SUPREME COURT OF FLORIDA

WILLIAM REAVES, Appellant, -vs- STATE OF FLORIDA Appellee	)	CASE NO. 71,148

APPEAL FROM THE JUDGMENT OF CONVICTION
AND
SENTENCE OF DEATH
ENTERED FOR THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA
ON SEPTEMBER 2, 1987

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS (CON'T.)

TABLE OF CITATIONS

TABLE OF CITATIONS (CON'T)

PRELIMINARY STATEMENT

The State of Florida was the Plaintiff in the Trial Court below and will be referred to as the State or the Appellee. The Appellant was the Defendant and will be referred to as the Appellant or the Defendant.

The record on appeal consists of sixteen (16) volumes of pleadings, motion hearings, and trial transcripts. The pleadings, motions, and trial on record will be referred to as "R". The Appellants confession, admitted in Volume X, will be referred to as "R1402, Conf."

Finally, any items included in Appellant's Appendix, and subject of Appellant's Motion to Supplement, will be referred to as "A".

SUMMARY OF ARGUMENT

I. In this issue Appellant demonstrates that the prosecutor in this case, Bruce Colton, previously represented him in one prior criminal case and conferred with him on another. In this case, the prior two cases were used against Appellant and explored at length in the sentencing phase and were used to establish an aggravating factor. Many of the facts and issues discussed in the two prior cases were either identical or similar to those in the guilt phase of this trial. Appellant argues that his prosecution by his former lawyer under these circumstances was a violation of due process and rules of ethics.

II. In this issue Appellant demonstrates that he submitted a required instruction on Third Degree murder to the court, and that the facts of the case required the giving of same. Prejudice resulted in that the instructions represented his theory of the case and the jury was therefore precluded from considering his defense.

III. In this issue Appellant demonstrates that a black prospective juror was peremptorily excused by the State. The trial court failed to make the inquiry as to the State's reasons, or evaluate the reasons the State volunteered into the record. The record establishes that the two reasons volunteered by the State were simply a pretext for discriminatory exclusion.

IV. In the sentencing phase, the trial court allowed evidence "going behind" two nonviolent convictions to establish that they were violent. These two convictions, for conspiring to commit robbery and grand larceny, were the same referred to

in Issue I, wherein Bruce Colton represented or conferred with Appellant, and one of which resulted from a plea entered pursuant to Bruce Colton's advice. Appellant argues that the State should be precluded from introducing evidence contradicting the actual convictions and that Bruce Colton's previous representation of him in these cases precludes their use, or his involvement in them, in this case.

V. Appellant argues in this issue that his proffered evidence narrowly and specifically establishing his help in 1973 in foiling a jailbreak and saving a jailer from harm should not have "opened the door" to evidence of his prior behavior in incarceration through the years. The trial court's contrary ruling essentially deprived Appellant of the opportunity to prove same.

VI. Appellant argues that the facts of the case do not establish any "additional acts" by him in this murder to cause the victim increased or extended suffering, and that, therefore, the case is not "especially heinous, atrocious, or cruel" as a matter of law.

STATEMENT OF THE CASE AND FACTS

By indictment filed October 9, 1986, in the Circuit Court of Indian River County, Appellant was charged with Murder in the First Degree, Possession of a Firearm by a Convicted Felon, and Trafficking in Cocaine in Excess of twenty-eight (28) but less than four hundred (400) grams (R2050). On December 17, 1986, venue for trial was ordered changed to Sarasota County (R2122).

On January 27, 1987, Appellant filed a Motion to Disqualify State Attorney Bruce Colton and his office from prosecution of this case (R2169-2173). As one ground, Appellant cited facts and issues surrounding Bruce Colton's representation of the defendant in a criminal case in 1973 (R2170). A hearing was held on the Motion to Disqualify on February 13, 1987, during which testimony was taken and exhibits introduced (R1961-2023). (These facts will be addressed in depth in Issue #I). Appellant's Motion to Disqualify was subsequently denied by the trial court (R2322-2323). On March 10, 1987, Appellant's Motion for Severance was granted, separating the latter two (2) counts for trial after the First Degree Murder charge (R2334).

The trial of Appellant on the First Degree Murder charge began in Sarasota on August 17, 1987. The primary issue for the jury was whether the shooting of the victim was premeditated. The Appellant, through counsel, admitted at the outset being

the shooter (R869-874), and the jury was not instructed on the applicability of the First Degree Felony-Murder statute (R1684-1697).

Testimony and evidence at trial established that the victim, Deputy Richard Raczkowski of the Indian River County Sheriff's Department, was on patrol during the early morning hours of September 23, 1986, when he was dispatched by 911 to the Zippy Mart on Twentieth (20th) Street regarding a call to 911 from that address' pay phone (R934,935).

Working at 911 on the night in question was Susie Erhardt who handled the telephone (R916), and Cathleen Cooney, who handled the radio transmissions (R932). Erhardt had received the phone call at 3:06 a.m. and the address had automatically come up on the screen even though the caller immediately hung up (R917,918). Erhardt then had advised Cooney of the possibility of "some kind of problem" (R918).

Deputy Richard Raczkowski reported his arrival at the Zippy Mart at 3:08 a.m., and at 3:09 a.m., radioed that he would be out with a black male at the location (R936,937). Shortly thereafter Deputy Raczkowski radioed a request for a local warrants check from Cooney at 911 for Appellant (R937). Cooney radioed back a "10-54" which indicated that there were no outstanding warrants on Appellant (R939). Deputy Raczkowski then used the phone at 3:11 a.m., to call Erhardt to request that she call a cab for Appellant (R920). The 911 transcript reveals that Deputy Raczkowski advised that Appellant had "called them a couple of times . . . he's down here waiting, needs a ride home . . . he's just waiting for them" (R1030). Deputy

Raczkowski then requested a "10-39" which meant he wanted to be called back with verification (R921). Erhardt called and verified with the cab company that they had a cab going to the Zippy Mart (R921). Shortly thereafter Cooney was communicating over the radio with Deputy Brown, when their conversation was "walked on" by another unit's transmission (R941). Just seconds later Cooney received a partial radio transmission from a Mr. Whitaker advising that an officer was "down" at the Zippy Mart address, and requesting an ambulance (R1032).

Although there is no exact record of the times of these events other than noted above, Detective Pisani determined that two (2) minutes and thirty-two (32) seconds elapsed between Deputy Raczkowski's last transmission for a "10-39" and Deputy Brown's communication being "walked on" (R1060). After hearing Whitaker's transmission over the radio that Cooney was handling, Dispatcher Erhardt called for an ambulance at 3:17 a.m. (R922).

