that the in-court identification is reliable, and that it is based on the witness' independent recollection of the initial encounter. See United States v. Wade, 388 U.S. 218, 239-242 (1967); Gilbert v. California, 388 U.S. 263, 272 (1967); United States v. Crews, 445 U.S. 463, 473 and n.18 (1980); Cribbs v. State, 297 So.2d 335 (Fla.2d DCA 1974); State v. Mendez, 423 So.2d 621, 622 (Fla.4th DCA 1982). If, and only if, the state meets this burden, then the in-court identification is admissible, and may be placed before the jurors for them to determine its

weight. See e.g. State v. Britton, 387 So.2d 556 (Fla.2d DCA 1980). On the other hand, if the state is unable to make the requisite showing of reliability and independent recollection, based on an analysis of the factors identified in Neil and Manson, then the in-court identification is inadmissible, and may not be put before the jury at all. Manson v. Brathwaite, supra, 423 U.S. at 112 (jury should not hear eyewitness testimony unless that evidence has aspects of reliability); see e.g. Hearns v. State, 262 So.2d 907 (Fla.4th DCA 1972); State v. Sepulvado, 362 So.2d 324, 327 (Fla.2d DCA 1978); M.J.S. v. State, 386 So.2d 323 (Fla.2d DCA 1980); Howard v. State, 458 So.2d 407 (Fla.4th DCA 1984). Whether the illegality of the pre-trial confrontation was grounded on the use of suggestive procedures [see Neil; Manson; Cribbs; Sepulvado; Mendez], or on denial of the right to counsel [see Wade, Gilbert; Hearns; Sobczak v. State, 462 So.2d 1172, 1173 (Fla.4th DCA 1984); cf Cribbs (at 337, on petition for rehearing, discussing Wade)],

or both [13], the state must establish a basis in fact for the witness to make a reliable identification, independently predicated on his observations during the crime (or encounter) itself, before the in-court identification can be put before the jury. Hearns.

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13 / As recognized in United States v. Wade, supra, 388 U.S. at 236-238 and n.26, 29,30 and Stovall v. Denno, supra, 388 U.S. at 297-298, the issue of right to counsel and the issue of suggestiveness are interrelated, since counsel, if he is present at a pre-trial confrontation, can take protective measures to ensure the fairness of the procedure. Moreover, the absence of counsel can (as it did in the instant case) prevent or impede the accused "from reconstructing what occurred [at the confrontation] and thereby from obtaining a full hearing on the identification issue at trial." Stovall v. Denno, supra, 388 U.S. at 298. [In the instant case, the police felt there was "no need" (R820) to photograph the lineup, since it appeared, at the time, to have been exculpatory. Had counsel been present, he would have had an opportunity to request the preservation of this evidence by photograph. Instead, when Jeff Walters later claimed that he did recognize appellant at the lineup, defense counsel was severely hamstrung in his effort to show that the lineup was unfairly and suggestively constituted. When mugshots of the lineup participants were obtained, and defense counsel argued that "none of them resemble the defendant except for race" - that the others were relatively thin men, considerably younger than appellant, who did not fit even the very general description given by Jeff Walters (R903,see R862) - the prosecutor countered by pointing out that those people might not have looked that way on the day of the lineup (R903). In addition, Sgt. Fleeman testified that neither he nor Det. Marquiss had anything to do with picking out the participants in the lineup; "that's done by the jail personnel" (R823). While Det. Marquiss was aware of Walters' description of the black man in the car, he was not present at, and knew nothing about, the lineup (R825-826). Sgt. Fleeman, on the other hand, conducted the lineup, but was not familiar with Walters' description of the suspect (R819-823). Consequently, it does not appear from the record that the anonymous jail personnel who selected the lineup participants were even aware of Walters' very general description of the suspect by the shape of his face (round) and the length of his hair (short). Perhaps this explains why, of the six men in the lineup, only one besides appellant could arguably fit even this rudimentary description. See p. 38-43 of this brief]. Had counsel been present at the lineup, he would have had the opportunity to (a) make sure that the officers selecting the participants were familiar with the witness' description of the suspect, (b) objected to the inclusion of the three thin-faced men and a fourth man who had a bushy "afro" hairstyle, and (c) insisted on a photographic record of the lineup.

B. Application of the Factors Bearing Upon the Reliability of the Identification in the Instant Case

In the instant case, the evidence (largely consisting of the testimony of the witness himself, Jeffrey Walters) strongly points in the direction of the unreliability of the purported in-court identification. Appellant will discuss the relevant factors in sequence.

(a) The opportunity of the witness to view the criminal at the time of the crime or encounter. This is perhaps the most critical factor in assessing the reliability of an eyewitness identification. See People v. Moore, 450 NE.2d 855, 859 (Ill.App. 1st Dist. 1983). In United States v. Wade, supra, 388 U.S. at 228-229, after recognizing that "the annals of criminal law are rife with instances of mistaken identification" and noting Justice Frankfurter's observation that the identification of stangers is "proverbially untrustworthy", the U.S. Supreme Court went on to state that the dangers for the accused "are particularly grave when the witness' opportunity for observation was insubstantial."

Jeffrey Walters' own testimony compellingly demonstrates that his opportunity to observe the black man who was in the car with Ireland Boyd at the Quick Stop was minimal. In the hearing before the trial judge, Walters stated that Hillbilly Boyd yelled something out to James Norman, at which point Walters glanced over at the car for about three or four seconds, dividing his glance between the passenger (Boyd) and the black male driver (R810,813-814). In his testimony before the jury, Walters was asked (on direct examination by the prosecutor) if he took a look at the

black male, and he replied, "Yes, barely. I just glanced over" (R872). While the encounter took place around midnight at a convenience store/gas station, and while Boyd and the black man were seated inside their car, Walters testified that the artificial lighting around the gas pumps was very bright (R810, 871).

(b) The witness' degree of attention. Once again, Jeffrey Walters' own testimony amply demonstrates the unreliability of his purported identification of appellant. Walters acknowledged that when he looked at the two people in the car he wasn't being very attentive, as there was no reason to pay much attention to them at the time (R813). He further acknowledged that the only thing that stood out in his mind about the driver, aside from the fact that he was a black man, was that he had a round face (R814).

> MR. MOSCA: In fact, the only recollection you have of that person is the outline of his face; isn't that right?
>
> JEFFREY WALTERS: Yes.
>
> Q. And you never saw or paid the least bit of attention to his features, such as his mouth, his nose, his chin, or anything like that, did you?
>
> A. No, I didn't.

(R814)

The description given by Walters to Det. Marquiss was as follows: a round, almost chubby face, short dark hair, dark eyes (R810,818). Also, "his cheeks were a little darker as in sideburns, but I did not see sideburns, it's just that he may have sideburns (R818). Walters testified that, when he viewed the lineup on May 6, 1986, the only thing he recognized about

appellant was the outline of his face (R818). Later on the day of the lineup, or the day after, Walters saw a mugshot photograph of appellant in the newspaper (R812,815). In seeking to show that Walters was unable to make a reliable identification based solely on his superficial observation of the black male in the car at the Quick Stop, and untainted by the lineup and the newspaper photograph, defense counsel pursued the following line of questioning:

> MR. MOSCA: --- And do you recognize the man sitting here today as the man you saw in the [newspaper] mug shot?
>
> JEFFREY WALTERS: Yes, I do.
>
> Q. Do you recognize the man sitting here today as the man you saw in the lineup?
>
> A. Yes, I do.
>
> Q. One of the men that you saw?
>
> A. Yes, I do.
>
> Q. Mr. Walters, you can't possibly recognize this man as the man you saw in the big brown car that night, can you?
>
> A. Just his facial features.
>
> Q. Well, you just told me you didn't see his features. Now, are you talking about the outline of his face?
>
> A. Yes.
>
> Q. And that is all you're talking about?
>
> A. Yes.

(R815-816)

Similarly, in his testimony before the jury, Walters (after admitting that he barely glanced at the black man in the car) stated on direct examination, "I just noticed the outline

of his face. He had a large face, had dark eyes, short dark hair" (R872). On cross-examination, Walters testified:

> Q. [by Mr. Mosca]: Now, Mr. Walters, you're sitting in this courtroom today, and it is your testimony, is it not, that the man sitting at that table [appellant] is the man that you saw in that car?
>
> A. Yes, sir, I believe it was.
>
> Q. And yet is it not also a fact, Mr. Walters, that you never saw the facial features of the man, the black man in that car, aside from the round face? Isn't that true?
>
> A. Yes, it is.

(R876)

Thus, with respect to what are probably the two most important indicia of the reliability or unreliability of an eye-witness identification - the witness' opportunity to observe and his degree of attention paid - Jeffrey Walters' purported identification of appellant as the black man at the Quick Stop fails dismally to meet the constitutional criteria for the admissibility of an in-court i.d. which was preceded by a constitutionally defective lineup. By his own admission, Walters barely glanced at the man in the driver's seat of the car, had no reason to pay attention to him, did not notice his facial features, and saw

nothing of consequence except a round face and short hair.[14]

(c) The accuracy of the witness' prior description. Appellant is indeed a black male with a round face and short hair. Like most black males, his hair and eyes are dark. Therefore, he fits Jeff Walters' description of the suspect. Whatever weight this factor might carry toward establishing the reliability of the in-court i.d., however, is diminished by the fact that Walters' description is so sketchy and general that several thousand black men in and around Sarasota County could fit it.[15] The important thing is that Walters' description, like his identification, is predicated so heavily on just the shape of the man's face (see R810,814,815-816,818,872,876,878).

