SUPREME COURT OF FLORIDA

FRANK VALDES,

Appellant,

CASE NO. 76,569

vs.

STATE OF FLORIDA,

Appellee.
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INITIAL BRIEF OF APPELLANT

(On Appeal from the Circuit Court of the
Fifteenth Judicial Circuit, In and For
Palm Beach County, Florida)

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I. STATEMENT OF THE CASE AND THE FACTS:

A. Statement of the Case.

Appellant was the Defendant and Appellee the Prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this Initial Brief, the Appellant will be referred to as "Valdes" and the Appellee as the "State". Reference to the Record on Appeal will be designated by the symbol "R", followed by the volume and page number; reference to the Supplemental Record on Appeal will be designated by the symbol "Supp. R.", followed by the volume and page number.

Frank Valdes was charged in a twelve (12) count indictment[1] as follows: Count I, first-degree murder (Officer Fred Griffis); Count II, armed robbery (Officer Steve Turner); Count III, attempted first-degree murder (Officer Steve Turner); Count IV, possession of a firearm by a convicted felon; Counts V-X, attempted first-degree murder, each count naming a different intended victim (Officers Richard Hines, Freddie Naranjo, Jeffrey Woodward, Dale Fell, Robert Provost and John Woods, respectively; Count XI, aggravated assault (Dr. Fred Brown); and Count XII, aiding the escape of a prisoner in lawful custody (James O'Brien). (R. 26/3957-63). Count IV, possession of a firearm by a convicted felon, was severed prior to trial. (R. 8/1167).

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[1] Valdes was originally charged by indictment with two (2) co-defendants, William Van Poyck and James O'Brien. The original indictment, filed on July 14, 1987, was in 15 counts. (R. 22/3234-38). On July 20, 1988, O'Brien was severed for trial leaving Valdes and Van Poyck to be tried together. (R. 3/348). On August 4, 1988, Valdes was rejoined with O'Brien leaving Van Poyck to be tried alone. (Supp. R. 1/1-44). On January 9, 1989, on what was to be the first day of the Valdes/O'Brien trial, the court granted Vales' Motion for Severance from O'Brien. (R. 7/965). On October 24, 1989, the State refiled against Valdes the twelve count indictment discussed above. (R. 26/3957-63).

Valdes was found guilty on all counts by a jury. (R. 19/2865-67). In the sentencing phase, the jury recommended the death penalty by a vote of eight (8) to four (4) on Count I, first-degree murder. (R. 20/3101-02; 28/4369). On July 27, 1990, the Court sentenced Valdes to death for the murder of Officer Fred Griffis. (R. 21/3165; 28/4415-39). As to the remaining counts, the Court sentenced Valdes as follows: life, with a three (3) year mandatory minimum (Count II); seven (7) separate life sentences, without the possibility of parole for twenty-five (25) years, (Count III, Counts V-X); five (5) years, with a three (3) year mandatory minimum (Count XI); and fifteen (15) years (Count XII). The Court ordered all sentences to run consecutively. (R. 21/3165-3169).

B. Statement of the Facts.

1. <u>The Guilt Phase</u>

a. Mr. Valdes' Attorneys.

On May 29, 1990, the first day of jury selection in Frank Valdes' first degree murder trial, a hearing was held to determine the ability of Valdes' court-appointed attorneys to render effective assistance of counsel.[2] (R. 8/1293-94). Four days

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[2] Initially, the public defender's office was appointed to represent Valdes. (R. 2/56). Almost four (4) months later, the public defender withdrew from Valdes' case because of a conflict with a potentially adverse witness that the public defender was appointed to represent before being appointed to the Valdes case. (R. 2/68-70).

Nelson Bailey, appointed as a special public defender, was allowed to withdraw from Valdes' case about three (3) months after his appointment. (R. 2/97-111; 22/3356-58; 23/3402).

Three months after Bailey withdrew, attorneys Mark Wilensky and Marc Goldstein were appointed special public defenders. (R. 22/3262; 23/3437-38). The attorneys represented Valdes for about one and one-half (1 1/2) years. During the last seven (7) months of their representation, Valdes filed and argued three (3) motions to

earlier, Valdes filed, in open court, a pro se motion and various supporting papers requesting the discharge of appointed attorneys, Craig A. Boudreau and Frederick Susaneck. (R. 8/1268; 26/4231-47). This was Valdes' second pro se motion to discharge these attorneys. (R. 26/3976-92).

According to Valdes' in-court statements and his pro se motion/papers, during a meeting at the Palm Beach County Jail with his appointed attorneys, Boudreau struck Valdes, bloodying his nose, and Susaneck threatened Valdes to silence. Valdes also cites "irreconcilable conflict", culminating in the above-mentioned altercation, as grounds for the removal of the appointed attorneys and explains that the cause of the altercation was Valdes' increasing dissatisfaction with his attorneys' "inaction", including the attorney's refusal to investigate Valdes' theory of the case, refusal to allow Valdes to participate in the preparation of his defense, and, refusal to question (include as witnesses) certain persons whom Valdes believed were instrumental to his defense. (R. 8/1198-1206; 26/3976-4003; 27/4231-71). At the Court's direction, Boudreau and Susaneck filed affidavits in response to Valdes' motion, denying the incident. (R. 8/1279-80; 26/4008-09, 4010-12).

At the "effective assistance" hearing on May 29, 1990, the State presented three witnesses, Deputies Smith and Allen, and Mr. McDaniels, the defense attorneys' investigator, in opposition to Valdes' claim of tortious conduct by his attorneys. (R. 8/1290-1303).

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discharge/replace Wilensky and Goldstein. (R. 23/3578-81; 24/3591-94; 6/3437-38, 900-17; 7/1033-34, 1054-63 1080-1100). Valdes' motion was eventually granted (R. 7/1100), and Craig A. Boudreau and Frederick Susaneck were appointed as Valdes' special public defenders. (R. 25/3846-47; 7/1109-17).

According to Valdes, he was "constructively without counsel" at the hearing on his motion. (R. 8/1292). In a pro se motion directed to Chief Judge Daniel T. K. Hurley, Valdes requested the appointment of an attorney to represent him at the hearing on his motion to discharge. (R. 27/4259-65). The trial judge denied Valdes' request. (R. 8/1290-93).

Following the State's direct examination of Deputy Smith, the following colloquy occurred:

> The Court: Cross?
>
> Mr. Boudreau: Your Honor, we have no objection.
>
> The Court: Mr. Valdes,do you have any questions of the deputy?
>
> The Defendant: I have no attorney representing me, Your Honor. I object to the hearing. I object to the questions being posed by Mr. Geesey [the prosecutor] because the questions being asked are outside the scope of [the deputy's] knowledge.
>
> The Court: The Court will interpret Mr. Valdes' comments as not wishing to ask [the deputy] any questions. (R. 8/1297).

When it came time to cross-examine Deputy Allen, the following occurred:

> The Court: Mr. Boudreau?
>
> Mr. Boudreau: No question, Your Honor.
>
> The Court: Mr. Valdes?
>
> The Defendant: Your Honor, I again object to this hearing on the form that it's taken that I am

without counsel. Of course, the attorneys have no questions, they are in the position where they are defending themselves and not myself.

The Court: Court once again takes Mr. Valdes' remarks and interprets them as having no questions. (R. 8/1300-01).

When it came time to cross-examine McDaniels, the following occurred:

The Court: Mr. Boudreau, Mr. Susaneck?

Mr. Boudreau: No questions.

The Court: Mr. Valdes?

The Defendant: You're going to sit there and fucking tell them that lie? (R. 8/1303).

Following a brief recess, the trial judge stated: "Let the record reflect that the Defendant physically attacked the witness and the Court interpreted his action as having no further questions of this witness." (R. 8/1303).

The court instructed Valdes that he had a choice: Valdes could either behave in an appropriate manner and remain in the courtroom in full restraints or he would be removed from the courtroom to an adjoining room where he would listen to the proceedings via the court's sound system. Valdes stated that he considered the proceedings a "farce" and a "sham", and he was removed to the adjoining room. (R. 8/1304-05).

The same day, Boudreau and Susaneck filed a motion to withdraw. (R. 27/4273-74). Following the removal of Mr. Valdes from the courtroom,

the court inquired if Boudreau or Susaneck wished to present anything more, to which inquiry Boudreau responded as follows:

> Yes, especially as it relates to our motion to withdraw. Also ties in with the fact that Mr. Valdes is now being held in another courtroom and absent from this court.
>
> I have to object, Your Honor, for the purpose of this record to Mr. Valdes being absent from his own trial in another room....
>
> If Mr. Valdes is continued to be placed in that room, I feel that would constitute an extreme prejudice on Mr. Valdes' case, Your Honor, all of us too, Your Honor, myself, as a lawyer, personally, and as an officer of this court.
>
> I have a concern and that concern is, Your Honor, is that I am placed in the position of objecting to that. I have to be honest, I'm afraid of sitting at the table with him. I feel that, that I would be physically assaulted.
>
> I think that ties into why I feel there is a conflict of interest here in this case because how can I on the one hand argue what the Court is doing, how can I fairly argue on behalf of him, what is happening? I am not going to defend him and it's going to deny him a fair trial and at the same time with a straight face, not tell this Court that I am concerned.
>
> * * *
>
> I am concerned here it may be at a later time, maybe an appellate record that further objection to that procedure going to be made and I would hope that what I have done here has at least preserved the record to the point that, appellate argument that arises out of this situation can be made.
>
> Obviously, I feel it will be subjected on how I just colored my comments on the record. I do not want to bastardize my position in any way. I am trying to let the Court know how I

> feel, as it relates to the motion to withdraw and everything.