Mr. Whitaker, the caller who reported an officer "down" testified that just before the incident he was delivering papers near the Zippy Mart, which was closed that morning (R965). He heard noises he thought were firecrackers just as he pulled onto Eighty Second (82nd) Avenue which runs north and south along side of the Zippy Mart:

> "There was about four of five noises like firecrackers going on, and there was another one, the last one, but it was much louder than the first set of noises that I heard". (R963-965)

Expert testimony established later that the deputy's gun, a Magnum, would have a louder report than the Appellant's gun, a nine (9) millimeter (R1501).

After hearing the shots, Mr. Whitaker observed the deputy's car parked in front of the Zippy Mart as depicted in State's Exhibit "53", (R964), and a black male behind the deputy's open driver's door (R966). The black male ran west in front of the Zippy Mart and out of view (R967). The black male ran in the type of crouched position that Mr. Whitaker had only seen used by those being shot at during his own experience in Vietnam. Mr. Whitaker remembered the black male as being about five feet seven inches to five feet nine inches (5'7" - 5'9") tall and one hundred eighty to one hundred ninety pounds (180 - 190lbs.), and dressed in red shorts and white socks (R973). After the black male disappeared, Mr. Whitaker went to the deputy's side in the dirt area of the parking lot and offered his assistance (R968). He observed that Deputy Raczkowski had his own gun already drawn and being held in his right hand (R977). Although Mr. Whitaker could not observe any injuries at first, Deputy Raczkowski kept repeating "get an ambulance, get help" (R968). Mr. Whitaker observed, from experience as an EMT that the deputy appeared to be in "some state of shock" (R969). Mr. Whitaker then went to the deputy's car and radioed 911 that a deputy was down and an ambulance needed (R971). Not knowing whether the transmission was received he then went and repeated the message on the pay phone (R971).

Just as Mr. Whitaker hung up the pay phone, the deputy fired a shot from his gun (R972). (Despite Mr. Whitaker having heard only two (2) shots apparently attributable to the deputy's gun, expert testimony established that three (3) shots had actually been fired from that gun (R1500).

While assisting the rescue personnel working on Deputy Raczkowski, Jr. Whitaker observed that he appeared to be in "pretty much pain" (R978), an observation shared by Sgt. Hamilton, the first law enforcement officer on the scene (R1077). Medical Examiner Walker testified that the deputy's wounds were such that he would not have died instantly, but rather would languish for "some time period" (R1463).

Criminalist Laurito matched three (3) bullets taken from the victim's body and one (1) lodged in a trailer across the highway, to the defendant's gun (R1490-1491). The defendant's confession verified that he had emptied the clip (R1402, pg. 13). Four (4) shots struck Deputy Richard Raczkowski, three (3) in the back area, and one (1) in the left arm, as indicated in State's Exhibits #67, #68, and #70 (R1451-1453). Dr. Walker further testified that the path of the bullets through the victim's body were consistent with the shots being fired while the victim was in a crouched position (R1457-1459). Although Dr. Walker could not establish from how far away the shots were fired, they were not fired at point blank range (R1466-1467).

In his confession to authorities in Georgia following his flight to avoid capture, Appellant indicated that, prior to the shooting, he was at his girlfriend's house watching football (R1402, Conf. 2). His girlfriend was late coming home so he walked to the Zippy Mart (R1402, Conf. 2). He called a cab twice, became impatient because he was "all coked out", and proceeded to dial 911 because he had run out of change for the phone (R1402, Conf. 2-3). Then, Appellant stated:

> "By this time, by the time, was about three minutes, maybe, I walked out by the street, the

> deputy pulled up, he pulled in by the phone. I was standin' by the highway. I called, asked him, 'How you doin' officer?' He said, 'Fine,' he said, 'You want to step over here?' Then I said, 'Sure'. He asked me did I, I say yes, I used the 9-1-1. I ran out of funds. I didn't have anymore money, I had got a quarter from another guy that was hitchhikin'. So, he ask me my name, I gave 'im my name, he ran a check on me, everything was clean. I was waiting there. He called back to the Sheriff's Office for them to call him back "39" or "29" or somethin', I don't recall. . . I'm still wired all out. And after that, me and him stood there, we talkin'. . . I've never met a finer officer in my life. Somehow I had on some short red pants, a .380 fell. . . it fell to the ground, tried to pick it up, he stepped on my hand . . . I, both of us panicked. I panicked . . ." (R1402, Conf. 2-3)

The events that followed, which resuled in the deputy being shot, are in dispute.

Appellant stated in his confession that he didn't want to let the deputy have his gun because he was an ex-felon and if caught with that gun would get "a mandatory three (3) years" (R1402, Conf. 39). According to Appellant:

> "Officer hollered, 'Give me that'! He stepped on it, I pushed his knee back, I said, 'Officer, I'm not give you my gun 'cause you done checked me out, I'm clean and everything. All I want to do is go home.' That's when I had him right here.
>
> Pisani: Okay. You say you had him right here, can you explain?
>
> Appellant: I had, I had the officer around the throat with my left hand, I told him all I want to do is go home, and want no trouble. I couldn't let that officer get the gun because I was an ex-felon. So the officer proceed to back back, and he got to the back of the car on the right corner of the passenger side, he started runnin' toward 82nd." (R1402, Conf. 37)

Appellant stressed many times during his confession that he did not shoot until the officer pulled his own gun as he was running around the car away from Appellant (R1402, Conf. 7,8,13,35 38,41). Appellant also confirmed that he had been in combat in Vietnam (R1402, Conf. 40).

Appellant further indicated that, although he didn't have a "reason" to shoot the officer, he was under the "influence of cocaine", he "panicked", he was "paranoid", and he thought the officer was going to try to shoot him because he was an "ex-felon" with a "hot" gun (R1402, Conf. 8).

After shooting Deputy Raczkowski, defendant ran for about 6.9 miles away from the crime scene (R1257). He ended up at a house occupied by Eugene Hinton.

Eugene Hinton testified at trial that he had known Appellant since high school in 1969 (R1161). On Tuesday morning he was awakened by Appellant knocking on his window (R1163). He let Appellant in the door whereupon Appellant said "I fucked up. I just shot a - - I just shot a police, I just shot a police, I shot that cracker" (R1165). According to Hinton, Appellant was sweating, was wearing red shorts and he was scratched on his arms and legs (R1164-1165). Appellant was carrying a pistol wrapped in a white tee shirt (R1165). Appellant then took a shower and put on some clothes provided by Hinton (R1166-1167). Hinton disposed of Appellant's clothes and later led police to them (R1171).