(d) The level of certainty demonstrated by the witness at the confrontation. Usually this factor is simple enough to analyze; either the witness was certain when he

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14 / The extreme unreliability of an identification (especially in a death penalty case) based on such fleeting and superficial observation is exacerbated by the fact that this is a cross-racial identification. Even under the best of circumstances - where the witness has had an ample opportunity to observe the suspect, and has had reason to pay some attention to the person's appearance - experts in the field have recognized that the dangers of misidentification are significantly increased when the witness and the suspect are of different races. See Johnson, Cross-Racial Identification Errors in Criminal Cases, 69 Cornell L.Rev. 934 (1984). Cf. United States v. Smith, 736 F.2d 1103, 1106 (6th Cir. 1984)("Dr. Fulero also might have provided insight outside the jury's 'ken' about the possibility of cross-racial misidentification"). In the present case, Jeff Walters' description of the man in the car included the fact that he had dark hair and dark eyes, but (as Walters acknowledged in regard to the latter characteristic (R817)), most black men have dark hair and dark eyes. It is clear from the totality of Jeff Walters' testimony that this cross-racial identification is based almost entirely on the round shape of the man's face and, to a lesser extent, on the fact that he had short hair.

15 / See Dickerson v. Fogg, 692 F.2d 238, 245-246 (2d Cir. 1982) (generality of description devalues its importance as a factor in determining reliability of identification).

identified the accused at the pre-trial confrontation, or he wasn't. In the instant case, there is a complication, but it is one which (like most of the other circumstances surrounding this identification) points strongly toward the unreliability of Jeffrey Walters' eyewitness testimony. The complication is the fact that, after viewing the lineup, Walters told the police that he did not recognize anybody in the lineup (R814-815,816-816,877,880). Thus, at the time of the confrontation, according to what he told the police, his level of certainty was zero. The record does not indicate what caused Walters to change his statement to the police, or when that occurred.[16] But at some point, Walters stated that he really did recognize appellant at the lineup, but he lied about it because he was afraid of getting arrested for violating his New York probation (R816-817,880-881). Even (arguendo) taking him at his word on this, his "level of certainty" does not tend to establish the reliability of his identification; in fact, it tends to show the opposite. Consider the following scenario (which, according to Walters, is exactly how it happened): Walters is at a gas station on the night of April 26, where he sees an acquaintance

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16/ Walters' name was provided to the defense in a discovery response served on August 11, 1986. Due to a change of address by the witness, defense counsel was unable to take Walters' deposition until November 5, 1986. At that deposition, in Watertown, New York, defense counsel learned for the first time that a lineup had been conducted, in which Walters had failed to identify appellant. Defense counsel moved (unsuccessfully) to exclude Walters' in-court testimony on Brady grounds (failure by the state to disclose exculpatory evidence)(see R1463-1465,35-41).

(Ireland Boyd) pull up in a car driven by a black man. Walters divides a 3-4 second glance between the two men. He has no reason to pay any attention to them, and he "barely" looks at the black driver, noticing only his large, round face and his short hair. He does not notice the man's facial features. The encounter is of no importance to him. Within the next day or two, however, Walters hears or reads that Hillbilly Boyd has been killed, and it occurs to him that he may have seen something important (R881-882). Walters has no inclination to go to the police, but they come to him (R881-882). On April 29, Walters is interviewed at some length by Detective Marquiss in regard to the investigation into the death of Ireland Boyd (R873,876, 879,888-889,928-929, see R810,818,825-826). Walters gives Det. Marquiss his sketchy description of the black man who was in the car with Boyd; round face, short dark hair, dark eyes. On May 6, Walters is brought to the police station for a lineup. The purpose of the lineup is to see whether Walters can recognize any of the participants as the round-faced black man he saw at the Quick Stop with the deceased, Ireland Boyd. Now consider the following testimony, given by Walters at the hearing on the motion to exclude his i.d.:

> JEFFREY WALTERS: I recall I was put in a room and several men were brought in, through a window I was asked if I recognized any of them.
>
> MR. WHITAKER [prosecutor]: Do you recall how many were brought in?
>
> A. No, I don't. Six, seven.
>
> Q. Can you recall the descriptions of these men?

A. Just one.

Q. Okay, and why do you recall that particular description?

A. Because I had seen him somewhere before.

Q. And are you talking about--did you realize where you had seen him before?

A. Not at first, and then the thought, as I was leaving the thought occurred to me that I had seen him at the Quick Stop.

(R811)

This testimony, when considered in light of the circumstances, borders on the ludicrous. Jeffrey Walters, while he was viewing the lineup, was well aware (and none too happy about it) that he had been brought to the police station to see if he could pick out the round-faced, short-haired black man he had described to the police as having been in the car with Ireland Boyd at the Quick Stop. As he looked at each participant in the lineup, there are three things Walters could plausibly have thought: (a) "That's him! That's the guy from the Quick Stop."; or (b) "That's not the guy from the Quick Stop"; or (c) "Well, this one looks like he might could be the guy from the Quick Stop, but I'm not sure." It is not at all plausible, under these circumstances, that upon seeing round-faced, short-haired John Edwards in the lineup, Walters (while telling the police he didn't recognize him) would have thought to himself that he had seen this guy "somewhere before" but not realize where, and then have the thought "occur to him", while leaving, that it was at the Quick Stop.

Thus, whether viewed in terms of what he said to the police at the time of the confrontation (i.e., that he didn't recognize anybody in the lineup), or in terms of what he later said he really thought, Walters' "level of certainty" cannot be considered as a factor establishing the reliability of his in-court identification. Even taking his inherently incredible testimony at face value, Walters admitted that the only thing he recognized about appellant at the lineup was the outline of his face (R818)(just as the shape of the face was the only thing he really noticed about the man in the car). Yet even knowing that the purpose of the lineup was to see if he could pick out the black man from the Quick Stop, and even though appellant was one of only two lineup participants who had both a round face and short hair, Walters (according to his own testimony) did not immediately recognize him as the man who was in the car at the Quick Stop. At the initial encounter, Walters had barely glanced at the black man for a second or two, and paid little or no attention. At the lineup, in contrast, his attention was focused on the subjects and directed to the Quick Stop incident; and the police presumably gave him all the time he needed to observe the subjects. Yet, while looking at appellant, Walters only had the vague notion that he had seen him "somewhere before"; it did not cross his mind until he was leaving that "somewhere" was the Quick Stop.

Whatever way you look at it, Jeffrey Walters' "level of certainty" at the confrontation is yet another factor which points

strongly in the direction of the unreliability of his in-court identification.[17]

(e) The length of time between the crime and the confrontation. The Quick Stop encounter took place around midnight on April 26-27, 1986. The illegal lineup was conducted on May 6, 1986, or about a week and a half later.

(f) The suggestiveness of the lineup. In Manson v. Brathwaite, supra, 432 U.S. at 114, the Court said:

> We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations. The factors to be considered are set out in Biggers. 409 US, at 199-200, 34 L.Ed.2d 401, 93 S.Ct. 375. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

In the present case, the trial court agreed with the defense that the lineup was conducted in violation of appellant's

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17/ While not relevant to the question of admissibility (since it occurred later on), this Court may also wish to consider, in the interest of justice [see Fla.R.App.P. 9.140(f)], the testimony of three witnesses in the hearing on appellant's motion for new trial, to the effect that Walters was complaining in the witness room about having been brought down from New York State, because all he saw in the car was a shape (and used his hands to outline a human form)(R1610, see R1608,1612-1613). In response to defense counsel's argument that this constituted newly discovered evidence, the prosecutor replied "I gather he [Walters] was upset because he was brought so far away to give what testimony he had to give and he did not understand the significance of it. His testimony at trial under cross-examination was, yes, all I identified the guy from was from the outline of the face. The statements made in the witness room are no different in substance than what he said on cross-examination, and this cannot qualify as newly [discovered] evidence" (R1615).

right to counsel, on the authority of Sobczak v. State, 462 So.2d 1172 (Fla.4th DCA 1984), rev.den. 469 So.2d 750 (Fla.1985)[18].
Consequently, the trial court never specifically ruled on whether the lineup was also improper on the alternative ground of suggestiveness. However, the judge did request that the police and jail officials attempt as best they could to reconstruct the lineup by compiling a photospread, using mug shots of the participants (R835, 842). This was done, and the photographs were made part of the record on appeal.[19] (R853-856, see R835,842,847-856,861-862, 902-906).

Appellant's position on this question is twofold: (1) The lineup was impermissibly and unnecessarily suggestive, and therefore it was constitutionally deficient even apart from the violation of appellant's right to counsel. Thus, Jeffrey Walters' in-court identification was inadmissible on this ground as well, unless the state met its burden of establishing by clear and convincing evidence that Walters' in-court i.d. was reliable[20], and that it was uninfluenced by the improper pre-trial confrontation.

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18 / See also Smith v. Wainwright, 484 So.2d 31 (Fla.4th DCA 1986), rev.den. 492 So.2d 1336 (Fla.1986); Smith v. State, 501 So.2d 657 (Fla.4th DCA 1987)(question certified); cf. McHaney v. State, ___ So.2d ___ (Fla.2d DCA 1987)(case no. 86-164, opinion filed Oct. 2, 1987)(12FLW 2356)(under Florida law, right to counsel attaches when adversary judicial proceedings have been commenced; this "include[s] formal charging, a preliminary hearing or arraignment and the first appearance"). See Fla.R.Crim.P. 3.111(a) and 3.130.

19 / Pursuant to the Court's order of September 10, 1987, the original color photographs (exhibits B through H) have been sent to this Court (R1601-1602).

20 / Under the totality of the circumstances, as assessed with reference to the Neil v. Biggers/Manson v. Brathwaite factors.

See United States v. Crews, supra, 445 U.S. at 546-547 and n.18; Hearns v. State, supra; Cribbs v. State, supra; State v. Sepulvado, supra, at 327; M.J.S. v. State, supra; State v. Mendez, supra; Howard v. State, supra. This the state clearly failed to do.