(R. 8/1307-08).

The court denied both Valdes' motion to discharge and Boudreau and Susaneck's motion to withdraw. (R. 8/1309; 27/4276-77). As to Valdes' motion to discharge, the court stated that Valdes is incapable of representing himself and that his disruptive conduct precluded the court from conducting an inquiry under Hardwick v. State, 521 So.2d 1071 (Fla. 1988). The court grounded its denial of Valdes' motion to discharge on the strength of the State's evidence refuting Valdes' charges regarding his attorney's conduct and on the affidavit of Valdes' attorneys. (R. 8/1309). As to the attorneys' motion to withdraw, the court was "of the opinion" that even with new counsel, Valdes' "course of conduct to frustrate this Court and the trial...." would result in the same situation occurring 'six, eight months down the pipe...." (R. 8/1309-10). Boudreau requested, and the court so noted, that the record show that the attorneys continued their representation of Valdes under order of the Court. (R. 8/1311-12).

Valdes was absent from the courtroom during the remainder of the proceedings on May 29, 1990, and for all of the pre-trial/jury selection proceedings the next day.[3]

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[3] Boudreau and Susaneck lodged several objections to Valdes' absence from the courtroom on the ground that it precluded an attorney-client relationship. (R. 8/1310-11; 9/1344; 10/1430032).

Prior to bringing up the first group of prospective jurors,[4] the Court brought Valdes back into the courtroom and asked him whether he would behave properly and not disrupt the proceedings. Valdes' responded as follows: "Your Honor, I object to these proceedings 'cause I am not represented by counsel." The court interpreted Valdes' response in the negative and ordered him removed from the courtroom. (R. 8/1318). The court inquired of Valdes regarding his behavior a second time on May 29, 1990, with the same result. (R. 8/1318-21).

Following the lunch recess on May 29, 1990, and before continuing the jury selection process, Susaneck noted that there were certain pro se motions and other communications from Valdes before the court. (R. 1346-49; 27/4252-72). The court summarily denied any pro se motions on the ground that Valdes had an attorney and was not designated as co-counsel. (R. 1346-47). The motions and notes were filed for the record. (R. 27/4255-72, 4275).

Prior to commencement of the jury selection process on the following day, the Court again inquired whether Valdes wished to be present in the courtroom. (R. 10/1430-31). Valdes responded to the court's inquiry as follows: "...Your Honor, I do not concur with anything that the attorneys have done thus far. I do not recognize them as my counsel." The court interpreted Valdes' response in the negative and he was removed from the courtroom. (R. 10/1431-32).

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[4] The initial jury panel was stricken on objection by defense counsel regarding the court's comment in its preliminary instructions on Valdes' absence from the courtroom. (R. 8/1324-43; 9/1341-42).

On the third day of the proceeding, Valdes was present and remained in the courtroom for the completion of the jury selection process and the trial. (R. 12/1670-71). The record reveals that Valdes appeared before the jury flanked by two deputies. (R. 12/1756-57).

Prior to denying the several motions concerning the appointed attorneys, the court did not ask Valdes or the attorneys about the preparation of the defense, the applicable law or the facts. Following Valdes' removal from the courtroom on May 29, 1990, he was brought back into court on three (3) occasions. At no time did the court discuss anything with Valdes, other than to ask Valdes if he intended to behave.

Boudreau and Susaneck were appointed to represent Valdes on August 1, 1989, by the Honorable Michael Miller. (R. 7/1103-08, 1109-17). At the first hearing, following their appointment, the attorneys stated the need for a continuance in light of the fact that trial was set to begin three months later, on November 6, 1989. (R. 25/3845). Judge Miller denied the motion and suggested the attorneys work nights and weekends. (R. 7/1119-20).

On October 6, 1989, Boudreau again argued a motion for a continuance before Judge Miller. (R. 8/1135-37; 25/3850-52). As a ground for the continuance, Boudreau stated that he was required to attend as "stand-by counsel" the first degree murder trial in the Amos case, in the event that Amos abandons his decision to proceed pro se and invokes his right to counsel. A heated discussion ensued between the Court and counsel, and the motion was denied. (R. 8/1135-37).

On October 31, 1989, Boudreau informed Judge Miller of a trial conflict with a 1986 case that was scheduled for retrial in early November "over a hung jury". (R. 8/1158-62). The motion was granted and Valdes' trial was reset for March of 1990. (R. 8/1169; 25/3867).

Under a refiled indictment,[5] proceedings in Valdes' case commenced in January of 1990 before Judge Colbath. (R. 8/1174-79). In early February of 1990, Susaneck requested another continuance on the grounds that Boudreau was presently involved with trying the Amos case for a fourth time; that Boudreau had, in addition to Amos, another first degree murder case that was being tried for a third time; and that, in the middle of all of this, Boudreau had chicken pox. The motion was denied. (R. 8/118-89).

At a hearing before the Honorable Marvin Mounts on March 3, 1990, defense counsel again requested a continuance of Valdes' trial.[6] Boudreau told the court that because of his involvement with the Amos case, he was incompetent to try the Valdes case next week; Boudreau did not know that when the Valdes case was transferred between divisions, the case was automatically reset for May of 1990. (R. 1194). Boudreau initially stated that a May trial date was acceptable; Valdes expressed his reservations about the May trial date and requested a three (3) or four (4) month continuance. (R. 8/1196).

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[5] The indictment against Valdes was refiled and Valdes was arraigned in October of 1989. (R. 26/3957-63; 8/1165-71).

[6] Judge Colbath, sua sponte, transferred the Valdes case from Division "V" to Division "S". (R. 25/3878). The case was eventually transferred back to Judge Colbath's division. (R. 25/3879).

According to Valdes, the continuance was necessary because of Boudreau's involvement with the Amos case and the lack of pre-trial preparation in Valdes' defense. (R. 8/1196-1200). Boudreau changed his position and agreed that a continuance was necessary because of Amos and because his investigator had turned up new leads. (R. 8/1200). The motion was denied. (R. 1206).

Valdes' trial commenced a little more than nine months later, on May 29, 1991.

b. Jury Selection.

Following the altercation between Valdes and McDaniels, Valdes was removed from the courtroom and jury selection commenced. (R. 8/1301-09).

First, individual interviews were held for those people who claimed a hardship exemption from jury duty. (R. 8/1319-21, 1324-33; 9/1349-59; 11/1599-1607). Eighteen (18) of the sixty-six (66) potential jurors were granted a hardship exemption and were excused from the case. (R. 9/1362-46; 10/1433; 11/1607-12).[7]

Next, individual interviews were conducted, at which time the potential jurors were questioned regarding their opinions on the death penalty and their exposure to pre-trial publicity.[8] (R. 10/1450-1522; 11/1529-97). As a result of these

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[7] Jury selection in this case actually commenced with the second pool of jurors. The initial pool was stricken on motion by the defense due to a prejudicial comment by the judge in the preliminary instructions regarding Count IV of the indictment (possession of a firearm by convicted felon), which had been severed prior to trial. (R. 8/1336-38).

[8] Potential jurors were questioned about their familiarity with the case due to media coverage at the time of the incident (3 years prior to trial) as well as the recent media coverage of the in-court incident involving Valdes and McDaniels.

interviews, twelve (12) more potential jurors were excused for cause. (R. 10/1470-75, 1496-98; 11/1535-42, 1542-44, 1550-51, 1555-59, 1565-70, 1581-86, 1586-87, 1592-94, 1633-37, 1652-58).

The trial judge stated that he was disinclined to excuse a potential juror for cause if the juror had been exposed to media coverage of the in-court incident between Valdes and McDaniels, unless a potential juror stated unequivocally that the media coverage would preclude the juror from listening to/deciding on the facts of this case, because Valdes' conduct created the situation. (R. 10/1488-89).

Defense counsel moved to excuse for cause three (3) other potential jurors based on their responses in the individual death penalty/pre-trial publicity interviews, but the motions were denied. Two of the jurors whom defense counsel objected to, Mr. Valdivia and Mr. Lucas, were subsequently stricken upon stipulation by the State. (R. 10/1483-88; 11/1619-25, 1763, 1768). However, the third juror to whom Defense counsel objected, Ms. Stelzel (R. 11/1641-49), was subsequently seated on the jury. (R. 12/1772-73).

During Stelzel's individual interview, she stated that her father had been a corrections officer in a maximum security facility and that his best friend had been killed. Stelzel said that she feels:

> as though sometimes we are too lenient. We really need, if someone has killed someone and all the evidence points to them exclusively, what we need is to treat them in kind. (R. 11/1642-43).