In a substantial contradiction of Appellant's account of the shooting in his confession, and the 911 tape admitted into evidence, Hinton testified that Reaves' told him that his gun fell out while the deputy was waiting for the "check" to come back (R1179). Of course the 911 tape revealed that, in fact, the warrants check had already come back on the radio negative and the deputy had already called 911 on the phone to request they call the Appellant a cab (R920). Hinton then testified, again in contrast to Appellant's account, that

Appellant told him that after Appellant picked up the gun, he put it in the deputy's face, the deputy offered to let Appellant leave, and then pleaded for his life (R1181-1182). According to Hinton Appellant told Hinton that his reply to the deputy was "one of us got to go, me or you" (R1183). Hinton then testified on cross examination that Appellant said he thought it was him or the deputy once the deputy went for his gun (R1218), although he changed this on redirect (R1228). At this point, according to Hinton, the deputy turned and ran and appellant "cut loose four (4) times" (R1183). Other testimony at the trial established that, in fact, Appellant had shot seven (7) rounds (R1101). Although Hinton later changed his testimony to allege that the Appellant said he hit the victim four (4) times (R1186), he was impeached by a prior sworn statement (R1199-2000). In addition it was established that Hinton changed his story several times with regards to whether or not there was another witness (Jerry Bryant) to Appellant's statements (R1200-1204). Hinton also admitted at trial that he had given detailed statements to law enforcement on two (2) occasions in this case which were total lies (R1193-1194), that he had seen television accounts of the shooting before his first "truthful" statement (R1197), and that he in fact was good at telling lies and having people believe him (R1229). Eugene Hinton admitted to prior impeachable convictions numbering "four or five" (R1193).

Appellant's confession indicates that he was given a ride from Hinton's house to Melbourne by Jerry Bryant (R1402, Conf. 21), that he took a bus to Albany, Georgia, the next day (R1402, Conf. 29), and that he carried a large amount of

cocaine with him (R1402, Conf. 29-30).

Alexander Hall, a narcotics investigator with the Sheriff's Department in Albany, Georgia, testified that on September 24, 1986, he was dispatched to the local bus station in plainclothes to watch for Appellant, that Appellant approached him offering to sell cocaine, and that they entered the bathroom for that purpose (R1310-1313). Once in the bathroom, Hall observed Appellant's pistol and Appellant showed him a "twenty dollar rock" (R1312-1313). Hall then went into a stall, and drew his gun. A scuffle ensued over the gun, the Appellant was arrested and put into a police car, and subsequently fled on foot down the street (R1334-1335). Appellant was recaptured and transported to the jail where he gave a false name (R1357). Appellant later admitted his correct name and that he was the man who shot the deputy (R1380). Appellant advised that he wanted to talk to the Sheriff from Florida (R1380).

The recording of Appellant's subsequent confession, admitted without objection, was played to the jury, who followed with transcripts provided them for that sole purpose (R1402). In addition a drawing made by Appellant during his confession, depicting the events of the shooting, was admitted into evidence, again without objection (R1406).

After deliberation, the defendant was convicted by the jury of First Degree Murder as charged (R1706).

In the sentencing phase of the trial the State presented, over Appellant's objection, judgments of conviction and live testimony describing the actual events, of two (2) prior allegedly violent felonies. (R1760-1794). Appellant objected

to this evidence because of the prior attorney-client relationship in these cases between Bruce Colton and Appellant, and because the actual convictions were for lesser, non-violent crimes (R1735-1742).

As to evidence of mitigation, the Appellant filed with the court a written waiver of all specific statutory mitigating circumstances (R1714) and announced his intention of presenting nonstatutory evidence of mitigation in two (2) main areas - his Vietnam combat experience and Honorable Discharge, and his participation in foiling a jailbreak at the Stuart jail in 1973 (R1727). The latter evidence was proffered in the form of prior sworn testimony by two (2) jail guards (R1734). Later, Appellant decided not to present the "jailbreak" evidence to the jury based on the court's ruling that it would open the door to damaging rebuttal evidence (R1820-1821). However, Appellant did present evidence to the jury of his Vietnam Combat experience and his Honorable Discharge from the army (R1830-1859).

The jury recommended a death sentence for Appellant, and the sentencing was ordered held in Indian River County (R1907-1913). At the Sentencing the court filed a written order setting forth its finding of three (3) valid aggravating factors (Prior Violent Felony, Avoidance of Arrest, and Especially Heinous, Atrocious, or Cruel) and one (1) mitigating circumstance (Appellant's military service in active combat) (R2527-2530). The court sentenced Appellant to death (R2525).

Appellant filed a timely Notice of Appeal (R2509) and the undersigned counsel was appointed to represent the Appellant on said appeal (R2533).

ARGUMENT

I. THE CONTINUED PROSECUTION OF APPELLANT BY HIS FORMER PUBLIC DEFENDER WAS FUNDAMENTAL ERROR AND PER SE VIOLATION OF DUE PROCESS WHERE SUCH PROSECUTION INVOLVED ISSUES AND FACTS IDENTICAL OR RELATED TO THOSE IN PRIOR CASES AND TO THE CONFIDENCES REVEALED IN SAME, WHERE AGGRAVATING FACTOR WAS ESTABLISHED WITH CONVICTION OBTAINED PURSUANT TO FORMER ATTORNEY'S ADVICE, AND WHERE THERE WAS CREATED AN OVERWHELMING APPEARANCE OF IMPROPRIETY.

As the record amply reflects, Bruce Colton took an active role in both stages of Appellant's trial. The record also indicates that the issues and facts from two (2) 1973 criminal cases in which Bruce Colton shared attorney-client relationship with Appellant, were intermingled throughout.

On February 13, 1987, an evidentiary hearing was held on Appellant's Motion to Disqualify (R1961). At the hearing Appellant introduced a Judgment of Conviction and Presentence Investigation from Indian River County case number 73-119 into evidence (R1962). The Judgment of Conviction for #73-119 reflected that Bruce Colton was Appellant's counsel of record (A-1). The PSI in the case reflects that Bruce Colton submitted a statement on Appellant's behalf for sentencing purposes, in which he referred to Appellant's recent assistance in foiling a jailbreak in the Martin County Jail (A-4). The Judgment further reflects that Appellant had just been sentenced for Conspiracy to Commit Robbery in Martin County in case number 73-123 (A-1).

Appellant testified at the Disqualification hearing that Bruce Colton represented him in the prior Indian River case (R1966-1967), that he had conferred with Bruce Colton

at least twice, that Bruce Colton negotiated and advised him of a plea offer in the case (R1969-1970), that Bruce Colton advised him to take the plea (R1970), and that, based partly on Bruce Colton's advice, he in fact accepted the plea (R1970). Appellant further testified that the Indian River County case and the Martin County case both involved drug-related armed robberies of Holiday Inns or Howard Johnsons by Appellant and a co-defendant, that he had discussed the facts of the Martin County case with Bruce Colton as well as his Vietnam Combat experience and drug addiction (R1968-1969), and that he had advised Bruce Colton of his participation in foiling an escape from the Martin County Jail (R1971). The PSI in the Indian River County case reveals that Appellant fled the jurisdiction after committing the Indian River and Martin County robberies, and that he later confessed to his involvement in same (A-2). Appellant testified that the communications he had with Bruce Colton were expected by him to remain within the attorney-client privilege (R1971). Finally, Appellant testified that he was sure there were other things discussed with Bruce Colton that weren't contained in the PSI, although he could not recall them (R1979).