(2) Even assuming arguendo that the suggestiveness of the lineup was not so extreme as to amount to an independent constitutional violation apart from the denial of the right to counsel [21], the fact remains that the trial court did find the lineup to be illegal on the latter ground. Thus, even if the lineup was not outrageously suggestive, it was at least partially suggestive, and the suggestiveness was totally unnecessary. Consequently, in determining whether Jeffrey Walters' in-court identification was reliable enough to be admissible notwithstanding the illegality (on right to counsel grounds) of the lineup, the composition of the lineup itself is another factor which suggests that the in-court i.d. may well have been tainted.

Jeffrey Walters' description of the black man at the Quick Stop is notable for two things: its lack of detail, and its emphasis on the round shape of the man's face. Obviously, the more general the description of a suspect is, the easier it ought to be to find lineup participants who conceivably could fit it. Also obviously, when a description emphasizes a particular feature of the suspect's appearance, the fairness of the lineup is diminished by every participant who does not have that feature.

21/ Which appellant does not concede.

In the instant case, the lineup was composed of six men, only two of whom could reasonably have fit the rudimentary description which Walters gave to Detective Marquiss. 22 /

A lineup need not be composed of clones, or fraternal twins of the suspect, but, on the other hand, the stand-ins must appear reasonably similar to the accused in their physical characteristics - and especially those characteristics which are important elements of the description provided by the witness. See e.g. Israel v. Odom, 521 F.2d 1370, 1374 (7th Cir. 1975); State v. Henderson, 569 P.2d 252, 256-257 (Ariz.App. 1977); People v. Gaddy, 496 NYS.2d 495, 115 A.D.2d 658 (1985); People v. Tatum, 492 NYS.2d 989, 1003-1004 (Supp.1985) 23 / . Compare State v. Farr, 357 NW.2d 163, 165 (Minn.App. 1984)("Lineups need not use exact clones of an accused. The six men used in the lineup were remarkably similar in appearance and were close to the description complainant gave police.");

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22 / The lineup participants were appellant (Exhibit F), Reginald Kindle (E), Kenneth Gipson (H), Vernon Charles (C), Lemuel Green (D), and Willie Evans (B and G; the photographs are of the same man taken on different dates). Only appellant, Charles, and Evans have round faces, and Evans'hair is not short, but rather is styled in a bushy "afro". The photographs were taken in January, March, May and October, all in 1986. [To the extent that the state may argue that the photographs might not accurately reflect the participants' appearance on May 6, it is the state's own fault that a contemporaneous photographic record is not available. See p.28 n.13 of this brief. See also United States ex rel Pierce v. Cannon,508 F.2d 197, 201-202 (7th Cir. 1974)(disapproving of procedure where no photograph was taken of lineup, as unnecessarily compromising the reliability and fairness of the identification)].

23 / In Tatum, the court said "Where the stand-ins have been so hastily chosen so that only one other person [besides the accused] could possibly fit the description given to the police, the lineup will be considered unduly suggestive." See People v. Lebron, 360 NYS.2d 468,471, 46 A.D.2d 776 (1974). This observation is particularly cogent as regards the instant case, where the stand-ins were selected by jail personnel who were apparently not even aware of the description Walters had given to Detective Marquiss.

Bivins v. Wyrick, 640 F.2d 179, 180 (8th Cir. 1981)("We have inspected the color photographs of the lineup and find it to be an excellent selection of black men fitting the general description of the robber"); United States v. Hardesty, 706 F.2d 859, 860 (8th Cir. 1983)(good selection of women fitting general description of suspect); Nettles v. Wainwright, 677 F.2d 410, 414 (5th Cir. 1982) ("All the [lineup] participants fit the same description as, and were of similar appearance to Nettles. Furthermore, Nettles was represented by counsel at the lineup").

In the instant case, two-thirds of the lineup participants lacked one or both of the only two characteristics (round face, short hair) that Walters really noticed about the suspect at the Quick Stop. When so constituted, a six-man lineup becomes a two-man lineup. But not only was the lineup unduly suggestive, it was unnecessarily suggestive. See State v. Henderson, 569 P.2d 252, 256-257 (Ariz.App. 1977). The selection process for the lineup was extraordinarily sloppy. Due to the absence of counsel, of course, the defense had no input into the selection of the participants, and was deprived of an opportunity to object to (for example) the inclusion of the narrow-faced Reginald Kindle or the bushy-haired Willie Evans. 24/ In addition, Sgt. Fleeman testified that neither

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24/ Contrast State v. Leggett, 287 SE.2d 832, 837 (N.C. 1982)(all participants in lineup were black males of similar size, shape, and age as defendant; defendant's attorney was present at lineup and rejected several other individuals the officers proposed to use in lineup); see, generally, United States v. Wade, supra, 388 U.S. at 236-238; Stovall v. Denno, supra, 388 U.S. at 297-298; United States v. Thevis, 665 F.2d 616, 642-643 (5th Cir. 1982)(presence of counsel at a lineup, once adversary process has commenced, serves as a deterrent to misuse of identification procedures which can result in misidentification, and helps defendant exercise his rights at trial by effectively reconstructing any unfairness in the identification procedures).

he nor Det. Marquiss had anything to do with selecting the participants, as that is done by jail personnel. Sgt. Fleeman was the officer who supervised the actual lineup, but he was not familiar with Walters' description of the suspect (R819-823). Conversely, Det. Marquiss, who was the officer to whom Walters had given the description, was not present at, and knew nothing about, the lineup. Thus, it does not appear from the record that the jail personnel who selected the participants were necessarily even aware that the suspect had been described as having a large, round face and short hair. They may well have simply pulled the first five black inmates who were available.

The suggestive aspects of the lineup were entirely unnecessary;they could have been avoided if appellant's right to counsel had been honored, and they could have been avoided if the police had coordinated their investigation, and taken the initiative to choose participants for the lineup who at least fit the basic description, rather than leaving the selection up to the "jail personnel."

The State's inability to show that Walters could make a reliable identification based solely on his independent recollection from his glance at the black driver at the Quick Stop is compounded by yet another problem. At the May 6 lineup, Walters had a much longer, more focused, and better motivated look at appellant than he had at the driver on the night of April 26. While he later claimed that he recognized appellant, from the outline of his face (R818), at the lineup - first as having seen him "somewhere before", and, upon leaving, having it dawn on him that it was at

the Quick Stop (R811) - Walters did not tell this to the police. Later that day or the following day - before he told the police he could identify appellant - Walters saw a front page mugshot photograph of appellant in the Sarasota Herald-Tribune, under the lurid headline "Murder-for-Sex Suspect Was Convicted in '75 Death" (see R812,815,823-874,877,1466). The photograph depicts appellant accurately as a round-faced short-haired black man. Now Walters had just seen appellant in a lineup that same day or a day earlier, unhurried and with his attention focused. In contrast, and by his own admission, he had barely looked at the black driver at the Quick Stop, for a couple of seconds at most, and was paying no particular attention; and that was some ten days earlier. There is a very substantial danger, therefore, that the newspaper photograph crystallized his recollection not of the man he saw at the Quick Stop, but of the man (appellant) he saw at the illegal lineup. 25/

25/ Cf. People v. Prast, 319 NW.2d 627, 635 (Mich.App. 1982) ("Where an identification of a defendant is based on a newspaper photograph rather than the witness' own perceptions, it should be excluded"). See also United States v. Dailey, 524 F.2d 911, 914 (8th Cir. 1975)(witness' statement that his identification was based on observations made at scene of crime is not necessarily conclusive; this is so not because of any ascription of bad faith to the witness, but because the witness is apt to retain in his memory the image of the photograph rather than the person actually seen, thereby reducing the trustworthiness of the subsequent courtroom identification).

C. <u>The State Failed to Show by Clear and Convincing Evidence that, Under the Totality of the Circumstances, Jeffrey Walters' In-Court Identification was Reliable, or that it was Uninfluenced by the Illegal Lineup; Consequently, the In-Court Identification was Inadmissible</u>.

In the present case, the factors of opportunity to observe the suspect at the time of the encounter, and the degree of attention paid by the witness at that time (which are probably the two most important considerations in determining the reliability of an identification) both strongly indicate the unreliability of Jeffrey Walters' identification, and the likelihood that it was based not on his fleeting glance at the black driver at the Quick Stop, but on the intervening illegal lineup and on the newspaper mugshot of appellant. Essentially what this is is a purported positive identification, in a death penalty case, of a stranger of a different race, where the witness barely glanced at the suspect for a second or two, had no reason to pay any attention, and did not notice any of the man's features except the round shape of his face and his short hair. The factors regarding the witness' level of certainty at the confrontation, and the suggestiveness of the lineup itself (followed by the newspaper photo), also point in the direction of unreliability. The length of time between the encounter and the lineup, and the fact that (in that he is black, round-faced, and short-haired) appellant fits Walters' vague description, are, at best, neutral factors under the circumstances of this case. See <u>Dickerson v. Fogg</u>, 692 F.2d 238, 245-247 (2d Cir. 1982).

Since the reliability of an in-court identification which has been preceeded by an improper pre-trial confrontation must be determined by a totality of the circumstances test, appellate opinions in other cases are useful only as a guide. In that capacity, appellant submits the following decisions, in each of which the in-court identification was held to be unreliable and inadmissible, following an application of the Neil v. Biggers/Manson v. Brathwaite factors to the circumstances surrounding the i.d.: State v. Davis, 345 SE.2d 549, 558-559 (W.Va. 1986); State v. McDonald, 700 P.2d 327, 329-330 (Wash.App. 1985); (Rodger) Reaves v. State, 649 P.2d 777, 780 (Okla.Cir. 1982) [26]; Dickerson v. Fogg, 692 F.2d 238, 244-247 (2d Cir. 1982); Solomon v. Smith, 645 F.2d 1179, 1185-1187 (2d Cir. 1981).