Stelzel stated that she would make a recommendation for the death penalty if she felt "that he was just simply guilty"; she also stated that it was "possible"

that some mitigating factors might persuade her to recommend life if a defendant was found guilty of first degree murder of a correctional officer. (R. 11/1643-44; see also 11/1644-48).

Stelzel stated that although she did not remember the media coverage of the case three (3) years ago, she was aware of the in-court incident the day before; a girlfriend had mentioned the "outbreak" and Stelzel saw a newspaper headline and heard a radio broadcast. (R. 11/1644-46).

Defense counsel argued that Stelzel should be excused for cause because her answers demonstrated that she would recommend death, but that a life sentence was only possible. In addition, counsel argued that Stelzel favors the death penalty in a case where a corrections officer is murdered because her father was a corrections officer and the father's best friend was killed. Finally, counsel argued that Stelzel should not be seated on this jury due to her exposure to recent pre-trial publicity concerning the in-court incident between Valdes and McDaniels. (R. 11/1648-49). The motion was denied. (R. 11/1649).

Finally, the potential jurors, as a group, responded to a series of general questions and, depending on their responses, counsel conducted further individual inquiry. (R. 11/1613-18; 12/1671-1745). During the group interviews, juror Garko acknowledged that she had seen a headline concerning the altercation between Valdes and McDaniels. When asked whether the headline caused her to form an opinion regarding Valdes' guilt or innocence, Garko responded, "I don't think so". (R. 12/1743). Defense counsel queried whether, as a result of her exposure to the publicity, she had any "negative thoughts" regarding Valdes. Garko again responded, "I don't think so". Id.

In seating the jury, the State and the defense were each allowed ten (10) peremptory challenges each. (R. 9/1365-66; 12/1761). Following the reading of the names of the presumptive panel of twelve (12), defense counsel asked that the entire panel be stricken for cause. (R. 1758). Interalia, counsel asked that juror Dean be stricken for cause because her daughter is a corrections officer and that juror Garko be stricken because of her exposure to pre-trial publicity. Counsel also renewed their objection to juror Stelzel. (R. 1761).

Following the denial of defense counsel's motion to strike the presumptive jurors, (R. 12/1758-61) counsel exercised six (6) peremptory challenges, including a challenge to juror Dean. (R. 12/1763-64). Following the reading of the second presumptive panel, defense counsel used their remaining four (4) peremptory challenges, including a challenge to juror Garko. (R. 12/1764-66).

Defense counsel requested, and was denied, four (4) additional peremptory challenges. According to counsel, the defense required additional challenges because they were forced to use strikes to remove jurors who should have been stricken for cause; in the alternative, counsel requested a change of venue because of the negative impact of the pre-trial publicity surrounding this case. (R. 12/1767).[9]

Following the denial of defense counsel's request for additional peremptory challenges and a change of venue, and because the defense had no more peremptory challenges, counsel moved to strike juror Gifford for cause, based on her

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[9] Valdes' initial request for a change of venue was lodged early in the proceedings when defense counsel orally joined a motion made by then co-defendant, O'Brien. (R. 7/954-55).

exposure to pre-trial publicity (R. 12/1769)[10] and renewed their motion to strike juror Stelzel for cause. (R. 12/1768). The motions were denied (R. 12/1768-69), and both Stelzel and Gifford were seated on the jury. (R. 12/1773-74).

c. Trial Testimony

(1) **The Events at Olive Avenue:** On June 24, 1987, Steve Turner, a Glades Correctional Institution ("GCI") transportation officer, and his partner, trainee Fred Griffis, were assigned to transport GCI inmate James O'Brien from the jail in Belle Glade to the West Palm Beach office of dermatologist Dr. Steven Rosenberg on North Olive Avenue. (R. 13/1925-33). Upon arriving at the doctor's office, Turner, seated in the passenger side, glanced at his watch and reached for his pad to record the arrival time. When Turner looked up, he saw one man (later identified as Van Poyck) standing at the passenger side window pointing a nine millimeter gun at him and another man running around the front of the van toward the driver's side. (R. 13/1933-35). Turner described the gun that Van Poyck carried as black with brown handles. (R. 13/2000, 2013-14, 2022).

Van Poyck ordered Turner out of the van, disarmed him and ordered him to lie down and crawl underneath the van. (R. 13/1936-37). Van Poyck

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[10] The record on appeal includes evidence of the extensive media coverage of Valdes' case, and in particular, the in-court incident between Valdes and McDaniels. (R. 27/4258-72; 8/1264, 1269-70, 1316; 10/1461-65; 12/1778-82).

Mr. Valdes read into the record a prepared statement concerning, inter alia, his belief that he was being tried in the media. (R. 8/1269-70). The trial court granted a defense motion to supplement the record, for appellate purposes, with all video(s) and printed material(s) concerning the trial. (R. 12/1778-82). In addition, upon defense request, the potential jury and the ultimate jury panel were repeatedly told not to read newspapers or listen to television/radio accounts of the proceedings. (R. 8/1316, 1329; 9/11356-57; 11/1604-05).

pushed, kicked and threatened to kill Turner if he failed to comply. (R. 13/1939). From underneath the van, Turner saw "two sets of feet" on the driver's side, one of which he knew to be Griffis by the patent leather shoes; Turner knew Van Poyck was still on the passenger side at this time, because Van Poyck was kicking him. (R. 13/1937-38). By watching the movement of the feet, Turner knew Griffis was being taken to the back of the van. Van Poyck ceased kicking Turner and moved to the back of the van and "a few minutes later", Turner heard the shooting start and saw Griffis go down. (R. 13/1939-41).

Turner crawled out from under the van on the driver's side, where he was met by Van Poyck, who was still holding the black gun with the brown handles. (R. 13/1942). Van Poyck forced Turner around the van to the passenger side and ordered Turner to search inside the van for the keys. (R. 13/1944-45). O'Brien shouted that "the other officer had the keys." (R. 13/1945-46). Van Poyck forced Turner to search through Griffis' pockets, but only Griffis' personal keys were found. (R. 13/1947-49). While Turner searched Griffis' pockets, the other suspect, whom Turner identified at trial as Valdes (R. 13/1948-49), began shooting at the lock on the side of the van with an all black "Sig Sauer" pistol (State's Exhibit #77); a ricochet hit Turner's shoulder. (R. 13/1948-50, 2024). Van Poyck pointed the black gun with the brown handles at Turner, said Turner was "a dead man" and pulled the trigger; the gun did not go off.[11] (R. 13/1950-51). At this point, Van Poyck pulled out a Star .22 caliber pistol, also black with brown handles. (R. 13/2000-01, 2023-25). Next, according to Turner, Valdes broke the glass window of the van

[11] Van Poyck's conduct in this regard formed the basis for the charge against Valdes of attempted first degree murder of Officer Turner, Count III.

with the butt side of his all black gun. Van Poyck's attention was diverted by the sound of breaking glass, and Turner ran toward the backside of the doctor's office and out to the street to find help. (R. 13/1951-52). Moments later, Turner encountered West Palm Beach police officers Johnston and Meyers. (R. 13/1952).

Over defense objection, two (2) pieces of physical evidence were recovered from the Olive Avenue scene, a bloody towel (State's Exhibit #34), taken from the front seat of the GCI van, and a bloody GCI radio "code sheet" (State's Exhibit #38), found near Griffis' body, were admitted into evidence. (R. 16/2388-92). Also over objection, the State introduced twelve (12) photographs of the area around the van which included Griffis' body and/or blood spatter and/or skull fragments (State's Exhibit #87, 90, 98, 101, 103, 106, 112, 113, 186, 195, 201, and 202); objections to three (3) photographs were sustained (State's Exhibit #95, 96 and 105); and, fifty-four (54) other photographs of the crime scene were admitted without objection. (R. 16/2397-2410).

(2) **The Cause of Death**: Medical examiner John Marraccini testified that Officer Griffis died as a result of any one of the following three (3) gunshot wounds: two (2) wounds to the chest, which injured the heart, and one (1) contact wound to the head. (R. 17/2645, 2654). According to the State's forensic expert, Jerry Styers, (State's Exhibit #75), a nine millimeter "Hungarian Arms" pistol, fired all three of the bullets removed from Officer Griffis. (R. 16/2551-52, 2560). State's Exhibit #75 was described as black, with brown "grips" or handles. (R. 16/2550, 2560).[12]

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[12] Lorrie Sondick, Valdes' live-in girlfriend at the time, testified that in March of 1987, she purchased a gun like State's Exhibit #75, and that on the morning of June 24, 1987, Valdes left home with the gun. (R. 17/2599, 2603-04).

Witnesses at the scene at or near the time Griffis was shot testified that one of the suspects, later identified as Valdes, carried an all-black gun. (R. 13/2000-01; 16/2452). According to the State's witnesses, the other gunman, later identified as Van Poyck, carried at least one gun with brown handles. (R. 13/1994-96, 1999-2001; 16/2559-61).