Bruce Colton testified that although he had no recollection of William Reaves, any of the communications with William Reaves, or his own statements reported in the PSI (R1985-1986), he was not disputing Mr. Reaves' testimony on those matters (R1970). Bruce Colton also admitted that after Mr. Reaves was arrested in the case at bar he announced publicly that he intended to seek the death penalty for his ex-client (R1990).

As detailed in the Statement of Case and Facts, in the guilt phase of this trial Appellant's intoxication by illegal drugs, Vietnam experience, firearms possession, flight to avoid prosecution, and confession , were all issues similar or identical to those in the prior cases.

Further, the sentencing phase of this trial was saturated with not merely similar, but the identical facts and issues to which the attorney-client privilege pertained. During the sentencing phase, to establish the aggravating factor of prior conviction of capital felony or violent felony, the State presented copies of Appellant's convictions in 1973, (previously referred to), for Conspiracy to Commit Robbery in Martin County (R1777-1778) and Grand Larceny in Indian River County (R1789). In addition, three (3) live witnesses were presented, who testified to the facts behind the two (2) convictions. Their testimony established that in the Martin County case two (2) black males entered the Holiday Inn in Stuart on May 13, 1973, paid for a room, and later robbed the night auditor. The defendant was identified as being the individual who held the gun and at one point threatened to blow the auditor's head off (R1760-1773). In the Indian River County case, a witness established that on May 17, 1973, the Holiday Inn was the victim of an armed robbery, bags from the robbery were found at the defendant's mother's house, and the defendant confessed to committing the robbery with another person and to carrying a gun during the robbery (R1780-1790). In mitigation, Appellant proffered evidence of his aid in foiling the 1973 jailbreak attempt at the Martin County jail (R1821). Appellant also testified to the jury about his

Vietnam combat experience (R1839-1850).

Appellant submits that disqualification of at least Bruce Colton, and more appropriately his entire office, were required both from an ethical and a due process perspective, and that reversible error resulted from this prosecution. Several Florida cases have dealt with disqualification issues similar, though not identical, to the case at bar. The first, Young v. State, 177 So.2d 345 (Fla. 2d DCA 1965) addressed the issue, contained in a Motion for Post Conviction Relief, of a lawyer who prosecuted a defendant with whom he had allegedly conferred on the same case while a defense lawyer. The Court held that, if the allegations were true, the defendant was deprived of the substance of a fair trial and due process, and amounted to fundamental error. The Court cited a foreign case, State v. Leigh, 1955, 1978, Kan., 549, 289 P.2d 774 which also dealt with a prosecutor who had only discussed a case with a defendant, but later prosecuted him in that case. Although the prosecutor in Leigh, as in the case at bar, said he did not remember any of the facts revealed by the defendant, the appellate court reversed that conviction. The Young court approvingly quoted from the Leigh decision the following language:

> "An attorney cannot be permitted to participate in the prosecution of a criminal case if, by reason of his professional relations with the accused, he has acquired knowledge of facts upon which the prosecution is predicated or which are closely interwoven therewith." 289 P.2d at 777; 177 So.2d at 346.

Several years after Young this Court addressed a situation in Thompson v. State, 246 So.2d 760 (Fla. 1971) where a defendant moved for disqualification of an entire State

Attorney's office because his co-defendant's lawyer, with whom his own lawyer shared an investigator, had joined the prosecution staff while the case was pending. In Thompson, this Court noted that the co-defendant's former attorney was not directly involved in the defendant's prosecution nor was he revealing the confidences he had obtained thus there was no per se violation of due process. This Court then held that due process is only violated where the former defender either 1) acts directly against his former client in a related matter or 2) provides information or assistance to those who would so act. Shortly after the Thompson case, Surrette v. State, 251 So.2d 149 (Fla. 2d DCA 1971)revisited the issue in an almost identical fact pattern, the only exception being that the former defender turned prosecutor had actually represented the defendant in the same case. The Court in Surrette extended the Thompson rationale to cover the new fact pattern, and held that neither of the two Thompson prohibitions had been violated under the facts of the case. Finally, this Court's opinion in Fitzpatrick v. State, 464 So.2d 1185 (Fla. 1985) provides the last real judicial guidance on the disqualification issue. For the first time in Florida a court addressed ethical, in addition to due process, considerations.

In a fact situation identical to that in Surrette, this Court held that ethical rules did not impose the same necessity of imputed disqualification on government lawyers and associates as in private law firms. From a due process perspective, however, this court specifically approved the twin prohibitions announced in Thompson. It should also be

emphasized that despite the fact that in Fitzpatrick the defense lawyer turned prosecutor had only conferred with the defendant and had not actually represented him in the case concerned, there was no question but that he himself had to be disqualified. The issue, as it had been in the other cases since Young, was only whether the prosecutor's associates should be disqualified along with him.

The Fitzpatrick majority's ruling against imputed disqualification was objected to by Justice Ehrlich in a strongly worded dissent:

> ". . . I believe the majority misses the philosophical point of Canon 4 and that the result of the decision here will be to further erode public confidence in our justice system. All attorneys, public and private, are bound by Canon 9 to 'avoid even the appearance of professional impropriety.' As Ethical Consideration 9-1 states: 'Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system.
>
> A lawyer should promote public confidence in our system and in the legal profession.' Although we are convinced that in this case no actual breach of client confidentiality has occurred or would have occurred, we are not the forum in need of convincing. To the public at large, the potential for betrayal in itself creates the appearance of evil, which in turn calls into question the integrity of the entire judicial system. When defendants no longer have absolute faith that all confidential communication with counsel will remain forever inviolate, no candid communication will transpire, and the guarantee of effective assistance of counsel will become meaningless. This is too high a cost for society to bear.
>
> On the other hand, the cost of disqualification of the state attorney is relatively minimal. Section 27.14, Florida Statutes (1981), provides for assignment of a state attorney from one circuit to another where the state attorney has been disqualified. This process is frequently used and is entirely appropriate here.
>
> 464 So.2d 1188 and 1189.

The old Code of Professional Responsibility referred to by Justice Elrich in his dissent was in effect at the time this prosecution was begun by Mr. Colton and his associates. Canon 9 stated in bold print that **"A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY"**. It is hard to imagine a more significant appearance of impropriety than an attorney strenuously arguing to a jury that his former client's life should be ended in part because of a prior conviction which he as the defense lawyer had helped procure by his advice to the Defendant. From a more practical standpoint it would also be extremely prejudicial in a capital case for a jury to become aware that someone who once had such an intimate, albeit professional, relationship with the defendant should feel that he deserved the death penalty. This would be comparable to one of the defendant's own family asking the jury to impose death on the defendant. Further, it puts the defendant in a "catch - 22" situation when trying to determine on voir dire if the jury knew of the attorney's prior representation of the defendant, for to ask the question would give the very information feared.