Appellant recognizes, however, that the issue ultimately comes down to the circumstances surrounding the identification in this particular case. Based on the facts and arguments set forth

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26 / Contrast (Steven) Reaves v. State, 649 P.2d 780, 783 (Okla. Cr. 1982). In these cases, the victim (Rhodes) identified the Reaves brothers from photographic displays (impermissibly suggestive as to Rodger, not impermissibly suggestive as to Steven). In applying the Neil-Manson factors to the in-court identifications, the Oklahoma Court of Criminal Appeals found Steven's to be reliable and admissible, and Rodger's to be unreliable and inadmissible. The court emphasized that the victim had an "excellent" opportunity to view Steven, that most of his attention was directed toward Steven, and that his attention during the robbery and struggle was "clearly more than that of a casual observer." (649 P.2d at 783). As to Rodger, on the other hand, "[T]he victim did not observe his second assailant for any great length of time" and told the police that he did not get a very good look at him, as he had lost his eyeglasses by that time (649 P.2d at 780).

at p. 4-12 and 29-45 of this brief, appellant submits that the state completely failed to show that Jeffrey Walters' in-court identification was reliable, or that it was uninfluenced by the illegal lineup. Consequently, it was inadmissible.

D. The Error Requires Reversal.

The state may attempt to portray the erroneous admission of Jeffrey Walters' identification testimony as "harmless error", on the theory that the jury could have convicted appellant solely on Mary Boyd's testimony. Such a contention, if made, will be meritless. The erroneous admission of an eyewitness identification, when tainted by a constitutionally defective [27] pre-trial confrontation, is error of constitutional dimension. See Wade; Gilbert; Stovall; Neil; Manson. Constitutional error can not be written off as harmless unless the state meets the burden of showing beyond a reasonable doubt that the error could not have contributed to the jury's guilty verdict. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). As this Court summarized in DiGuilio (at 1139):

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The

27 / Whether the impropriety is a violation of the right to counsel, impermissible and unnecessary suggestiveness, or both.

> question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

In the present case, Jeffrey Walters' identification of appellant clearly could have, and almost certainly did, play a significant role in the jury's deliberations. In particular, Walters' testimony, if believed, provided sorely needed corroboration for Mary Boyd's accusation against appellant. See Simons v. State, 389 So.2d 262, 265-266 (Fla.1st DCA 1980)(admission of improper identification testimony was not harmless error, notwithstanding the fact that another witness properly identified the defendant, since "it would be highly conjectural to say that the jury would nevertheless have convicted defendant solely on [second witness'] testimony").

In the instant case, the potential (and likely the actual) harmful effect of the error is further demonstrated by what transpired during the jury's deliberations. Two hours into deliberations, the jury submitted the following written request: "Could we review the testimony of Jeff Walters and Mary Boyd?" (R1523,1270, see R1267). The trial court discussed the matter with counsel for both sides, and expressed the concern that it would take a great deal of time to prepare a transcript of these two witnesses' testimony and then to read it back to the jury (R1270-1276). The trial court observed that neither Boyd

nor Walters was what he would consider an ideal witness; "they made many inconsistent statements" (R1275), and "it was very difficult to get a direct answer from either one of them on many questions" (R1272). Eventually, with the consent of both counsel, the trial court informed the jury that it would take a total of six hours to comply with their request, and this would likely mean they would have to be sequestered in a hotel overnight (R1276-1277). Therefore, the court suggested that the jurors try to reach a verdict based on their recollection of the testimony, but if they could not do it, transcripts of the two witnesses' testimony could be prepared (R1277). After the jury resumed its deliberations, the judge said:

> They may be very close, but quite frankly that's the crux of the whole case. Those two witnesses. So I would have to say that they must be a real stumbling block at this point. I mean, that was really the two witnesses that was the crux of the case. 28 /

(R1278)

Under these circumstances, the erroneous admission of Walters' identification was plainly harmful error. Chapman; DiGuilio; Simons. Appellant's convictions and death sentence must be reversed for a new trial.

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28 / The prosecutor, in his closing statement to the jury, argued "And why is Jeff Walters' testimony so important? Because it's extremely damaging to the defendant who's sitting over there, because it corroborates the testimony of Mary Boyd" (R1249). Obviously, then, the prosecutor felt that Jeff Walters' identification testimony would contribute to the jury's verdict.

The trial court instructed the jury "You should use great caution in relying on the testimony of a witness who claims to have helped the defendant commit a crime. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant." Jeffrey Walters' testimony provided that corroboration for the heavily impeached Mary Boyd. It's admission was clearly harmful.

ISSUE II.

THE TRIAL COURT ERRED IN ARBITRARILY CURTAILING VOIR DIRE, BY PREVENTING DEFENSE COUNSEL FROM ASKING THE PROSPECTIVE JURORS ANY QUESTIONS CONCERNING THEIR VIEWS ON THE LEGAL PRINCIPLES OF PROOF BEYOND A REASONABLE DOUBT, THE PRESUMPTION OF INNOCENCE, AND THE ACCUSED'S RIGHT NOT TO TESTIFY, AS THESE UNNECESSARY RESTRICTIONS INFRINGED APPELLANT'S RIGHTS PRESERVED BY FLA.R.CRIM.P. 3.300(b), AND IMPAIRED HIS ABILITY TO INTELLIGENTLY EXERCISE HIS PEREMPTORY CHALLENGES.

A. Introduction

"In Florida, a reasonable voir dire examination of prospective jurors by counsel is assured by Florida Rule of Criminal Procedure 3.300(b)." Williams v. State, 424 So.2d 148, 149 (Fla. 1982).

> The purpose of voir dire is to obtain a "fair and impartial jury to try the issues in the cause." King v. State, 390 So. 2d 315, 319 (Fla. 1980). Time restrictions or limits on numbers of questions can result in the loss of this fundamental right.[4] [[4] Loftin v. Wilson, 67 So.2d 185 (Fla. 1953); LaRosa v. State, 414 SW.2d 668 (Tex. Cr.App. 1967)]. They do not flex with the circumstances, such as when a response to one question evokes follow-up questions

Williams v. State, supra, at 149.

The trial court's exercise of his discretion in the conduct of voir dire is not unlimited, but is "subject to the essential demands of fairness." Leon v. State, 396 So.2d 203, 205 (Fla.3d DCA 1981), quoting United States v. Nell, 526 F.2d

1223, 1229 (5th Cir. 1976). See also Lavado v. State, 492 So.2d 1322 (Fla. 1986)(adopting in its entirety the dissenting opinion of Judge Pearson in Lavado v. State, 469 So.2d 917, 919-921 (Fla. 3d DCA 1985)); O'Connell v. State, 480 So.2d 1284, 1286-1287 (Fla. 1985); Barker v. Randolph, 239 So.2d 110, 112-113 (Fla. 1st DCA 1970) [29/]; Williams v. State, supra, 424 So.2d at 149;

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29 / See also the specially concurring opinion of Judge Wigginton in Barker v. Randolph, supra, at 113-114, in which he observed:

> Although the trial judge does and must possess a broad latitude of discretion in determining at what point in the voir dire examination counsel's interrogation of the jury should be foreclosed, such discretion should not be exercised in such manner as to prevent counsel for either party from making such interrogation as may be reasonably required in order to procure a fair and impartial jury. The necessity for dispatching the work of the court and shortening the time of trial should not be accorded greater importance than the necessity for procuring an unbiased and impartial jury to try the issues of the case. In the case sub judice it affirmatively appears that the necessity for peremptorily challenging the juror in question would depend upon his answers to further questions by plaintiff's counsel. No justifiable reason for precluding plaintiff from further examining the juror under the circumstances of this case appears in the record before us.

DeLaRosa v. State, 414 SW.2d 668 (Tex.Cr.App. 1967)[30]; Fla. R.Crim.P. 3.330(b) provides:[31]

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30 / Texas, like Florida (and unlike, for example, the federal system, where the trial judge is primarily responsible for conducting the voir dire examination) specifically preserves the right of voir dire examination by counsel. Compare Fla.R.Crim.P. 3.300(b) with the Texas provision (developed by caselaw) discussed in DeLaRosa, 414 SW.2d at 671-672. [The DeLaRosa case is cited in some subsequent decisions (including the Florida Fifth DCA's decision in Williams v. State, supra) as LaRosa].

31 / Prior to the adoption of the current version of the rule (which became effective Jan. 1, 1981, see Moody v. State, 418 So.2d 989, 993, n.2 (Fla.1982)), Florida guaranteed the right of full voir dire by counsel only in civil trials. See Underwood v. State, 388 So.2d 1333, 1334 (Fla.2d DCA 1980), in which the court observed:

> Florida Rule of Criminal Procedure 3.300(b)[pre-1981 version] provides for examination of the prospective jurors by the court first with each counsel being permitted to "propound pertinent questions" to the prospective jurors after the court's examination. Florida Rule of Criminal Procedure 3.300(b) is quite different from Florida Rule of Civil Procedure 1.431(b), wherein there is specifically preserved the right of counsel for the parties to examine jurors orally on voir dire. Rule 1.431(b) provides that the court is then allowed to ask additional questions. While recognizing the differences in the two rules and what also may be a subtle distinction in the language of Rule 3.300(b) where it provides for the court to "examine" prospective jurors and for counsel to be "permitted to propound pertinent questions" to them, we interpret Rule 3.300(b) to allow counsel the opportunity to ask orally "pertinent questions" on voir dire except where the exigencies of the particular case dictate otherwise. Broad discretion over the extent and nature of questions asked by counsel is conveyed to the court by the use of the word "pertinent."