(3) **The Chase:** Nine (9) police officers testified about the car chase involving the white-topped Cadillac and West Palm Beach police, which began in downtown West Palm Beach, heading west on Palm Beach Lakes Boulevard.[13] The Cadillac eventually turned southward onto Australian Avenue, avoiding a roadblock at Australian and First Street, crossing Okeechobee Boulevard and Belvedere Road, and finally turning right onto a rental car return road at Palm Beach International Airport ("PBIA"), where the Cadillac skidded and hit the tree.

According to the officers' testimony, on several occasions during the chase, the passenger in the Cadillac leaned out the passenger side window and fired numerous shots at the police cars, bullets and/or ricochets striking four (4) of the seven

[13] The following officers testified about the car chase; Officer Provost (R. 13/2093-2108); Officer Persall (R. 14/2175-83); Officer Hines (R. 14/2184-2208); Officer Naranjo (R. 14/2209-17); Officer Woodward (R. 15/2223-33); Officer Fell (R. 15/2234-39); Officer Woods (R. 15/2239-52); Officer Ross (R. 15/2253-76); and Officer Sprague (R. 15/2278-85).

(7) pursuing cars.[14] At no time did the officers return fire at the Cadillac; at no time did the driver of the Cadillac fire any shots at the police cars.

After the Cadillac hit the tree, the driver opened the car door and fell to the ground. (R. 15/2256). At trial, Valdes was identified as the driver of the Cadillac. (R. 15/2246, 2285; 16/2495). The passenger was later identified as Van Poyck. (R. 15/2195, 2231-32).

Lorrie Sondick, Valdes' live-in girlfriend at the time, testified to the nature of the relationship between Valdes and Van Poyck. On or about June 4, 1987, Sondick and Valdes moved from Miami to Tamarac specifically to get away from Van Poyck because Van Poyck "bothered Frank to do him favors" and was dominant over Frank. She said that after they moved, Van Poyck called Valdes only two (2) times: the second call was around midnight on June 23, 1987, or early morning on the 24th. (R. 17/2601-02, 2611).

According to Sondick, Valdes left the house with Van Poyck around 7:45 a.m. on June 24, 1987. Valdes told her that Van Poyck asked him to go "up north" to do Van Poyck a favor, but that he had no idea what the favor was or where "up north" they were going. According to Sondick, Valdes was upset when he left the house with Van Poyck. (R. 17/2599-2602).

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[14] The cars occupied by the following officers were struck by bullets fired by the passenger of the Cadillac: Officers Hines and Naranjo (State's Exhibit #150, 157) (R. 14/2192); Woodward and Fell (State's Exhibit #151)(R. 15/2226-27, 2237); Provost (State's Exhibit #146, 152-56, 158)(R. 13/2090-2100); and Woods (State's Exhibit #$130, 148-49)(R. 15/2143). Van Poyck's conduct in this regard formed the basis for six (6) charges against Valdes for attempted murder, Counts V-X.

(4) **Corrections Officer Steven Gaglione:** The State proffered the testimony of Officer Gaglione, on duty at the Palm Beach County Jail on June 28, 1987, who overheard a conversation between Valdes and another inmate regarding the Olive Avenue incident. (R. 17/2626-31). After the proffer, a defense voir dire and an examination of the officer by the court, defense objections to the testimony based on constitutional grounds were overruled (R. 17/2630-31), but a motion to limit the officer's reference to the type of custody under which Valdes was held, i.e., "maximum security" or "lock-out", was granted. (R. 17/2630-32).

Officer Gaglione testified that he overheard Valdes tell another inmate that shooting Officer Griffis was planned. (R. 17/2633; 2640). According to Gaglione, Valdes told the other inmate that "they put him to his knees". (R. 17/2634).

On cross-examination, Gaglione acknowledged that Valdes' statement to the inmate was that "they" planned it, not that "I" planned it. (R. 17/2640-41). On further redirect by the State, Gaglione confirmed that Valdes said that "they" (not "I" or "we") put Officer Griffis to his knees. (R. 17/2641).

2. **The Penalty Phase.**

a. **The Evidence and Testimony**

The penalty phase commenced one week after the jury found Valdes guilty of the murder of Officer Griffis.

The defense attorneys requested a continuance of the penalty phase proceedings in order to develop mitigating factor evidence. (R. 19/2866-70, 2879-80). Counsel represented that they were unable to contact/serve many members of Valdes' family

and that there may be a need to request appointment of a psychologist to examine Valdes in light of his deteriorating emotional state. The motion was denied. (R. 19/2880).

The defense attorneys' evidence at the penalty phase consisted of the testimony of Valdes' sisters, Francis Valdes Collati (R. 19/2922-52) and Joyce Valdes Hernandez (R. 20/2958-73).

Out of the present of the jury, Francis, who is seven (7) years older than Valdes, told the judge that there are other family members and friends who would have testified for Valdes had they been informed of the proceedings; Francis did not learn of the hearing until two (2) days ago. (R. 19/2922-23). On inquiry by the State regarding the family's lack of knowledge of these proceedings, Francis admitted that she was aware of Valdes' arrest three (3) years ago and of the trial, and that she had spoken with Valdes more than ten (10) times over the last three (3) years; however, Francis stated that in the last several weeks, as far as she knew, Valdes had no access to a telephone and no visitation privileges. (R. 19/2923-24).

Francis and Joyce testified as to the Valdes children's family life, parents and relationships. Frank Valdes was the youngest of four (4) children. (R. 19.2926-27; 20/2958). He spent his early years in a predominantly Jewish and Italian middle-class neighborhood in Brooklyn, then Queens, New York. (R. 19/2928; 20/2958, 2962). At age seven, Valdes spent a year in a military-type boarding school in upstate New York. (R. 19/2934-37; 20/2960-61). According to Francis, Valdes felt hurt and unwanted as a result of being sent away; there were bullies at the school. (R. 19.2934-37). Joyce, who is two and one-half (2 1/2) years older than Valdes, believed that their parents sent Valdes away to

school to get him out of their way and because their father was a strict disciplinarian who believed that the only way to solve anything was through discipline. (R. 20/2961).

When Valdes was about eight or nine, the Valdes' family moved to Miami. (R. 19/2937; 20/2963). Again, Valdes was put in a military-type school. (R. 19/2934-37; 20/2963-64). This school was in Little Havana and most of the teachers and students spoke Spanish. Even though Valdes' parents were Cuban immigrants, English was the Valdes children's primary language. According to Francis, there were problems at the school as a result of the fact that Valdes did not converse in or respond to Spanish; the school apparently felt Valdes was brazen or bold for not speaking Spanish and he was often punished. Both sisters remember one incident where Valdes was forced to stand in the school playground and stare into the noon-time sun for hours. (R. 2936-37; 20/2964). After being taken out of this school, Francis noticed a change in Valdes: he once was a loving, patient and caring child, but after the military school experience, Valdes became belligerent and rude. (R. 19/2937).

When Valdes was about twelve, his parents divorced. (R. 19/2928). Both sisters testified that their father, a businessman in the export-import business who traveled away from home frequently and often for extended periods of time, was a violent, abusive, alcoholic. (R. 19/2928-31, 2930-32, 2934-37; 20/2959-60, 2961-62). The father was particularly violent with Valdes and his brother Mario, who was the oldest child. (R. 19/2930-32; 20/2961). The father would badly beat the boys, even hitting them with his fist, like in a boxing match. (R. 19/2930-32; 20/2962).

According to Joyce, the father was more violent and abusive with Valdes. (R. 20/2961). She recounted one incident in particular: when Valdes was about eleven or twelve, a particularly bad beating occurred after Valdes got into trouble with some other boys in an empty house; the father whipped and punched Valdes (R. 20/2965), threw him against a wall and bloodied his nose. (R. 20/2974).

Although Francis referred to the family as "close-knit", she and Joyce testified that Mario, the oldest child, wanted little to do with Valdes. (R. 19/2932; 20/2967). According to Joyce, the male members of Valdes' family did not pay attention to Valdes or his problems. (R. 20/2967).

Both sisters testified that there was some sort of a problem with Valdes' birth. (R. 19/2951-52; 20/2959). According to Francis, their mother had "a paper" to that effect. (R. 19/2951-52). Both sisters remember that Valdes had a problem in kindergarten or first grade paying attention. (R. 19/2051-52; 20/2959). According to Joyce, it was determined that Valdes had a hearing problem. (R. 20/2959).

At age eleven, Valdes was hit by a car. Apparently, the driver did not realize that she had hit anyone and dragged Valdes for several blocks before stopping. (R. 19/2938-39; 20/2966-67). Valdes was in intensive care for several weeks with a ruptured spleen, seven broken ribs, and, according to Joyce, a broken collar bone (R. 2967-68); he almost lost one of his hands. (R. 19/2938-39). According to Joyce, Valdes had a lot of trouble dealing with his physical appearance after the accident. (R. 20/2967).

Francis testified that while Valdes was in intensive care, his father promised Valdes that he would quit drinking if Valdes recovered; although Valdes did eventually recover, the father broke his promise. (R. 19/2939-40).