On January 1, 1987, of course, the old Code of Professional Responsibility was superceded by Chapter 4, Rules of Professional Conduct. See Rules Regulating the Florida Bar, 494 So.2d 1977 (Fla. 1986). The changes, in addition to squaring with this court's holding on the ethical issue of imputed disqualification in Fitzpatrick, seem to offer more guidance in the unique issue in the case at bar than did the old Code of Professional Responsibility.

Rule 4-1.11(c) and (d) specifically address, in

pertinent part, ethical obligations for private turned government lawyers:

> (c) A lawyer serving as a public officer or employee shall not:
>
> (1) Participate in a matter in which the lawyer participated personally and substantially while in private practice . . .
>
> (d) As used in this rule, the term "matter" includes:
>
> (1) Any judicial or other proceeding. . . controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties . . .
>
> 494 So.2d at 1045

The comments following the above-cited rule, while specifically rejecting the idea that the disqualification of the individual government lawyer imputes disqualification for his associates, does impose additional requirements on the individual lawyer:

> "A lawyer representing a government agency. . is subject to the rules of professional conduct, including the . . protections afforded former clients in Rule 4-1.9."
>
> 494 So.2d at 1045

Rule 4-1.9 of the Rules of Professional Conduct reads in pertinent part:

> "A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) Use information relating to the representation to the disadvantage of the former client. . "
>
> 494 So.2d at 1041

The comments to the above Rule emphasize that "the scope of a matter may depend on the facts of a particular situation or transaction", 494 So.2d at 1041.

Appellant submits that the confidences exchanged in the 1973 attorney-client relationship between himself and Bruce Colton and the legal acts and issues with which they were concerned, are so interwoven with the case at bar that they are either the "matter" as defined in Rule 401.11, "substantially related" matters referred to in Rule 4-1.9, or "related" matters referred to by this Court in Fitzpatrick, Id, at 1188. It cannot be disputed that Bruce Colton acted against William Reaves in the presentation of the facts involving either the 1973 cases or the present case, nor can it be argued that William Reaves in any way consented to Bruce Colton's participation in the prosecution. Therefore, Bruce Colton's participation, under the facts of this case, was a per se violation of due process amounting to fundamental error.

Because fundamental error was committed by the ethical and due process violations detailed above, a new trial and sentencing proceeding is required.

II. THE TRIAL COURT'S REFUSAL TO GIVE A THIRD DEGREE MURDER INSTRUCTION, WHICH REPRESENTED APPELLANT'S THEORY OF DEFENSE AND WHICH WAS SUPPORTED BY THE EVIDENCE, WAS REVERSIBLE ERROR.

During the charge conference Appellant requested the Court give an instruction of Third Degree Murder, and tendered the proposed instruction (R1534). The instruction as requested relies on the crime of Resisting an Officer with Violence as the underlying felony (A-7). The State objected to such an instruction because it was of the position that Resisting an Officer with Violence was "part and parcel of the killing" (R1539). Appellant emphasized to the Court that the instruction was supported by the evidence and fit his theory of the case, and was included as a category two (2) lesser included offense in the Supreme Court's newly revised Standard Jury Instructions reported June 5th in the Florida Law Weekly (now at 508 So.2d 1221)(R1539-1542).

The trial court refused to give Appellant's instruction because it was of the opinion that it "would be outside the accusatory pleadings and proof as adduced at trial". At sentencing, however, the court stated in its written sentencing order that:

> "... The evidence at trial, in the form of the defendant's own voluntarily given statement, establishes beyond and to the exclusion of any reasonable doubt that dominent motive for the murder of the officer was to avoid arrest for possession of a firearm. . ." (R2528)

In Green v. State, 475 So.2d 235 (Fla. 1985) this Court reviewed a district court's holding in Green v. State, 453 So.2d 526 (Fla. 5th DCA 1984) that "third degree murder is not a degree of crime of simple premeditated murder" 453

So.2d at 528. The indictment of that appellant stated:

> That JOSH GREEN did, on the 7th day of May, 1981, in Osceola County, Florida, in violation of Florida Statute 782.04(1), from a premeditated design to effect the death of a human being kill and murder KRISTI MEDIA STARLING, in said county, by shooting her with a rifle. Id at 527

It was appellant Green's contention that the underlying felony of Third Degree Murder in his case was discharging a firearm into an occupied vehicle. The Florida Supreme Court, while approving the district court's result, specifically rejected the reasoning behind it, and held that:

> "Although Third Degree Felony Murder is not a necessarily included offense of First Degree Murder, it is, under certain circumstances and evidence, a proper permissive lesser included offense of First Degree Murder, requiring a jury instruction to that effect." 475 So.2d at 236.

This Court in Green seems to have placed the focus on the facts of the case, not the accusatory pleadings, when deciding this issue. It emphasized that the Appellant's suggested underlying felony was simply not supported by the facts since:

> "It is unrefuted that the victim was outside the truck when she was shot and that the truck was not occupied at the time of the shooting." Id at 237

An analysis of the facts of the case at bar clearly support the underlying felony suggested for Appellant's requested Third Degree Murder instruction.

The crime of Resisting Arrest with Violence is defined in 843.01 in pertinent part as follows:

> "Whoever knowingly and willfully resists, obstructs, or opposes any . . . deputy sheriff . . . in the lawful execution of any legal duty, by offering or doing violence to the person of such officer. . ."

It can hardly be argued that the defendant's actions before

and during the shooting, as reflected in both his confession to law enforcement and that allegedly made to Eugene Hinton, do not constitute the completion of that crime. Thus the question becomes whether the trial court's error in failing to give the requested instruction requires the granting of a new trial.

Appellant contends that the trial court's failure to instruct on Third Degree Murder was prejudicial to the extent of depriving him of a legitimate defense to argue to the jury, and depriving the jury of a logical lesser charge to choose from. Appellant's entire opening and closing statements during the guilt phase were devoted to 1) admitting that Appellant unlawfully killed Deputy Raczkowski while resisting his efforts to disarm and/or arrest him, 2) denying the existence of premeditation or ill will, and 3) explaining that the shooting, based on the confession and other evidence, resulted from fear and panic once the deputy pulled his own gun (R869-74,1588-1609,1670-82).

The only two (2) lessers for the jury to choose from were Second Degree Murder and Manslaughter (R1687). Second Degree Murder was not consistent with the defendant's defense since the jury was instructed on the requirement of "ill will, hatred, spite, or an evil intent" (R1688).

Manslaughter, under the facts of this case, was not a realistic alternative either. Over Appellant's objection (R1688-1689) the trial court gave the long, standard instruction on culpable negligence (R1688-89). Thus, to argue manslaughter, trial counsel would have been forced to argue to the jury that Appellant's firing four (4) bullets into the deputy's back

was an act virtually comparable to negligence - a completely untenable position to say the least.