The committee note to the 1980 amendment, in which the current version of Rule 3.300(b) specifically preserving the right of counsel to examine each prospective juror orally on voir dire was adopted, states, "As to examination by parties, this brings Rule 3.300(b) into conformity with Florida Rule of Civil Procedure 1.431(b)."

Accordingly, the relevant Florida case law, with regard to whether the trial court improperly curtailed counsel's right to examine the prospective jurors on voir dire, is comprised of appellate decisions in civil cases, and those arising from post-Jan. 1, 1981 criminal trials, governed by the current rule which affords that right.

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

See O'Connell v. State, supra; Williams v. State, supra.

In addition to preserving the right of counsel to orally examine each prospective juror on voir dire, Florida recognizes the importance of the informed exercise of peremptory challenges. See, generally, Francis v. State, 413 So.2d 1175, 1178-1179 (Fla.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"). "The examination of a juror on voir dire has a dual purpose, namely, to ascertain whether a legal cause for a challenge exists and also to determine whether prudence and good judgment suggest the exercise of a peremptory challenge." Mitchell v. State, 458 So.2d 819, 821 (Fla. 1st DCA 1984). A voir dire that has the effect of impairing the defendant's ability to intelligently exercise his challenges does not comport with "the essential demands of fairness." United States v. Rucker, 557 F.2d 1046, 1049 (4th Cir. 1977). See also Lavado v. State, 469 So.2d 917, 919 (Fla.3d DCA 1985), in which Judge Pearson, in a dissenting opinion which was subsequently adopted as the opinion of this Court (492 So.2d at 1323), said:

> It is apodictic that a meaningful voir dire is critical to effectuating

> an accused's constitutionally guaranteed right to a fair and impartial jury. See Rosales-Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981).
>
> > "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. See Connors v. United States, 158 U.S. 408, 413, 39 L.Ed. 1033, 15 S.Ct. 951 [953] (1895). Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts." Rosales-Lopez v. United States, 451 U.S. at 188, 101 S.Ct. at 1634, 68 L.Ed.2d at 28 (footnote omitted).

The right of counsel to examine jurors on voir dire [Rule 3.300(b)], and the right to informed exercise of peremptory challenges are inextricably linked. In Ritter v. Jiminez, 343 So.2d 659, 661 (Fla.3d DCA 1977), for example, the court said:

> We are in full accord with the holding of Florida courts that in the trial of every cause before a jury in this state, the law grants to the respective parties the right, either personally or through their attorneys, to orally examine jurors on voir dire. Mizell v. New Kingsley Beach, Inc., 122 So.2d 225 (Fla.1st DCA 1960). Trial attorneys should be accorded ample opportunity to elicit pertinent

> information from prospective jurors on voir dire examination. It is from information so obtained that trial attorneys can call upon their own skill to determine whether to challenge for cause or exercise a peremptory challenge.

Similarly, in Barker v. Randolph, 239 So.2d 110,112 (Fla.1st DCA 1970), the court said:

> The peremptory challenge is a useful tool which cannot be denied a party by the court. It is a shield granted litigants to secure jurors as impartial as human frailties permit. Trial attorneys rely heavily upon their skill to elicit pertinent information from prospective jurors on voir dire examination, thus, relating the jurors' attitude to the trial of the case. The examination is vital to lay a predicate so that counsel may determine whether to challenge for cause or exercise a peremptory challenge.

See also Lavado v. State, supra; Johnny Roberts, Inc. v. Owens, 168 So.2d 89, 92 (Fla.2d DCA 1964)(counsel ordinarily has no right on voir dire to implant the thought of insurance coverage in the minds of prospective jurors; counsel have only the right to elicit information necessary to show impartiality or lack of it, disqualification or unfitness to serve as a juror, and such further information as may be necessary to properly inform the questioning attorney whether he should exercise his right of peremptory challenge); DeLaRosa v. State, 414 SW.2d 668, 671 (Tex.Cr.App. 1967)(counsel has right to question members of the jury panel "to the end that he may form his own conclusion, after his personal contact with the juror, as to whether in counsel's judgment he would be acceptible to him or whether, on the other hand,

he should exercise a peremptory challenge to keep him off the jury"); State v. Dolphin, 525 A.2d 509, 512-513 (Conn. 1987) (purpose of voir dire is twofold: to provide information from which the trial court can decide which if any jurors should be excused for cause, and to provide information to counsel which may aid them in the exercise of their right to peremptory challenge).

In the present case, over his strenuous objection, defense counsel was denied the right to ask any prospective jurors any questions concerning their understanding of, or their views on, the legal principles of the state's burden of proof beyond a reasonable doubt, the presumption of innocence, and the right of the accused not to take the witness stand. The lines of examination which counsel wanted to pursue (and was absolutely prevented from doing so) were clearly proper areas of inquiry. See Lavado v. State, supra, at 919-920 (dissenting opinion of Judge Pearson adopted by this Court)(scope of voir dire properly includes questions about jurors' attitudes toward particular legal doctrines pertaining to the case, where relevant to determination of whether challenges for cause or peremptory challenges are to be made); contrast King v. State, 390 So.2d 315, 319 (Fla. 1980)(judge was within his discretionary authority in sustaining the objection to proposed inquiry, where question did not address the juror's impartial application of existing law, but rather it concerned her conception of what laws should exist). "The trial judge's role during jury selection, given a permissible line of interrogation, is really only to evaluate the conduct of

counsel as to good faith and propriety in pursuing the inquiry." Sutton v. Gomez, 234 So.2d 725, 727 (Fla.2d DCA 1970).

What the trial judge did here, in clear violation of the letter and spirit of Rule 3.300(b), was to pre-empt entirely from counsel three of the most critical areas of inquiry concerning the jurors' attitudes about the law. The only justification given by the judge for declaring these areas "off limits" to counsel was the belief that he (the judge) had "covered" them in his own collective examination of the panel. For the reasons previously set forth, and which will be discussed further in Part C of this Point on Appeal, this was a poor justification for infringing appellant's right to meaningful voir dire by counsel, and it had the further effect of impairing his ability to obtain information relevant to the exercise of his peremptory challenges. See DeLaRosa v. State, supra, 414 SW.2d at 672; State v. Dolphin, supra, 525 A.2d at 513-514.

B. The Restriction of Counsel's Examination on Voir Dire

At the very beginning of the jury selection proceeding, the trial judge told the prospective jurors:

> I have decided to conduct this portion of the trial in two stages. One in which myself and the attorneys will have an opportunity to question each of you individually on a limited number of issues, and then a second stage where the attorneys will be questioning you as a group.

(R112)

Actually, the voir dire in this case was comprised of three parts. The preliminary portion was conducted by the trial court (R116-143, see R415). He first asked each prospective juror to state his or her name, residence in the county, occupation, marital status, and educational background (R116-137). He then briefly examined the entire panel collectively as to whether any of them knew the attorneys or the defendant (R137-138), as to whether any of them had medical problems which would interfere with their serving as a juror (R138); and as to their ability to follow the law in accordance with the court's instructions (R139-143). In so doing, the judge briefly instructed the jurors on the burden of proof beyond a reasonable doubt, the presumption of innocence, the defendant's right not to take the witness stand, and that no inference of guilt may be drawn from the fact that he does not take the stand; and asked them collectively a number of questions designed to ascertain whether any of them could not follow his instructions on these principles of law [32/] (R140-143). In the second stage, the prospective jurors were questioned individually and outside of one another's presence, by the court and the attorneys, with regard to three subjects only: (1) their exposure to pre-trial publicity; (2) the possibility of racial prejudice; and (3) their views on the death penalty (R148-409, see R112-113).

32/The judge did ask one question of an individual juror, Mr. Borgus, by way of illustrating his point about the presumption of innocence (R141). Another juror, Mr. McGovern, spoke up in response to an earlier collective question, and stated that if he believed a law enacted by the legislature was wrong, he would have a hard time honoring the court's instruction to follow it (R139). None of the other thirty-eight jurors made any recorded response to the judge's collective questioning concerning the basic principles of law to be applied.

In the third stage, the prospective jurors were re-assembled, and counsel for both parties examined them in groups [33]; but with their questions directed to individual jurors, and eliciting responses from those jurors (R419-547).

At the beginning of the stage of voir dire to be conducted by counsel, the trial judge announced:

> The Court would put on the record that we started, I think, jury selection yesterday about 9:15, 9:30. The court gave a preliminary instruction that was approved by both sides and then asked some preliminary questions of the group as a whole. We then recessed for individual questioning. Mr. Edwards was present throughout all these proceedings.

(R415)

The trial judge stated that he was limiting the questioning of the first group of 14 jurors to 45 minutes per side [34] (R415-416). If, at the end of 45 minutes, counsel felt that more time was necessary, he could approach the bench and show good cause, and the court would rule at that time (R415). The trial court (properly) instructed counsel not to attempt to establish rapport with the jurors by injecting comments like "My little girl goes to the same kindergarten that your little girl does", and not to ask jurors what kind of verdict they might

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33 / Fourteen at a time (see R415,480-482,527-528).