After the family moved to Miami, Valdes attempted suicide on at least one occasion. Francis remembers only one attempt, when Valdes was eleven or twelve, when he inhaled paint (R. 19/2940); according to Joyce, Valdes painted himself with metallic paint to close up his pores and kill himself. (R. 20/2965-66). Following this attempt, Valdes was hospitalized in Jackson Memorial and, according to Francis, received counseling for a short time. (R. 19/2940, 2944-45; 20/2966). Joyce also recalls a second suicide attempt, around the time their parents' divorce, when Valdes tried to kill himself by drinking gasoline. (R. 20/2966).

On cross-examination, the State elicited testimony from the sisters to the effect that, as far as they knew, Valdes was not retarded, mentally handicapped, brain damaged or slow. (R. 19/2943-52; 20/2973). According to Francis, other than the counseling he received after the suicide attempt, Valdes was never treated for mental or emotional problems. (R. 19/2944-45).

Following his sisters' testimony, the court asked Valdes whether or not he would like to speak on his own behalf. (R. 20/2976-77). Consistent with his position throughout the trial as to the ineffectiveness of his attorneys, Valdes declined the opportunity to speak because his attorneys would be questioning him. Id.

The defense attorneys did not present any expert testimony regarding Valdes' mental or emotional condition now or at the time of Officer Griffis' murder. No expert sociological or psychological testimony was offered regarding the effect of Valdes' upbringing and family environment on his mental or emotional condition; no expert medical testimony was offered to explain the nature or effects of Valdes' problems

at birth, the suicide attempts or the car accident. No hospital, medical or school records were offered to substantiate Valdes' sisters' testimony.

b. The Jury Instructions

In the penalty phase, the jury was charged on four (4) aggravating and five (5) mitigating factors. (R. 20/3087-95; 28/4367-68). The court overruled all defense objections to the jury charges on the aggravating factors. (R. 20/2992, 3000, 3005), but agreed to instruct the jury on all of the mitigating factors. (R. 20/3007). The jury was charged accordingly (R. 20/3087-91), and returned a recommendation of the death penalty by a vote of eight (8) to four (4). (R. 3101-06). Following the jury's recommendation of the death penalty, the defense moved for, and was granted, an allocution hearing prior to sentencing. (R. 20/3106).

c. The Allocution Hearing

Nine days after the jury's advisory sentence was entered, the trial court held on allocution hearing. (R. 21/3114-42). Prior to this hearing, the defense submitted a memorandum of law in support of life imprisonment (R. 28/4407-13), and the State filed a memorandum in support of the death penalty shortly thereafter (R. 28/4440-76).

No one from Valdes' family testified at the hearing. (R. 21/3114). Valdes declined the offer to present a statement because of his position regarding his appointed attorneys' competence. (R. 21/3115). Thus, the defense presentation was limited to argument of counsel. Essentially, the defense attorneys' argument was that none of the aggravating factors considered by the jury, save one, exist as a matter of law or fact, but that there was evidence supporting the factors in mitigation. (R. 21/3119-30, 3136-38).

d. The Sentence

A sentencing hearing was held on July 27, 1990. (R. 21/3154-69). The Judge's sentencing order and judgment are a part of the record on appeal. (R. 28/4415-39).

The Judge determined that the evidence supported the existence of all four aggravating factors. (R. 21/3154-63). Further, the court found that the evidence supported beyond a reasonable doubt a finding of two (2) additional aggravating circumstances (1) that the capital offense was committed while the defendant was an accomplice in the commission of a robbery by the discharging of a destructive device; and (2) that the capital offense was committed to disrupt or hinder the lawful exercise of the enforcement of the law. (R. 28/4418, 4419). The court declined to consider either of these additional factors because such might constitute impermissible "doubling". Id.

The court determined that there was no competent evidence in support of any of the mitigating factors. (R. 28/4421-22). The court found "a mere hint" that Valdes was under the influence and domination of Van Poyck. (R. 21/3163). And, although the court acknowledged that there was evidence that Valdes' father was abusive and an alcoholic, the court was of the opinion that other evidence negated the effects of these facts, namely, that the father was away from the family for extensive periods and the rest of the family was loving and supportive. (R. 21/3164). Finally, the court was of the opinion that the automobile accident, Valdes' stint in the military schools, his difficult birth and the fact that he came from a broken home were not "sufficient mitigating circumstances to outweigh those aggravating circumstances heretofore found to exist." (R. 21/3165).

The death sentence was ordered on Count I, first-degree murder. (R. 21/3165; 28/4415-39).

II. SUMMARY OF ARGUMENT:

A. Guilt Phase Issues

ISSUE I. The trial court erred in failing to conduct the requisite inquiry into the effectiveness of Valdes' court-appointed attorneys, following Valdes' timely request to discharge them. In addition, the court erred in failing to advise Valdes of the parameters of his constitutional right of representation. As a result, Valdes was precluded from exercising his right of self-representation.

ISSUE II. The trial court erred in denying Valdes' motion to discharge his appointed attorneys without inquiry into the grounds alleged therein. As a result, unwanted counsel was "thrust" upon Valdes and he was denied his constitutional right to effective representation.

ISSUE III. The trial court erred in denying Valdes' motion for the appointment of a disinterested attorney to represent him at the ostensible "effective assistance of counsel" hearing. At the hearing, Valdes' attorneys were operating under a conflict of interest in that the attorneys were required to maintain a position contrary to Valdes' best interests. As a result, Valdes was left unrepresented at a critical stage of the proceedings in violation of his constitutional rights.

ISSUE IV. The trial court erred in failing to excuse for cause two (2) jurors whose state of mind precluded them from rendering a verdict based solely on the evidence and the law. One juror was biased in favor of the death penalty, and another was equivocal

about her ability to determine Valdes' guilt or innocence as a result of pre-trial publicity concerning the in-court altercation between Valdes and a witness. As a result, Valdes was denied his constitutional right to have his case decided by a fair and impartial jury.

ISSUE V. The trial court erred in sequestering Valdes during a critical stage of the proceedings, out of the reach of his attorneys, because it was not the least restrictive means of controlling him. As a result, Valdes was denied his constitutional right to be present during jury selection, a critical stage, and to communicate with counsel.

ISSUE VI. Valdes' conviction of armed robbery constitutes double jeopardy because Valdes was convicted of first-degree felony murder with armed robbery as the underlying felony.

ISSUE VII. Valdes' conviction of first degree felony murder is contrary to the law; Valdes should have been charged with the precise crime he committed - depriving an officer of means of protection - which is not an enumerated felony under the felony-murder statute.

ISSUE VIII. Valdes' conviction of armed robbery is contrary to the law because Valdes was not charged with the precise crime committed.

ISSUE IX. The trial court erred in denying Valdes' motion for judgment of acquittal as to Count XI, aggravated assault, because the evidence does not establish beyond a reasonable doubt that Valdes did any acts in furtherance of this crime.

ISSUE X. The trial court erred in denying Valdes' motion for judgment of acquittal as to Count XII, aiding escape, because the State failed to prove that anyone was

attempting to escape. It is axiomatic that Valdes cannot lend aid to an escape that is not attempted.

ISSUE XI. Valdes' conviction of six counts of attempted first degree murder is error because the evidence supporting the convictions is insufficient. The evidence on these counts is as consistent with Valdes' innocence as with his guilt.

ISSUE XII. It is fundamentally unfair to convict Valdes of six counts of attempted first degree murder because the primary participant and instigator, Van Poyck, was convicted of attempted manslaughter.

B. Penalty Phase Issues

ISSUE XIII. The trial court's error in denying Valdes' motion to discharge his attorneys prejudiced Valdes at the penalty phase. Had a proper inquiry been conducted, the trial court would have discovered that Valdes' attorneys were unprepared to present a penalty phase case on Valdes' behalf. Valdes was denied his constitutional right to effective assistance of counsel at the penalty phase, and this error impermissibly contributed to the imposition of the death sentence.

ISSUE XIV. The ineffectiveness of Valdes' attorneys during the penalty phase prejudiced Valdes and contributed to the imposition of the death sentence. Valdes was denied his constitutional right to effective assistance of counsel because his attorneys were unprepared to present, and did not develop and present mitigating circumstances, even though the record shows that such evidence existed.

ISSUE XV. The trial court abused its discretion in denying Valdes' motion for a continuance of the penalty phase proceedings, where Valdes' attorneys stated that they

were unprepared to go forward. The severe and final nature of the punishment involved, and the notion of due process, required that Valdes be given every opportunity to present a case in mitigation.

ISSUE XVI. The trial court erred as a matter of law in finding that the murder was committed in a cold, calculated and premeditated manner. In order to warrant this finding, the murder in question must evidence a "heightened premeditation" involving a "careful plan or prearranged design". The facts of this case show that the murder occurred as a result of a "hopelessly bungled" escape attempt.

ISSUE XVII. The trial court erred in failing to find the mitigating circumstances that Valdes was under the substantial domination and control of Van Poyck at the time of the murder. This finding is contrary to the testimony of Valdes' live-in girlfriend. Moreover, even were the girlfriend's testimony insufficient to establish this factor, the fault is with Valdes' attorneys. To punish Valdes for the errors of his attorneys is cruel and unusual punishment.