The record reflects the very prejudice discussed above - in his closing arguments to the jury, trial counsel was unable to apply his theory of the case to the jury instructions, and could only argue that premeditation had not been proven:

> "Ladies and gentlemen, what happened out there, in those seconds, not minutes, not ten minutes, seconds, was not premeditated and I'm not here to tell you what it specifically was. You'll hear the instructions and you'll have the opportunity to fit this case in the category in which it fits closest and I'm not telling you, under any circumstances, to return a verdict of not guilty. Thank you." (R 1682)

Once in deliberation the jury may have decided on the First Degree Murder verdict simply because the killing was not done from ill will, etc. and clearly was not the result of something as trivializing as the Defendant's negligence.

Appellant is familiar with this court's "one step - two step" test for harmless error determination in situations similiar to this, as announced in State v. Abrear, 363 So.2d 1063 (Fla. 1978). However, there are compelling reasons why such a test should not preclude a finding of prejudice in the case at bar. First, by so emasculating Appellant's theory of defense at trial by refusing the Third Degree Murder instruction, the actions of the trial court placed Appellant in a position more akin to instances where instructions relating to affirmative defenses were rejected, such as intoxication, self-defense, insanity, entrapment, and independent acts. In Bryant v. State, 412 So.2d 347 (Fla. 1982) this Court addressed

a situation in which a murder defendant's requested independent acts instruction was refused by the trial court. The Court cited long standing precedent in holding that:

> "Where there is any evidence introduced at trial which supports the theory of the defense, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense when he so requests. Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945)."
>
> 412 So.2d at 350.

The Court in Bryant reversed the conviction therein because it found evidence in the record both to support that defendant's theory of defense and indicating prejudice. Prejudice was shown partly by the fact that, as in the case at bar:

> "Although during argument to the jury, defense counsel made clear his position as to the theory . . . the jury was not apprised of any legal basis upon which it could consider this position since the court refused to give an instruction. . " Id at 350

Also, see Gardner v. State, 480 So.2d 91 (Fla. 1985) wherein this Court, using very similar reasoning, reversed a conviction for the trial court's failure to give an intoxication instruction.

Appellant submits that Third Degree Murder is actually a "theory of defense" instruction in the few instances such as this where it is the defendant requesting the instruction, the defendant supplying the underlying felony to support the charge, and especially, where the Defendant disputes only the presence of premeditation. To strictly apply the "one step - two step" test in this case would ignore the fact that the evidence at trial was far more consistent with the elements of Third Degree Murder than with either of the two (2) lessers given. Such a ruling would be akin to determining a "step" based on the degree of punishment, a position rejected by this

Court in State v. Bruns, 429 So.2d 307 (Fla. 1983).

Because the failure to give the requested Third Degree murder instruction deprived Appellant of an instruction on his theory of defense, which was amply supported by the evidence, a new trial is required.

III. THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN APPROPRIATE INQUIRY INTO THE STATE'S PEREMPTORY CHALLENGE OF BLACK JUROR, OR EVALUATION OF STATE'S VOLUNTARILY OFFERED REASONS FOR SUCH EXCLUSION, DESPITE LIKELIHOOD OF DISCRIMINATION.

On the second morning of jury selection, just after the night recess, the Court took challenges (R322). The State exercised a peremptory challenge on Carrie Gamon, a black woman, and Appellant immediately requested that the Court inquire as to the State's motives (R323). The Court responded that it did not feel an inquiry was necessary because the voir dire "was not perfunctory" and there had been "no showing that there has been a selective use of peremptory challenges" (R326). The State expressed concern that the law on this issue was in flux, and then volunteered its "neutral explanation" (R326). The State explained that 1) the juror was elderly and, therefore, susceptible to the "grandmother syndrome"; and 2) the juror was a domestic worker like Appellant's mother and therefore might "identify with Mrs. Reaves' background." (R326-327)

In response to the State's volunteered reasons for excusing Mrs. Gamon, and to support his concern that race was a factor, Appellant pointed out that the questioning of Mrs. Gamon by the State had been very limited, her answers weren't different from other jurors who weren't excused, she did not oppose the death penalty, she indicated that race wouldn't be a factor, and she was of the same age group as many other jurors retained (R327-328). The court then held that Appellant had made no prima facie showing of selective exclusion, voir dire of Mrs. Gamon was not perfunctory or different from other jurors, and that the reasons for the challenge were related

to the facts of the case (R329).

A close examination of the record supports Appellant's concerns expressed at trial, and establishes a prima facie case of discrimination. The only pertinent questioning of Mrs. Gamon by the State during voir dire consisted of the following dialogue: (R179-180)

> MR. COLTON: Now, you said to the Judge earlier that -- that your husband is disabled right now?
>
> PROSPECTIVE JUROR GAMON: Yes.
>
> MR. COLTON: How long has he been disabled?
>
> PROSPECTIVE JUROR GAMON: Since '82.
>
> MR. COLTON: But you're still working full-time; is that right?
>
> PROSPECTIVE JUROR GAMON: Four days per week.
>
> MR. COLTON: You said you're a domestic?
>
> PROSPECTIVE JUROR GAMON: Right.
>
> MR. COLTON: Do you work for a particular family or company or do you work for several different people or --
>
> PROSPECTIVE JUROR GAMON: I work for three different people; two days in one house and one in each of the other.
>
> MR. COLTON: Again, I'm not trying to suggest that you should say that it's a problem, but is it going to be a problem for you that, if you're here for a week and a half or two weeks or something --
>
> PROSPECTIVE JUROR GAMON: I don't think so. I hope not.

Mrs. Gamon had previously assured the trial judge that she did not oppose the death penalty nor did her views prevent her from finding the defendant guilty if the evidence so warranted (R93). She also assured the Court that she had no religious or moral beliefs that would interfere (R113). Finally, she assured defense counsel that race would play no part in the

trial (R260).