34 / While appellant does not concede the propriety of such a time limitation in a capital case [see e.g. DeLaRosa v. State, supra], he is not, in the circumstances of the present case, arguing this as a ground for reversal. Appellant's argument here is based entirely on the trial court's overbroad and arbitrary curtailment of the content of defense counsel's voir dire examination.

return on a hypothetical state of facts (R416). Then, however, the trial court announced the ruling which unfairly deprived appellant of his right to reasonable voir dire of each prospective juror by counsel, and impaired his ability to intelligently exercise his peremptory challenges. The judge said:

> Jurors may not be questioned concerning anticipated instructions or theories of law or their understanding of various legal principles yet to be explained to them. I have covered reasonable doubt, presumption of innocence, and the dedefendant's right not to testify. Now I don't want the same questions asked and I don't want the jurors being asked, well, now the judge read that to you. What's your understanding of it? Did you understand that? Does the judge need to explain it to you again, and so forth. I have no problem if you all want to touch on those areas.
>
> MR. MOSCA [defense counsel]: Well, your Honor, what I may very well do, what I've done in every criminal trial I've ever had is ask a jury how they feel about those things. I want them to tell me what they think. Some people don't think it's fair to make the state prove beyond a reasonable doubt.
>
> THE COURT: Well, I've asked them that.
>
> MR. WHITAKER [prosecutor]: He asked them that.
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> THE COURT: I asked them that yesterday. And also, you know, we've gone through an extensive list of questions. I don't want to be re-asking these people questions. I don't want questions on the death penalty or the areas that we covered yesterday.
>
> MR. MOSCA: No, but again for clarification, I fully intend to ask them how they feel about presumption of innocence and burden of proof, and if you don't want me to do it tell me now and I will just state an

objection on the record. I won't make a scene, but I fully intend on doing it unless you tell me not to.

THE COURT: I would at this point tell you that I feel that the questions you've represented to me have been asked and I would prohibit you from re-asking that question.

MR. MOSCA: Okay. Specifically the question: How do you feel about the state having the burden of proof? Do you feel that that is unfair to ask the state to do that? Are you telling me not to ask that question?

THE COURT: I'm telling you not to ask that.

MR. MOSCA: Okay.

THE COURT: Because I remember specifically asking that.

MR. WHITAKER: Yes, you did.

THE COURT: I said Mr. Whitaker has the burden, Mr. Whitaker accepts that burden. Do you all feel that that's unfair to make Mr. Whitaker do that?

MR. MOSCA: Judge, I would just make my objection for the record.

THE COURT: That's fine. No problem.

(R416-418)

Subsequently (after the first group of fourteen jurors was examined by counsel, but before the examination of the second and third groups),defense counsel moved for a mistrial on the ground that the court had refused to allow him to ask the jurors any questions on voir dire concerning burden of proof, presumption of innocence, or the defendant's right not to testify, "in violation of the defendant's constitutional rights and his rights under the constitution of the State of Florida" (R481). The trial court

denied the motion, saying "I would note for the record that I actually read the jury instructions that would be given to the jurors on all three of those subjects, and questioned each one[35], and they said they could follow the law on that"(R481).

C. The Trial Court's Pre-Emption from Counsel of All Questioning in Regard to the Jurors' Views on the Subjects of Burden of Proof, Presumption of Innocence, and the Accused's Right not to Testify Deprived Appellant of his Rights Preserved by Fla.R.Cr.P. 3.300(b), and Impaired his Ability to Intelligently Exercise his Peremptory Challenges.

Since the lines of questioning which defense counsel wished to pursue in his voir dire examination of the individual jurors were clearly within the proper scope of voir dire [Lavado v. State, supra, 469 So.2d at 919-920 (Judge Pearson's dissenting opinion, adopted by this Court)], and would have provided information regarding the attitudes of particular jurors toward these legal principles (which would have aided counsel in determining which jurors to challenge peremptorily), the only real question is whether the trial court's absolute prohibition of these lines of questioning can be justified as an exercise of "control of unreasonably repetitious and argumentative voir dire questioning." See O'Connell v. State, supra, at 1286-1287; Williams v. State, supra, at 149. Clearly it cannot be said that defense counsel engaged in repetitious or argumentative voir dire, since he never got to ask a single juror a single question on any of the

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35 / As previously set forth, the trial court's questions on these subjects (except for the one question to Mr. Borgus) were directed to the venire members collectively, and did not elicit a recorded response from any individual juror (R140-143).

"verboten" subjects. Rather, the trial judge's ruling was based on the faulty assumption that his own preliminary collective questioning (which was aimed merely at ascertaining that the jurors could follow the law as instructed by the court (seeR481)) "covered" the subject matter, and thus in effect pre-empted counsel's right to question the jurors individually, in order to determine their understanding of, and attitudes toward, these legal doctrines.

There are extremely important differences between, on the one hand, the preliminary instruction and questioning undertaken by the trial court at the very beginning of jury selection in this case, and, on the other, the examination which defense counsel sought to conduct during his portion of the voir dire on the second day of jury selection. See DeLaRosa v. State, supra, 414 SW.2d at 672; State v. Dolphin, supra, 525 A.2d at 513; State v. Rogers, 497 A.2d 387, 388-389 (Conn. 1985). The judge's questioning was directed to the venire as a collective body, while defense counsel's questions would have been directed to individual jurors. The judge's questioning was not likely to elicit a response from any particular juror, unless that juror felt that he could not follow the court's instructions. Defense counsel's questions, in contrast, would have elicited responses from the jurors. As he explained in objecting to the court's restriction of the subject matter of his voir dire, the purpose of his proposed questioning was to "ask [the] jury how they feel about these things. I want them to tell me what they think" (R417).

Perhaps the most telling difference between the judge's preliminary collective questioning and the proposed examination by counsel which he pre-empted is this: the judge's inquiry was useful, at best, only to identify those jurors who would be subject to a challenge for cause (based on their inability to follow the law). The judge's inquiry provided no information whatsoever which counsel could use in determining the exercise of their peremptory challenges. In fact, the judge's inquiry did not even provide any basis for counsel to distinguish one juror from another with regard to their attitudes toward the defendant's constitutional trial rights. See Ritter v. Jiminez, supra, at 661 ("Trial attorneys should be accorded ample opportunity to elicit pertinent information from prospective jurors on voir dire. It is from information so obtained that trial attorneys can call upon their own skill to determine whether to challenge for cause or exercise a peremptory challenge"); Barker v. Randolph, supra, at 112 (voir dire examination is vital to lay a predicate so that counsel may determine whether to exercise a challenge for cause or peremptory challenge; trial attorneys rely heavily on their skill "to elicit pertinent information from prospective jurors on voir dire examination, thus, relating the jurors' attitude to the trial of the case"); see also Lavado v. State, supra; DeLaRosa v. State, supra; State v. Dolphin, supra.

Rule 3.300(b) provides that after the prospective jurors are sworn for voir dire, the trial court "may then examine each prospective juror individually or may examine the prospective jurors collectively." The Rule also provides, in much more

emphatic language, that counsel for both sides "shall have the right to examine jurors orally on their voir dire." While the order in which the parties may proceed is to be determined by the court, "[t]he right of the parties to conduct an examination of each juror orally shall be preserved." This provision was adopted effective January 1, 1981, for the express purpose of bringing the criminal rule into conformity with the civil rule (Fla.R.Civ.P. 1.431(b)) [See footnote 31 on p. 52 of this brief]. Florida's appellate courts, in interpreting Rule 1.431(b), have long recognized the importance of the right to reasonable voir dire examination by counsel, and its relationship to the informed exercise of peremptory challenges. See e.g. Sutton v. Gomez, supra, at 727; Barker v. Randolph, supra, at 112-113; Ritter v. Jiminez, supra, at 661-662. Similarly, this Court and the Fifth District Court of Appeal, in criminal cases tried under the present version of 3.300(b), have recognized that the rule assures a reasonable voir dire examination of prospective jurors by counsel. Lavado v. State, supra; O'Connell v. State, supra; Williams v. State, supra. In Williams (at 149) the Fifth DCA noted that the purpose of voir dire is to obtain a fair and impartial jury to try the case, and that "[t]ime restrictions or limits on the number of questions can result in the loss of this fundamental right. They do not flex with the circumstances, such as when a response to one question evokes follow-up questions." In the instant case, defense counsel never even had an opportunity to get a response from any juror - much less ask any "follow-up" or clarifying questions - with regard to their attitudes about

the three basic principles of law which the trial judge arbitrarily placed "off limits."

The present Rule 3.300(b), like the civil rule, plainly assigns to counsel the primary role in examining each juror orally on voir dire. See e.g. Sutton v. Gomez, supra, at 727 (trial judge's role in jury selection, given a permissible line of inquiry, is really only to evaluate the conduct of counsel as to good faith and propriety in pursuing the inquiry). The rule also authorizes the trial judge, at his option, to examine the prospective jurors; either individually or collectively. Appellant emphatically submits, however, that the rule does not contemplate that the trial judge may conduct a brief, preliminary, collective examination which elicits no individual response from any juror - and then use that as a justification for pre-empting counsel's voir dire examination, by forbidding him to ask any questions concerning the subject matter of the court's collective inquiry, on the ground that it would be "repetitive." See also State v. Dolphin, supra, 525 A.2d at 513; DeLaRosa v. State, supra, 414 SW.2d at 672.

The factual situation in State v. Dolphin, supra, is somewhat analogous to the present case.[36] In that case:

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36 / Connecticut (by its state constitution), like Florida (by rule of procedure and case law) and Texas (by case law), specifically recognizes a defendant's right to question each prospective juror individually by counsel. State v. Dolphin, supra, at 512.

> During the voir dire examination, both the state's attorney and defense counsel sought to question the first member of the venire to ascertain whether she would give more or less credibility to a police officer's testimony solely because of his occupation. The trial court, however, refused to allow either attorney's inquiry. During the examination of the second venireman, defense counsel attempted to pursue the same line of questioning. Again the court interrupted defense counsel and refused to allow the question. Prior to the examination of the third prospective juror, defense counsel stated that he intended to question the remaining potential jurors "about whether they would put more weight on a policeman's testimony or that of another witness solely because he is a policeman," but would not continue that line of questioning because the court "has made it clear ... that [it] would sustain the objection." The court replied, "I have sustained the objections to certain questions that have been asked. As far as I'm concerned you don't have to repeat the question to each."

State v. Dolphin, supra, at 511-512.