ISSUE XVIII. The trial court erred in failing to find the mitigating factor that Valdes was an accomplice to the crimes charged. The determination is contrary to this Court's statement, in a separate case, that Van Poyck was the major player in the felony murder.

ISSUE XIX. The trial court in erred failing to find the mitigating factor that Valdes acted under an emotional disturbance at the time of the murder. Valdes' sisters' testimony provided fertile ground to substantiate this factor, but again, due to Valdes' attorneys' deficient preparation, the court heard only an indication of this factor.

ISSUE XX. The trial court erred in denying Valdes' challenge for cause to a juror who was biased in favor of the death penalty. The juror should have been excused because her bias would require the defense to meet an impermissible burden as to evidence in mitigation. As a result of this error, Valdes was denied his constitutional right to a fair and impartial trial.

ISSUE XXI. The trial court erred in admitting into evidence the testimony of Officer Gaglione, a guard at the jail, who overheard a conversation between Valdes and another inmate. Even on direct and re-direct examination by the State, Gaglione said that he overheard Valdes say that other people ("they") performed and/or planned the murder; Gaglione did not testify that Valdes was involved in the planning. The manner in which the State argued Gaglione's testimony mislead the jury and confused the issue as to Valdes' motive and/or state of mind, and it is reasonable possibly that the jury's verdict was a product of this improper evidence.

III. ARGUMENT:

A. Guilt Phase Issues

ISSUE I. THE TRIAL COURT ERRED IN FAILING TO MAKE A PROPER INQUIRY INTO THE EFFECTIVENESS OF COURT APPOINTED COUNSEL AND IN FAILING TO GIVE APPELLANT PROPER ADVICE REGARDING HIS RIGHT OF REPRESENTATION, THEREBY PREJUDICING APPELLANT'S CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL.

The trial court erred under in failing to fulfill its obligation under Nelson v. State, 272 So.2d 256 (Fla. 4th DCA 1973), and Hardwick v. State, 521 So.2d 1071 (Fla. 1988), to make

a sufficient record inquiry into the effectiveness of Valdes' court-appointed attorneys and to properly advise Valdes of his "choices" regarding his constitutional right of representation.

As a result of this judicial error, Valdes was denied the right of effective representation, and, under these circumstances, it cannot be said that there is no reasonable possibility that the court's error did not contribute to Valdes' convictions. As such, the error is not harmless, and this case must be reversed and remanded to the trial court for a new trial. Ciccarelli v. State, 531 So.2d 129 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

A. An Indigent Defendant Has the Right to Effective Court-Appointed Counsel.

An indigent defendant's right to court-appointed counsel includes the right to effective representation by that counsel. Anders v. State, 386 U.S. 738, 744-45 (1967).

The Fourth District Court of Appeal stated in Nelson v. State, that

> where a defendant, before the commencement of trial makes it appear to the trial judge that he desires to discharge his court-appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge.

272 So.2d at 258.

In the instant case, through his pro se papers and in-court statements, Valdes "made it appear to the trial judge" that he desired to discharge his appointed attorneys. (R. 8/1268; 26/3976-92, 4231-47).

In Nelson, the district court posited a procedure for a trial court to follow when confronted with an indigent's request to discharge his appointed counsel

> If incompetence of counsel is assigned as the reason, or as a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that court appointed counsel is not rendering effective assistance to the defendant.

Nelson, 274 So.2d at 258-59.

This Court approved the district court's procedure in Hardwick v. State, supra.

In the instant case, following Valdes' timely requests to discharge his appointed attorneys[15] the trial court held a hearing, ostensibly to determine the appointed attorneys' effectiveness. (R. 8/1293-94). In fact, however, the hearing involved only the State's presentation of three witnesses in opposition to Valdes' claim regarding his appointed attorneys' tortious conduct/threats. (R. 8/1290-1303). Valdes' claim regarding the attorneys' conduct was not the only ground Valdes asserted in requesting the attorneys' discharge.

At the "effective assistance" hearing, neither Valdes nor his attorneys cross-examined any of the State's witnesses; neither Valdes nor his attorneys put on evidence/testimony supporting Valdes' claim. (R. 8/1297, 1300-01, 1303).

Prior to the hearing, Valdes requested, and was denied, the appointment of an attorney ad litem to represent him at the hearing. (R. 8/1290-93; 27/4259-65). During the hearing, Valdes reiterated his frustration at having no attorney representing his interest, and told the court that because he was unrepresented, he did not recognize the proceedings. (R. 1292, 1304-05). The court "interpreted" Valdes' statements/objections as a waiver of Valdes' right to cross-examine the State's witnesses.

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[15] Pursuant to Nelson, a request to discharge appointed counsel must be made before trial. Compare, Dukes v. State, 503 So.2d 455, 456 (Fla. 2d DCA 1987).

Essentially (as noted by Valdes in his motion requesting appointment of an attorney ad litem), Valdes' appointed attorneys were placed in a position of defending against the State's evidence that the attorneys did not strike/threaten Valdes. In effect, to properly represent Valdes at this point in the case, Valdes' appointed attorneys were required to show that they did strike/threaten him. Needless to say, the attorneys did not cross-examine any of the State's witnesses, whose testimony was that the attorneys did not strike/threaten Valdes.

At no time during the alleged "effectiveness hearing" did the court ask Valdes to explain his reasons for wanting to discharge the appointed attorneys; to explain his allegations concerning the attorneys' failure to adequately prepare a defense or investigate leads that Valdes believed necessary to his defense; at no point did the court ask Valdes to address his claim regarding the attorneys' lack of attention to/contact with Valdes during the months preceding trial (while Boudreau was involved with "the Amos case and another first degree murder case).[16] The record in the instant case shows that the trial court failed to make a sufficient inquiry under Nelson and Hardwick regarding Valdes' reasons for wanting to discharge his appointed attorneys.

Moreover, the record shows that the trial court failed to make the requisite inquiry of the appointed attorneys.

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[16] Pursuant to Nelson, the allegation which triggers a court's duty to inquire is that appointed counsel is incompetent. Nelson, 274 So.2d at 258-59. Compare, Johnson v. State, 560 So.2d 1239 (Fla. 1st DCA 1990); Smelley v. State, 486 So.2d 669 (Fla. 1st DCA 1986). In his pro se papers and in-court statements, Valdes labels his reasons for wanting to discharge his appointed attorneys "conflict of interest", but the substance of his papers/statements shows that Valdes challenged their competence. See Brooks v. State, 555 So.2d 929, 930 (Fla. 3d DCA 1990).

> Although we are not able to formulate any verbal criteria that will define for all situations conduct which measures up to "effective assistance", it may be said with reasonable assurance that the delivery of effective assistance requires the attorney involved to make a reasonable investigation into the facts of the case and to acquaint himself with the law pertinent to the facts. In addition, effective counsel should be free of any influence or prejudice which might substantially impair his ability to render independent legal advice to his indigent client. (emphasis added)

Nelson, 274 So.2d at 258. See also, Perkins v. State, 585 So.2d 390 (Fla. 1st DCA 1991) (conviction and sentence for sale of cocaine reversed and remanded for new trial; trial court's failure to inquire of appointed counsel as to counsel's reasonable investigation into the law and facts of the case insufficient under Nelson.)

Rather than make the requisite inquiry of appointed counsel, the court merely asked Boudreau if he wished to "present anything more". Boudreau responded by objecting to Valdes' absence from the courtroom[17] by stating that he feared Valdes and that there was a conflict between Valdes and the attorneys; and by reiterating the attorneys' desire to withdraw. (R. 8/1307-08, 1310-11; 9/1344; 10/1430-32). At no time did the trial court ask the appointed attorneys to address Valdes' concern about the preparation of the defense or Valdes' claim that certain leads remained uninvestigated; at no point did the court ask the attorneys about their lack of attention to/contact with Valdes in the months preceding trial. Questioning on these omitted areas was particularly crucial in the instant case in light of the fact that the court was well-aware of Boudreau's involvement with "the Amos case" and

[17] Following the testimony of the State's third witness in opposition to Valdes' charges concerning his attorneys' conduct and the attorneys' failure to cross-examine the witness, Valdes became angry, swore at the witness and struck him. Valdes was removed from the courtroom and placed in an adjoining room.

another first degree murder trial in early 1990. The record in the instant case does not reveal that the court was ever made aware of Valdes' appointed counsels' trial preparation and/or investigation of the facts of the case. See Brooks v. State, 555 So.2d 929, 929-30 (Fla. 3d DCA 1990). Rather, the record shows that the trial court failed to make even a cursory inquiry of the appointed attorneys as required by Nelson and Hardwick.

B. A Trial Court's Failure to Protect an Indigent's Right to Effective Counsel Under Nelson and Hardwick is Reversible Error.