Appellant submits that reversible error was committed by the Court's refusal to either conduct an inquiry or evaluate the credibility of the prosecutor's asserted reasons for the challenge of Mrs. Gamon. State v. Slappy, 13 FLW 184 (Fla. SCO 1988). Even if this Court considers the trial judge's allowing the State to volunteer into the record its reasons for challenge a proper inquiry, the reasons themselves are impermissible because of the following factors: First, the questioning by the State was extremely brief as shown above, and did not even address whether or not Mrs. Gamon was infected with the dread "grandmother syndrome" or would sympathize with the defendant because his mother happened to be in the same line of work. Secondly, the State's reasons were not related to the facts of the case. It is unknown how Mrs. Gamon could have the "grandmother syndrome" when she did not even have children (R112). Further, the allegation that Mrs. Reaves was a "domestic" was not supported by the record. Finally, half of the jurors ultimately accepted by the State (R 1707,8), were apparently middle-aged or older with children, yet their service on the jury was not prevented by the State for those reasons:

> ALBERT JEFFREY: Five children, all in their late twenties or early thirties (R641)
>
> LEON BUTLER: Retired from Texaco after 30 years, had a 27 year old daughter (R107)
>
> FRANCIS HILL: Plant manager for 40 years (R356). Retired, with two grown children (R355)
>
> HERBERT BUBERT: Came to the U.S. in 1928, had 2 children ages 38 and 48 (R114)
>
> SALVATORE BENIGNO: A grandfather by his own admission (R118)

PETER HELEWSKI: Married thirty years with four children (R136-137)

Since there was no inquiry or initial evaluation of the State's offered reasons for challenging Mrs. Gamon, there was no rebuttal to the factors alleged by Appellant in court, as required by the Slappy decision. It is clear from the record that the possibility is great that the reasons given were simply a pretext to exclude Mrs. Gamon because of her race. It is simply not rational to suspect that an elderly woman without children would sympathize with a thirty-eight (38) year old defendant more than would men of her age group who had children and/or grandchildren. More importantly, the State did not even attempt to explore with Mrs. Gamon their concerns in the areas later announced as being their reasons for excusal. These facts are squarely within, and violate this Court's admonition in Slappy that:

> "when the state engages in a pattern of excluding a minority without apparent reasons, the state must be prepared to support its explanations with neutral reasons based on answers at voir dire or otherwise disclosed on the record itself".
>
> 13 FLW at 186

Appellant submits that in this, a murder trial with the victim being a white police officer and the defendant a black man, far greater care should have been taken to avoid any possibility of excluding jurors because of their skin color.

The error comitted by the trial court on this issue requires that Appellant be granted a new trial--one free from discriminatory jury selection.

IV. RESENTENCING IS REQUIRED BECAUSE OF THE ERRONEOUS PRESENTATION OF EVIDENCE TO SUPPORT, AND THE ACTUAL FINDING OF, THE AGGRAVATING FACTOR OF PRIOR CONVICTION OF CAPITAL CRIME OR VIOLENT FELONY.

The admission of the evidence discussed in Issue I concerning the Martin County and Indian River County "robberies" committed by Appellant was erroneous for two (2) reasons. First, this evidence violated due process and rules of ethics as discussed in Issue I. Secondly, the convictions in evidence were not legally for a capital crime or violent felony as required by Section 921.141(5)(b), Florida Statutes (1985).

This Court made it clear in Odom v. State, 403 So.2d 936 (Fla. 1981) that "consideration of mere arrests and accusations as aggravating circumstances is precluded." 403 So.2d at 942 . This Court in Lewis v. State, 398 So.2d 432 (Fla. 1981) further restricted this factor's application to those 'life-threatening' crimes in which the perpetrator comes in direct contact with a human victim." 398 So.2d at 438.

Since the Lewis decision the Court has indicated that some convictions are per se violent for purposes of this aggravating factor, without the need to examine the facts behind the conviction. See Harvard v. State, 414 So.2d 1032 (Fla. 1982) (Aggravated Assault);Simmons v. State, 419 So.2d 316 (Fla. 1982) (Robbery); and Lara v. State, 464 So.2d 1173 (Fla. 1985) (Murder and Sexual Battery). In addition, the court has recognized that some crimes may be violent, depending on the facts behind the convictions. See Johnson v. State, 465 So.2d 499 (Fla. 1985) (Burglary) and Brown v. State, 473 So.2d 1260 (Fla. 1985) (Attempted Arson).

While the Court in Brown seems to imply in dicta that any offense may be "violent" if the underlying facts support such a conclusion, Appellant submits that the better analysis would be to recognize some cases as per se nonviolent. The crimes of Grand Larceny and Conspiracy, by their very elements, rule out direct contact with a human victim. As to conspiracy, the crime consists only of an agreement between two (2) or more persons and an intention to committ a criminal offense, Orantes v. State, 452 So.2d 68 (Fla. 1st DCA 1984). More importantly, the crime of conspiracy has been held to be completely separate and distinct from the substantive offense which is the object of its intent, State ex rel. Ridenour v. Bryson, 380 So.2d 468 (Fla. 2d DCA, 1980). Thus when the State introduced facts indicating a robbery, they were proving mere accusations with regard to the Conspiracy case. As to Grand Larceny, it is the very "force, violence, assault or putting in fear" which aggravates a larceny to the crime of Robbery, Section 812.13(1) Florida Statutes (1987). Appellant has been unable to find a single instance where this aggravating factor has been established by a Grand Larceny. To the contrary, this Court in Lewis specifically held that Grand Larceny was not violent within the meaning of the statute.

Where the State charges a violent crime and then entices the defendant to plead to a decidedly nonviolent charge in the same case, the State should not be allowed to later claim that the crime committed was "actually" one of violence. In such a case the facts do not supplement the naked conviction, but actually contradict it. As such the defendant could be sentenced to death for acts which not only did not result in

convictions, but in which the court record legally disproved the acts seeking to be proven by the State at the sentencing.

This Court addressed a similar issue in Tyner v. State, 506 So.2d 405 (Fla. 1987) with regard to sentencing guideline scoring. In Tyner, the trial court dismissed two (2) murder counts against the defendant, but then used the victims deaths to exceed the guidelines range when sentencing the defendant for a related burglary. This Court rejected the attempted use of the murder evidence:

> "In this case, consideration of the murders in sentencing for the armed burglary would result in an egregious violation of due process because the defendant has already been acquitted of the murders" 506 So.2d at 406

Because the State in 1973 allowed Appellant to plead to two (2) crimes which by their very elements ruled out direct contact with a victim, it should also be barred by the doctrine of collateral estoppel from now using them to support this factor. This doctrine prohibits the government from relitigating facts necessarily established against it in a previous proceeding. The doctrine is usually used in conjunction with Double Jeopardy grounds to prevent a second trial where a defendant has had the facts decided by the jury in his favor in the first trial, for example in Gragg v. State, 429 So.2d 1204 (Fla. 1983). In Gragg this Court refused to allow prosecution of the defendant for Possession of a Firearm by a Convicted Felon where he had been convicted only of lesser misdemeanors at his first trial on aggravated battery and assault with firearms. This Court held that if there were a factual basis for the jury's verdict in the defendant's favor, the same facts could not be relitigated - in that case firearms possession. In the case at bar, there

must certainly have been a factual basis for the State's decision to reduce the charges for a plea as a factual basis is required for the entry of any plea. Estes v. State, 316 So.2d 276 (Fla. 1975). It is also clear that the collateral estoppel doctrine does not require a jury's finding of fact. In Wander v. State, 471 So.2d 83 (Fla. 5th DCA 1985), collateral estoppel was successfully invoked to prevent the State from refiling a criminal charge where the State had voluntarily dismissed its appeal of a trial court's dismissal ruling. The State evidently believed the trial court's ruling to be correct initially, but subsequently learned of this court's upholding of the very law challenged by that defendant.