On appeal, the Supreme Court of Connecticut agreed with the defendant's contention that the trial court violated his [state] constitutional right to question the members of the venire, and abused its discretion in restricting the voir dire examination. State v. Dolphin, supra, at 512. The State Supreme Court rejected the state's contention that the questions which defense counsel had been prevented from asking were adequately "covered" in other portions of the voir dire. Specifically, the state in Dolphin contended that "the trial court's preliminary instructions to the prospective jurors as to the weight to be afforded to a police officer's testimony, coupled with both counsel's opportunity to

question the jurors on whether they could follow the court's instructions, adequately provided the information needed to aid counsel in exercising their peremptory challenges" State v. Dolphin, supra, at 513. The Connecticut Supreme Court found this argument unpersuasive, and held that the trial court's preliminary instruction on the weight to be afforded a police officer's testimony (coupled with counsel's opportunity to question the jurors generally on whether they could follow the instructions) did not pre-empt the defendant's right to question the jurors individually on this subject by counsel:

> As we stated in State v. Rogers, supra, 197 Conn. at 317, 497 A.2d 387, "[a]lthough the court's preliminary instructions to the panel were expansive, thorough and well done, the fact that a court instructs the jury panel prior to voir dire and or charges the jury at the conclusion of the trial does not satisfy the defendant's constitutional right to examine, personally or by counsel, each juror. The court's charge does not necessarily delve into the mental processes of the jurors. It does not reveal the innermost thoughts, prejudices or feelings of the individual jurors." Similarly, a perfunctory inquiry as to whether a prospective juror will follow a court's preliminary

> instruction does not necessarily divulge any hidden prejudice or partiality harbored by the venireman. 37 /

State v. Dolphin, supra, at 513-514.

Even apart from the natural reticence of many people (including many prospective jurors) to speak up individually when a question is addressed to the group [see DeLaRosa], the fact also

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37 / Similarly, in DeLaRosa v. State, supra, at 672, the Texas Court of Criminal Appeals reversed the defendant's conviction because of an "unrealistic time limitation" which had the effect "of depriving the [defendant] of asking the prospective jurors individually proper and pertinent questions." The Court rejected the state's contention that the questions which counsel was prevented from asking pertained to subject matter which had already been "covered":

> As we understand the State's position, it is that appellant was not harmed in view of the Court's collective examination of the jury, the State's voir dire examination and the appellant's own collective examination. We cannot agree. In addition to the appellant being denied the opportunity to show harm, this Court in Plair v. State, [279 SW 267 (Tex.Cr. 1926)] supra, said,
>
>> "We think no case can be found in this state where it has been held permissible for the trial court to refuse to allow counsel to examine the jurors individually as to their qualification. We think the distinction is clear between an examination of this character and the mere asking of jurors the questions in a group. There is a certain degree of timidity and diffidence about some jurors that would be calculated to cause them to remain silent unless personally called upon to answer any questions."

remains that the trial judge's collective inquiry in this case was not designed to draw responses from those jurors who could follow his instructions on the law, but who might have personal viewpoints that would be of great importance to counsel in exercising his peremptories. For example, jurors, when questioned individually on the accused's right not to take the stand, will often make remarks to the effect that, while they would follow the court's instructions, "I know if I were accused of a crime, I'd want the chance to explain that I didn't do it." Similarly, as noted in United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973), "[i]t is equally likely that careful counsel would exercise a peremptory challenge if a juror replied [in response to a question about the presumption of innocence] that he could accept this proposition of law on an intellectual level but that it troubled him viscerally because folk wisdom teaches that where there is smoke there must be fire." As in State v. Dolphin, supra, the trial court's collective inquiry as to whether the jurors could follow his instructions was not designed to reveal "the thoughts, prejudices, or feelings of the individual jurors", and would not necessarily "divulge any hidden prejudice or partiality harbored by the venireman."

In conclusion, appellant submits that the trial court's refusal to allow defense counsel to ask the prospective jurors any questions concerning their views on the legal principles of proof beyond a reasonable doubt, the presumption of innocence, and the accused's right not to testify was a clear abuse of discretion, which infringed appellant's rights preserved by

Fla.R.Cr.P. 3.300(b), and impaired his ability to intelligently exercise his peremptory challenges. This severe and unnecessary curtailment of counsel's right to examine each juror individually on voir dire cannot be justified on the ground that the proposed questions, as directed to individual jurors, would have been "repetitive" of the trial court's collective inquiry. O'Connell; Williams; see DeLaRosa; Dolphin. Counsel's proposed questions were intended to serve an entirely different purpose than the judge's were - not just to see which jurors were excludable for cause, but to learn something about the individual jurors' attitudes toward the legal doctrines involved. Counsel's proposed examination, unlike the trial court's, was intended to elicit responses from the jurors, and to provide information to be used in determining whom to challenge peremptorily, not just for cause. The curtailment of voir dire in this capital trial infringed appellant's fundamental rights assured by Fla.R.Cr.P. 3.300(b) [see Williams v. State, supra, at 149], and he should be afforded a new trial. See also Lavado v. State, supra; Barker v. Randolph, supra; DeLaRosa v. State, supra; State v. Dolphin, supra (reversing judgments for new trial, based on imporper curtailment of voir dire).[38]

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38 / The decision of the Third District Court of Appeal in Jones v. State, 378 So.2d 797 (Fla.3d DCA 1979) should not be persuasive for the reasons discussed above. In addition, that case is plainly distinguishable. Jones was tried (and decided on appeal) under the pre-1981 version of Rule 3.300(b). Unlike the present criminal rule, and unlike the civil rule, the old rule did not specifically preserve the right of counsel to examine each juror orally on voir dire. See Underwood v. State, 388 So.2d 1333,1334 (Fla.2d DCA 1980). [See footnote 31 on p. 52 of this brief]. To

FOOTNOTE CONTINUED ON NEXT PAGE

ISSUE III.

THE TRIAL COURT'S COMMENTS DURING VOIR DIRE, IN WHICH HE DIMINISHED THE IMPORTANCE OF THE JURY'S PENALTY RECOMMENDATION, VIOLATED THE EIGHTH AMENDMENT STANDARDS OF RELIABILITY IN CAPITAL SENTENCING.

During the "death-qualification" portion of the voir dire in this case, the trial judge made statements to most (though not all) of the prospective jurors to the effect that their penalty phase verdict would be "only a recommendation" or"merely a recommendation" to him (R253,322, see R153-154,169,173,193,199,208,236, 238,247,275,303,310,316,327,329,333-334,354,360,368,371). On several occasions, the judge emphasized as well that "it's my decision as to the penalty" (R173); "the decision is up to me" (R193); "it is my job to determine what the appropriate sentence would be" (R253); and (to a prospective juror who indicated that it would be a pretty hard decision for him to make), "It's a tough job to be a juror and it would be tough to make that decision.

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

the contrary, prior to 1981, the criminal rule placed the primary role in conducting voir dire examination on the trial court, with counsel merely being permitted to "propound pertinent questions" after the court's examination. After 1981, on the other hand, the criminal rule clearly emphasizes the primary role of counsel, and preserves to him as a matter of right the opportunity to conduct a reasonable oral examination of each individual juror. As recognized in Underwood, the old criminal rule is "quite different" from the civil rule (and thus, also, quite different from the present criminal rule). Arguably, then the trial court's pre-emption of the subject matter of counsel's voir dire might have been within his discretion under the old rule [as in Jones]. On the other hand, such pre-emption clearly infringes the right to individual voir dire by counsel, which is assured by the present criminal rule. See Lavado; O'Connell; Williams; cf. DeLaRosa; Dolphin.

But you understand that the final decision would be up to me as a judge as to what the penalty would be ?" (R327)

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the U.S. Supreme Court held that the Eighth Amendment requirement of heightened reliability in capital sentencing is impermissibly compromised where the jury has been led to believe that the responsibility for determining the propriety of a death sentence rested elsewhere. Noting that its capital punishment decisions were premised on the assumption that a capital sentencing jury is aware of its "truly awesome responsibility", the Court wrote:

> ...the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell v. Mississippi, supra, 472 U.S. at 333.

In Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), the Eleventh Circuit determined that the Caldwell principle is applicable to the Florida capital sentencing scheme, notwithstanding the potential availability of the "override" provision of the statute, which, under certain carefully limited circumstances, permits (but never requires) the trial court to reject the jury's recommended sentence. See Tedder v. State, 322 So.2d 908 (Fla.1975), and its numerous progeny. Under Florida law, the jury's recommendation "is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So.2d 1091, 1095 (Fla.1985); see e.g. McCampbell v. State,

421 So.2d 1072 (Fla. 1982); Tedder v. State, supra. Recognizing the importance of the jury's penalty recommendation, the Eleventh Circuit in Adams v. Wainwright, supra (at 1530) concluded that the jury's role in Florida capital sentencing is "so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell." [39]

The statements that the jury's penalty verdict is "only a recommendation", and that "it is my job [as judge] to determine what the appropriate sentence would be", not only encourage the jury to abdicate its own sense of responsibility, they are actually misleading. Unlike several western states under whose death penalty statutes the trial court is solely responsible (subject to appellate review) for the capital sentencing decision, Florida has a "trifurcated" sentencing procedure in which the jury, the trial court, and this Court each plays a critical role. See State v. Dixon, 283 So.2d 1 (Fla. 1973); Tedder v. State, supra. For that matter, the Governor, the Cabinet, and the federal courts also have significant impact on whether a particular capital defendant lives or dies, but that certainly doesn't mean the trial judge is free to make a point of this to the jury. Caldwell v. Mississippi. The Eighth Amendment requires reliability in capital sentencing [Caldwell], and the recognized purpose of Florida's trifurcated procedure is to provide safeguards - safeguards which were missing under the prior statutory scheme - against unwarranted imposition of the death penalty.