The body of case law which emerged from the district courts following Nelson and Hardwick establishes that a trial court's failure to conduct an appropriate Nelson inquiry is error. A conviction and sentence under such circumstances must be reversed and the matter remanded for a new trial. See Brooks, 555 So.2d at 929-30, (following defendant's written and oral motions to discharge appointed counsel, trial court made no inquiry of either defendant or counsel and failed to rule on whether a reasonable basis exists for defendant's challenge to counsel's competence; conviction and sentence reversed and remanded for new trial); Williams v. State, 532 So.2d 1341, (Fla. 4th DCA 1988) (trial judge did not make necessary inquiry following defendant's motion to discharge counsel; conviction and sentence reversed and remanded for new trial); Chiles v. State, 454 So.2d 726, 727 (Fla. 5th DCA 1984) (trial court failed to conduct Nelson inquiry following defendant's motion to discharge counsel; order revoking probation reversed and remanded for new hearing); Parker v. State, 423 So.2d 553, 555 (Fla. 1st DCA 1982) (failure to conduct evidentiary hearing following defendant's motion to discharge counsel violated defendant's constitutional right to counsel; conviction and sentence reversed and remanded for new trial).

The ease with which the district courts have applied the Nelson-Hardwick procedure in a proper case, and the concomitant consistency in the resulting appellate decisions, proves that a strict application of the above-mentioned procedure is beneficial to both bench and bar. Two cases, decided by this Court following Hardwick, warrant further discussion. These cases may, at first blush, appear to narrow the responsibility of a trial court to conduct a Nelson inquiry: Bowden v. State, 16 FLW 614 (Fla. September 12, 1991), and Capehart v. State, 583 So.2d 1009 (Fla. 1991). Nonetheless, the factual situations in these cases are distinguishable from the instant case, and, in fact, examination of these cases shows that they do not narrow the court's duty under Nelson and Hardwick.

In Bowden, this Court stated that the record showed that the trial court made an adequate inquiry of both defendant and the appointed attorneys. In addition, in Bowden, the substance of the appointed attorneys' reason for moving to withdraw and defendant's reason for wanting them off his case was a breakdown in communication and defendant's lack of faith in the attorneys' representation. Finally, the appellate argument in Bowden failed to include an assertion that by denying defendant's request to discharge, defendant was deprived of effective assistance of counsel or otherwise prejudiced. See Bowden, n. 2 and the accompanying text.

In the instant case, the trial court merely entertained the State's evidence in opposition to Valdes' claim that his appointed attorneys struck/threatened him; no inquiry of counsels' effectiveness was made. In addition, in the instant case, Valdes' reasons for wanting to discharge his appointed attorneys go well-beyond a mere dissatisfaction with the attorneys: according to Valdes, the appointed attorneys failed to conduct a proper pre-trial

investigation, failed to prepare an adequate defense, and failed to maintain contact with him. Finally, in the instant case, Valdes maintains that the trial court's failure to conduct a Nelson inquiry prejudiced his right to effective counsel.

In Capehart, defendant's complaint regarding the effectiveness of appointed counsel was not timely made: the first time the court was made aware that defendant was unhappy with appointed counsel was after the jury found defendant guilty. In the instant case however, Valdes made a timely request to discharge his appointed attorneys.

As noted above, adhering to a strict, "bright-line" application of Nelson and Hardwick, upon a timely request by an indigent defendant to discharge his appointed counsel, facilitates the orderly administration of justice and judicial economy: ultimately, a strict application of these precedents under the appropriate circumstances will reduce the possibility of post-conviction attack. See Nelson, 274 So.2d at 259.

C. Where the Court Determines that Appointed Counsel is Competent to Represent a Defendant, the Trial Court Must Inform the Defendant of His Constitutional Right of Representation.

Pursuant to Nelson, following a trial court's record inquiry of defendant and counsel, if it is determined that counsel is competent to continue, the court must nonetheless advise the defendant of his "choices" regarding his right of representation:

> If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel, the State may not thereafter be required to appoint a substitute.

Nelson, 274 So.2d at 259. See also Williams v. State, 427 So.2d 768 (Fla. 2d DCA 1983).

In Chiles v. State, 454 So.2d 726 (Fla. 5th DCA 1984), revocation of defendant's order of probation was reversed and the matter remanded for a new hearing, based on the trial court' summary denial of defendant's request to discharge his appointed attorney without following the procedure set-out on Nelson. The gravamen of the trial court's error was explained as follows:

> Had [the Nelson] procedure been followed and [defendant] advised that substitute counsel would not be appointed, he could have insisted on dismissal of [appointed counsel] and chosen to exercise his right to represent himself provided his right to do so was unequivocal.... [I]n summarily denying [defendant's] motion, the trial judge indicated to [defendant] that his only course was to accept [appointed counsel] as his advocate. (emphasis added)

Chiles, 454 So.2d at 727.

The Fifth District Court of Appeal recognized merely advising a defendant that "the State may not thereafter be required to appoint a substitute", does not end a trial court's duty under Nelson. Proper "advice" in this regard includes advising a defendant of the parameters of his right of representation, including the right of self-representation. Merely advising a defendant, unhappy with his appointed attorney, that the State is not required to appoint a substitute for otherwise competent counsel is not enough; to stop at this point leaves the impression that the defendant is forced to proceed with such counsel.

> To thrust counsel upon a defendant against his considered wish, violates the logic of the Sixth Amendment to the United States Constitution, which guarantees rights necessary to full defense, including the implied right to self-representation.

Jackson v. State, 572 So.2d 1000, 1001 citing Faretta v. California, 422 U.S. 806 (1975).

In the instant case, as in Chiles, the trial court failed to discharge its duty to Valdes vis-a-vis his Sixth Amendment rights in two regards: as in Chiles, the trial court in Valdes' case did not conduct a sufficient inquiry of Valdes or appointed counsel, and the trial court did not advise Valdes of the parameters of his right of representation. In other words, contrary to the "logic" of the Sixth Amendment and without appropriate inquiry and advice, counsel was "thrust" upon Valdes against his considered wish.

The full extent of the "advice" requirement under Nelson was also addressed in Taylor v. State, 557 So.2d 138 (Fla. 1st DCA 1990). In Taylor, even though the trial court made a sufficient inquiry regarding appointed counsel's competency to render effective assistance, defendant's conviction was reversed and remanded for a new trial because "a determination of competency of counsel does not fully satisfy the duties imposed on the trial court." Id. at 143.

According to the First District Court of Appeal in Taylor, a trial court's failure to advise a defendant (1) that he could discharge appointed counsel, but that the state would not thereafter be required to appoint a substitute and (2) that the defendant had the right to represent himself, was reversible error. Id. Accord, Perkins v. State, 585 So.2d 3990 (Fla. 1st DCA 1991); Matthews v. State, 584 So.2d 1105 (Fla. 2d DCA 1991); Jackson v. State, 572 So.2d 1000 (Fla. 1st DCA 1990).

The above-cited cases demonstrate that in order to effectively protect a defendant's constitutional rights under Nelson a court must fully advise an indigent defendant of the parameters of his right of representation.

An indigent criminal defendant has a Sixth Amendment right to court appointed counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). In addition, absent unusual circumstances, all criminal defendants who are mentally competent have a Sixth Amendment right to self-representation. State v. Cappetta, 216 So.2d 749 (Fla. 1968) cert. denied, 394 U.S. 1008 (1969). In other words, a mentally competent, indigent criminal defendant has a constitutionally protected right of choice in connection with his defense in a criminal proceeding: he may exercise his right to have counsel appointed or he may exercise his right of self-representation. In the instant case, Valdes was denied the opportunity to exercise his right "choice" because the parameters of this right were never explained to him.

The right to self-representation is not absolute. A waiver of the right to appointed counsel, and, concomitantly, an exercise of the right of self-representation, must be intelligent and knowing. Faretta; see also, Florida Rule of Criminal Procedure 3.111(d)(3). Moreover, a request for self-representation must be stated unequivocally. Chapman v. U.S., 553 F.2d 886, 892 (5th Cir. 1977).

Under Faretta, when an accused makes a timely and unequivocal demand for self-representation, the trial court is required to advise him of the benefits relinquished by and the dangers of self-representation. Following the giving of this advice, the court is required to conduct a record inquiry to determine whether the accused is knowingly and intelligently waiving his right to appointed counsel. A court's failure to conduct a Faretta inquiry is reversible error. Faretta, 422 U.S. at 835-36; see also Smith v. State, 444 So.2d 542, 544-45 (Fla. 1st DCA 1984). However, absent an unequivocal demand for self-

representation, a trial court is not required to conduct a Faretta inquiry on the issue of self-representation.

A Nelson-Hardwick procedure, like a Faretta inquiry, protects an indigent defendant's right of representation. It can be said that the procedures/inquiries share an intimate relationship: where Nelson ends, Faretta begins. However, until and unless an indigent defendant, unhappy with his present appointed counsel, is properly advised of the parameters of his right of representation under Nelson, namely, to proceed with present counsel or represent himself, his right to demand self-representation and be examined under Faretta is foreclosed because it never arises.