The Wander court held that the State's dismissal:

> "left the trial court's judgment in the same status as if no appeal had ever been taken. . therefore the original judgment operated as an estoppel against the refiling of the same trafficking charge. . " 471 So.2d at 84

The trial court's admission of the above evidence before the jury, and finding of this aggravating factor was clear prejudicial sentencing phase error which requires Appellant be granted a new sentencing hearing.

V. THE TRIAL COURT ERRED IN RULING THAT MITIGATING EVIDENCE SHOWING THAT ON ONE OCCASION THE DEFENDANT HELPED TO FOIL A JAIL BREAK AND SAVE A JAILER FROM PHYSICAL HARM, "OPENED DOOR" TO EXTENSIVE HISTORY OF POOR BEHAVIOR DURING INCARCERATION, THEREBY ESSENTIALLY PRECLUDING APPELLANT'S PRESENTATION OF THAT MITIGATING EVIDENCE TO JURY.

Just before evidence in the sentencing phase was presented, the trial court heard argument with regard to whether evidence of the defendant's aid in foiling a jailbreak in 1973 "opened the door" to evidence of specific acts of misbehavior while he was incarcerated through the years (R1727-1734). Trial counsel stated to the court in reference to this issue:

> "Now, I am not going to argue -- and I can promise this Court I am not going to argue that because of that one incident, that one good thing that he did, that he's going to be a model prisoner. In other words, this is not -- I'm not bringing in model-prisoner testimony. I just want to bring out the fact that he did that one good thing" (R1727-1728).

Trial counsel also emphasized that the evidence would not come from Appellant himself but from documentary evidence (R1731). The State announced it intended to rebutt the "jail-break" evidence by showing:

> "that repeatedly, while he's been in prison, he's had disciplinary rule violations; they found drugs in his room while he was on work release; he stabbed an inmate in Indian River County jail; and he committed an unprovoked attack on another inmate" (R1730).

Trial counsel proffered to the court an affidavit and attached jail record from a Captain Porter (R2657) and deposition of Sal Masulio taken by the State (R2658). Ongoing health reasons prevented Captain Porter from attendance at

trial (R2657, pg. 1) and Mr. Masulio was at the time hospitalized in intensive care due to a recent heart attack (R1732-1733). The State stipulated to the admissibility of the deposition (R1733).

The deposition of Mr. Masulio indicates that he was employed by the Martin County Sheriff's department in 1973, (R2658, pg. 3), and that on August 26th of that year there was an attempted escape at the Martin County jail (R2658, pg. 4):

> "Before I know it, coming down the steps, at the time I didn't know who they were, but later on I found out it was the Miller boys. One had his arm around my throat and he had something looked like a knife there or something. But then the other fellows from the other cell, which weren't included in the jail break, helped me. And this young fellow named Reaves grabbed the Miller boys, they were the Miller boys, grabbed the one that had me around the throat and we put him in the drunk cell and that was over."

The trial court ruled that the proffered evidence regarding the 1973 jailbreak:

> "circumstantially shows the defendant is a model prisoner. And any evidence to rebut that nonstatutory mitigating circumstance would be appropriate..." (R1745)

Later, at the beginning of the defendant's case during the sentencing phase, Appellant's trial counsel announced that

> ". . . based upon the Court's ruling on the evidence of his aid in the jailbreak in 1973, that he did not intend to present the proffered evidence. . . " (R1821).

Appellant submits that the court's ruling that evidence of the above incident would open the door to the defendant's history of bad acts while incarcerated, was erroneous and was tantamount to its suppression. The facts of this case are quite unlike those in Parker v. State, 476

So.2d 134 (Fla. 1988) and Muehleman v. State, 12 FLW 41 (Fla. 1987), wherein defense experts had testified to general character traits, thereby opening the door to specific acts evidence to impeach or rebut the experts' conclusions.

The error discussed herein requires that Appellant be granted a new sentencing hearing to present this evidence free from improper rebuttal.

VI. THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

In State v. Dixon, 283 So.2d 1 (Fla. 1973) this court defined the term "heinous" to mean "extremely wicked or shockingly evil," the term "atrocious" to mean "outrageously wicked and vile," and "cruel" to mean "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." 283 So.2d at 7. In Cooper v. State, 336 So.2d 1133 (Fla. 1976), the court examined this factor with regard to the murder of a police officer who attempted to prevent a robbery escape. The defendant in that case killed the police officer instantly with two (2) shots to his head, upon confronting the officer. The court rejected the application of this factor in ruling that the standard of an aggravating circumstance is whether the horror of murder "is accompanied by such additional acts as to set the crime apart from the norm. . . which is unnecessarily tortuous to the victim." 336 So.2d at 1141 (emphasis added). The court held that the defendant in that case did not commit "additional acts which make the killing 'heinous'. . " Id at 1141.

Appellant realizes that since Cooper, this court has approved this factor in numerous instances involving either protracted discussion in front of the victim by the defendant of his intent to kill the victim, or torture inflicted by the defendant while the victim was alive. The court has also, Appellant realizes, often considered the pain suffered by the victim. Appellant submits, however, that with the exception of the victim's suffering, none of the above facts were

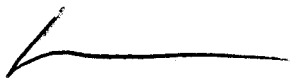
established by the evidence at trial. With regard to the victim's awareness of impending death, the only evidence of same was from a thoroughly discredited and impeached witness, Eugene Hinton. Such awareness, if established, was only for seconds before the shooting. There was absolutely no evidence of anything the defendant did to torture, increase or prolong the victim's suffering. In addition, all the evidence indicated that the incident was unplanned, that it occured over a span of minutes if not seconds, and that the officer was armed and able to return fire. Finally, it was clear from the record that Appellant had some semblance of a moral excuse for the shooting - his own self-preservation. These facts cause this case to pale in comparison with, for example, the ferocity of the murder in Parker v. State, 476 So.2d 134 (Fla. 1985). In Parker the victim, an unarmed young lady, was kidnapped from a convenience store during a robbery, told she was going to be killed while riding in the defendants' car, and finally shot execution-style in the head.

Because the facts in this case simply do not support this aggravating factor, Appellant urges this court to so hold and to order a new sentencing hearing.

CONCLUSION

Based on the arguments and authorities cited herein, Appellant requests this court to reverse his conviction and order a new trial, reverse his sentence of death for a new sentencing hearing, or reverse his sentence of death and order that a sentence of life imprisonment without parole for twenty-five (25)years be imposed.

Respectfully submitted,



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APPENDIX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. MAIL to Richard Bartmen, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, and to William Reaves, #040002, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 21st day of April, 1988.

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