39/ The Eleventh Circuit subsequently followed Caldwell and Adams in its decision in Mann v. Dugger, 817 F.2d 1471, 1481-1483 (11th Cir. 1987)(in which, as here, the improper comments were made during voir dire).

State v. Dixon, supra, at 7-8. Every participant in the process - each juror, the trial judge, and each member of this Court - must consider the question of penalty as if a man's life depended on it; that is the essence of the Caldwell rule. For this reason, appellant requests that this Court follow the reasoning of the Eleventh Circuit in Adams and Mann, and recede from its opinion to the contrary in Pope v. Wainwright, 496 So.2d 798,805 (Fla.1986).

Appellant recognizes that defense counsel failed to object to the trial court's comments. It is appellant's position that: (1) Remarks which minimize the jury's sense of responsibility for its penalty verdict diminish both the reliability of the sentencing decision and the fundamental fairness of the penalty proceeding itself, in violation of the Eighth Amendment [Caldwell v. Mississippi, supra, 472 U.S. at 339-341]. A sentence of death imposed pursuant to such a proceeding violates due process [contrast Caldwell v. Mississippi, supra, 472 U.S. at 339-341 with Donnelly v. DeChristoforo, 416 U.S. 637 (1974)], and therefore must be considered fundamental error. See, generally Sanford v. Rubin, 237 So.2d 134 (Fla. 1970); Pait v. State, 112 So.2d 380 (Fla.1959); Peterson v. State, 376 So.2d 1230 (Fla.3d DCA 1979). (2) Given the status of the law on November 13, 1986, when these comments were made, defense counsel could reasonably have believed that no legal basis for an objection existed. In Darden v. State, 475 So.2d 217, 221 (Fla. 1985), decided September 3, 1985, this Court at least strongly implied that it considered the Caldwell holding inapplicable under Florida's capital sentencing procedure. On October 16, 1986, less than a month before the trial

of this case, this Court even more emphatically rejected the Caldwell claim in the Florida context, saying "We perceive no eighth amendment requirement that a jury whose role is to advise the trial court on the appropriate sentence should be made to feel it bears the same degree of responsibility as that borne by a 'true sentencing jury'" Pope v. Wainwright, supra, at 805. The Eleventh Circuit's decision in Adams, which held that the eighth amendment principles expressed in Caldwell do apply in Florida death penalty trials, was issued on November 13, 1986, the very same day the comments were made to the prospective jurors in this case. Defense counsel could not reasonably be expected to have been aware of Adams on that date; nor should he be held to the burden of anticipating it, in light of Darden and Pope.

ISSUE IV

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY, IN THE PENALTY PHASE, ON THE STATUTORY MITIGATING CIRCUMSTANCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

A capital defendant is entitled, both under the United States Constitution and under Florida law, to have the jury fully instructed relative to their consideration of both statutory and non-statutory mitigating circumstances. See e.g. Hitchcock v. Dugger, ___U.S.___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); State v. Johnson, 257 SE.2d 597 (N.C. 1979)(discussing the applicability of the constitutional principle of Lockett v. Ohio, 438 U.S. 586 (1978) to penalty phase jury instructions);

Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976); Toole v. State, 479 So.2d 731, 733-734 (Fla. 1985); Robinson v. State, 487 So.2d 1040, 1042-1043 (Fla. 1986); Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986); Riley v. Wainwright, ___So.2d___ (Fla. 1987)(case no. 69,563, opinion filed September 3, 1987) (12 FLW 457).

In Robinson, for example, the trial court refused to instruct on two statutory mitigating factors because he "perceived a lack of competent, substantial evidence...to warrant charging the jury on those factors." This Court disagreed, and said:

> The degree of Robinson's participation is subject to some debate, but there is at least enough evidence to warrant the giving of this mitigating charge to the jury. Robinson also put on some evidence of impaired capacity. The trial judge may not have believed it, but others might have, and it, too, was adequate at least to instruct the jury on.
>
> The jury must be allowed to consider any evidence presented in mitigation, and the statutory mitigating factors help guide the jury in its consideration of a defendant's character and conduct. We therefore find that the court erred in not instructing on these two statutory mitigating circumstances. Regarding mitigating evidence and instructions, we encourage trial courts to err on the side of caution and to permit the jury to receive such, rather than being too restrictive.
>
> We affirm Robinson's conviction, but reverse his death sentence and remand for a new sentencing proceeding before a jury.

Robinson v. State, supra, at 1043.

As this Court recognized in Cooper v. State, supra, at 1140:

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

See also Riley v. Wainwright, supra, 12 FLW at 458.

In the penalty phase charge conference in the present case, the trial judge (after determining which aggravating factors he was going to instruct the jury on) turned to the subject of mitigating factors:

> THE COURT: ... I would then read the top paragraph, if you find the aggravating circumstances do not justify the death penalty, recommend life. Should you find sufficient aggravating circumstances do exist, it would then be your duty to determine whether mitigating circumstances exist. Among the mitigating circumstances you may consider are -- which of those did you wish to have them instructed on, Mr. Mosca?
>
> MR. MOSCA: Number two.
>
> THE COURT: The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

MR. MOSCA: The reason I bring that up, Your Honor, is because I think the testimony at trial from Mary Boyd and from Paula VanWormer indicate that due to the continued and rather brutal treatment that Ireland Boyd was exhibiting towards his wife the defendant was upset, he was under that kind of emotional, he was troubled emotionally by what he observed.

I think I can argue to the jury that they were neighbors for a period of months, during which time Mary Boyd was continuously exposed to this kind of degrading behavior by the victim, and that, you know, if there's any pretense at all in which to kill Ireland Boyd it was, I mean, he didn't rob him, he didn't get in a fight with him. He took him out the same night that he [Boyd] tried to have oral sex with his wife in the defendant's presence. And I think that would be sufficient evidence at least to make a colorable argument under paragraph two.

THE COURT: Mr. Whitaker, go ahead.

MR. WHITAKER: I disagree. I don't think that particular mitigating circumstance going to that kind of evidence was presented at trial, and, you know, I think if there was any extreme mental duress it was Mary Boyd's, it certainly wasn't the defendant's.

THE COURT: I would concur. I have no problem with your making that argument under the mitigating factor number eight, but I don't feel it would apply under number two 40/

(R1319-1321)

40/ Number eight is the non-statutory "catchall" instruction which reads "Any other aspect of the defendant's character or record and any other circumstances of the offense that you wish to consider in mitigation" (see R1339).

As a result of the trial court's ruling, the jury was given an instruction which was unbalanced in favor of aggravation. With regard to aggravating factors, the jury was specifically instructed on (1) crime committed while the defendant was under sentence of imprisonment, (2) defendant previously convicted of a violent felony, and (3) crime committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification (R1338). The jury was then instructed:

> Should you find sufficient aggravating circumstances do exist it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> Among the mitigating circumstances you may consider if established by the evidence are:
>
> Any other aspect of the defendant's character or record and any other circumstances of the offense that you wish to consider in mitigation.

(R1338-39)

An instruction of this sort is wholly insufficient to guide the jury in its consideration of mitigating circumstances. Essentially it amounts to defining a mitigating factor as "whatever"; and it has a denigrating effect, especially when contrasted with the clear and specific instructions on aggravating factors. See State v. Johnson, supra, 257 SE.2d at 616-617. This is not to say, of course, that the "catchall" instruction should not be given [41/]; only that it cannot serve as a substitute for a specific requested instruction on a particular statutory mitigating factor. See Robinson v. State, supra.

The state may contend that the trial court's refusal to give the requested instruction was justified by the absence of direct evidence that appellant was under the influence of extreme emotional disturbance. The problem here is that appellant has maintained his innocence of the murder (see R1337). He could not very well get on the stand in the penalty phase and say "I didn't kill Ireland Boyd for a five minute roll in the hay with his wife; I killed him because I was enraged at the things I saw him do to her, and the miserable way he treated her and everyone else he encountered." To the contrary, appellant maintains that he did not kill Ireland Boyd at all. That, however, cannot constitutionally preclude him from fair consideration of mitigating circumstances presented by argument of counsel. (see R1333-1335,

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41 / Indeed, it may be constitutionally required under Hitchcock v. Dugger, supra.

1336-1337). Cf. People v. District Court of State, 586 P.2d 31 (Colo. 1978).[42] Appellant was entitled to have the jury instructed that extreme emotional disturbance was a mitigating factor which it could consider. See Cooper; Toole; Robinson; Floyd; Riley; Johnson. His death sentence should be reversed for a new penalty proceeding.

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42 / In People v. District Court of State, supra, the Colorado Supreme Court held that state's death penalty statute unconstitutional under Lockett, in that it restricted consideration of mitigating circumstances to those enumerated in the statute. Rejecting the state's suggestion that it construe the subsection setting forth statutory mitigating circumstances as allowing for presentation and consideration of non-statutory mitigation as well, the court noted several impediments to such a construction:

> First, subsection (5) only allows the jury to consider whether the enumerated factors were in existence 'at the time of the offense.' Nothing in the numerous United States Supreme Court decisions cited above supports such a limitation. See Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442, 449-50, n.19 (1977).
>
> Second, factors (5)(b) through (5)(e) are all in the nature of affirmative defenses. Thus, if the offender maintains his innocence, he is precluded from offering any mitigating circumstances at all, except that he is under the age of eighteen.

People v. District Court of State, supra, at 35.

CONCLUSION

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

As to Issues I and II: Reverse his convictions and death sentence, and remand for a new trial.

As to Issues III and IV: Reverse his death sentence, and remand for a new penalty trial before a newly impaneled jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, FL 33601; and to the Appellant, JOHN EDWARDS, Inmate No. 011317, Florida State Prison, Post Office Box 747, Starke, Florida 32091; by mail this 18 day of December, 1987.

Steven L Bolotin
STEVEN L. BOLOTIN