Moreover, requiring a trial court to fully and specifically advise a dissatisfied defendant of the parameters of his right of representation is consistent with the notions of orderly administration of justice, consistency in the law, and a reduction of post-conviction attacks. Compare, McCall v. State, 481 So.2d 1231 (Fla. 1st DCA 1985) (conviction upheld; trial judge carefully explained defendant's right of representation).

Therefore, by failing to conduct a sufficient record inquiry into the effectiveness of Valdes' appointed counsel and in advising Valdes of the parameters of his right of representation, Valdes' convictions on all counts must be reversed. As the court failed to conduct the procedures required under Nelson and Hardwick, it cannot be said that Valdes received competent representation and that his convictions were not a result of counsel's incompetence. Thus, error is not harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

In addition, because the trial court failed to advise Valdes of the parameters of his right of representation, Valdes was precluded from exercising his constitutional right to waive appointed counsel and represent himself, and to be examined under Faretta. As such, it cannot be said that Valdes' convictions were not a result of the denial of Valdes' right to represent himself, and the error was not harmless. DiGuilio, supra.

ISSUE II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISCHARGE HIS APPOINTED ATTORNEYS WITHOUT SUFFICIENT INQUIRY INTO THE GROUNDS ALLEGED IN THE MOTION, THEREBY PREJUDICING APPELLANT'S CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL.

In large part, the law and the reasoning posited under Issue I, supra, is controlling on this issue, and is incorporated herein without reiteration. The trial court's error in denying Valdes' motion to discharge is inextricably tied to its failure to conduct a sufficient Nelson inquiry into Valdes' reasons for requesting the discharge of his attorneys.[18]

As a result of the trial court's failure to consider Valdes' reasons for requesting the discharge of his appointed attorneys and to conduct an appropriate inquiry thereon, Valdes was denied the right of effective representation. Under these circumstances, it cannot be said that there is no reasonable possibility that the court's error did not contribute to Valdes' conviction. As such, the error is not harmless, and Valdes' convictions must be reversed.

In denying Valdes' motion to discharge his appointed attorneys, the trial court in the instant case, stated that Valdes' disruptive behavior precluded an inquiry under Hardwick

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[18] The argument and the reasoning posited herein applied with equal force to the trial court's denial of Valdes' appointed attorneys' motion to withdraw.

(wherein this Court approved the procedure of the Fourth District Court of Appeal in Nelson), and that Valdes was incapable of representing himself.[19] (R. 8/1309-12; 27/4276-77). The first of these "determinations" was made without the requisite inquiry under Nelson and Hardwick; the second was made without conducting a Faretta inquiry. Moreover, as more fully argues in Issue I, supra, the trial court in the instant case never reached the Faretta issue because Valdes was precluded from exercising his right to represent himself by the court's failure to properly advise Valdes under Nelson-Hardwick.

A. A Trial Court Must Strike a Balance Between the Orderly Administration of Justice and a Defendant's Constitutional Rights.

As this Court noted in Jones v. State, 449 So.2d 253, (Fla. 1984):

> [N]either the exercise of the right to self-representation nor to appointed counsel may be used as a device to abuse the dignity of the court or to frustrate orderly proceedings.

Jones, 449 So.2d at 257.

The United States Supreme Court has held that there are three constitutionally permissible ways for a court to handle a disruptive defendant, including removing him from the courtroom until he promises to behave. Illinois v. Allen, 397 U.S. 337, 343-44 (1970) cited in Jones, 449 So.2d at 261-62.

In the instant case, Valdes' conduct in swearing at and striking McDaniels, the State's third and final witness at the alleged "effectiveness of counsel" hearing, was disruptive. As such, the court may have been initially justified in removing Valdes from the

[19] The court also stated that it was "of the opinion" that even if the attorneys withdrew, Valdes' future course of conduct would be to frustrate the court and the trial.

courtroom without conducting a Nelson-Hardwick inquiry. But, see the argument posited infra, Issue V.

Nonetheless, the record shows that on at least three (3) occasions after the above-mentioned incident, the trial judge had Valdes returned to the courtroom and asked Valdes whether or not he would behave. The record also shows that at some point, the judge was satisfied that Valdes would behave, and Valdes was allowed to remain in court for the remainder of the proceedings, including the trial. (R. 1304-05, 1318-21; 10/1430-32).

Not once, on any of the occasions that Valdes was returned to court and questioned, did the court make any effort to inquire of Valdes or his appointed counsel regarding Valdes' reasons for wanting to discharge his attorneys.[20] At no time did the court advise Valdes of his right to represent himself. Moreover, even after the court was satisfied that Valdes would behave and allowed him to remain in court, the trial judge did not initiate the requisite inquiry concerning Valdes' claim that his attorneys were ineffective.

Even though the right of an accused to be present in court during judicial proceedings against him may be lost as a result of the accused's disruptive behavior, the right may be reclaimed as soon as the accused is willing to behave and conduct himself in accordance with the decorum and respect inherent in the concept of judicial proceedings. Illinois v. Allen, 397 U.S. at 343-44.

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[20] Just before Valdes struck McDaniels, the court was entertaining the State's evidence in opposition to Valdes' claim that his appointed attorneys struck/threatened him. In addition to alleging the appointed attorneys' tortious conduct and threats, Valdes' motion to discharge and his other pro se papers challenged the attorneys' pre-trial preparation and lack of attention to his case. These grounds were never developed on the record.

Thus, although the trial court in the instant case was initially justified in removing Valdes from the courtroom without conducting a Nelson inquiry, the record shows that the justification for the court's refusal to inquire of Valdes and his appointed attorneys (Valdes' disruptive conduct) dissipated prior to the commencement of trial. At that point, Valdes was entitled to remain in the courtroom; at that point, Valdes' right to an appropriate inquiry and instruction regarding his right of representation was not outweighed by the court's interest in orderly proceedings.

Moreover, the trial court's "determination" regarding its duty under Nelson-Hardwick and Faretta are without record support. As to Nelson-Hardwick, the trial court determined that Valdes' conduct precluded meaningful inquiry; as argued above, such justification dissipated prior to trial and the record provides no support for the trial court's failure to inquire once it was satisfied with Valdes' conduct. As to Faretta, the court stated that Valdes was incapable of representing himself. This "determination" was made without any inquiry. Moreover, the record supports a contrary finding: in light of Valdes' mesne pro se papers, there is record support for a finding that Valdes was capable of making a knowing and intelligent waiver of appointed counsel and in preparing a defense/conducting his own trial, had he been given the opportunity.

In light of the foregoing, Valdes' convictions on all counts must be reversed.

ISSUE III. THE DENIAL OF APPELLANT'S MOTION FOR APPOINTMENT OF A DISINTERESTED ATTORNEY TO REPRESENT HIM AT THE "EFFECTIVE ASSISTANCE OF COUNSEL" HEARING WAS ERROR BECAUSE APPELLANT'S PRESENT COUNSEL WAS NOT COMPETENT TO REPRESENT APPELLANT AT THAT HEARING DUE TO A CONFLICT OF

INTEREST AND BECAUSE IT LEFT APPELLANT UNREPRESENTED AT A CRITICAL STAGE OF THE PROCEEDINGS.

Due to a conflict of interest, Valdes' present counsel was incompetent to represent Valdes at the "ineffective assistance of counsel" hearing. As a result of the trial court's error in denying Valdes' motion for a disinterested attorney, Valdes was left unrepresented at a critical stage of the proceedings.

A. An Accused is Entitled to be Represented by Counsel at Every "Critical Stage" of the Proceedings.

An accused's Sixth Amendment right to assistance of counsel applies to all "critical stages" of criminal proceedings. Anderson v. State, 420 So.2d 574, 576 (Fla. 1982). The absence of counsel at a critical stage offends the due process requirement "imposed upon the states by the dual impact of the Fourteenth and Sixth Amendments to the federal constitution...." Montgomery v. State, 176 So.2d 331, 334 (Fla. 1965) citing Gideon v. Wainwright, 372 U.S. 335 (1932).

A person's federal constitutional right to counsel attaches after adversary criminal proceedings have been initiated. Sobczak v. State, 462 So.2d 1172, 1183 (Fla. 4th DCA 1984) citing Kirby v. Illinois, 406 U.S. 682, 689-90 (1972). Moreover under Florida constitutional and procedural law, an accused is entitled to assistance of counsel in all criminal prosecutions, commencing as early as the defendant's first appearance or when he is formally charged with an offense. Sobczak v. State, 462 so.2d 1172, 1173 (Fla. 4th DCA 1985) citing Article I, section 16, of the Florida Constitution and Florida Rules of Criminal Procedure 3.130 and 3.111(a).

In the instant case, the ostensible "effective assistance of counsel" hearing was a critical stage in the criminal prosecution of Valdes. Although Valdes' appointed counsel were present at the hearing, the facts and circumstances of this case show that their mere presence was not sufficient to safeguard Valdes' federal and state constitutional right to effective counsel at this critical stage of the proceedings. Specifically, Valdes' appointed attorneys' interest in the proceedings was self-serving and, more important, directly conflicted with Valdes' best interests and his defense. (R. 8/1290-1303).

Valdes requested and was denied appointment of a disinterested attorney to represent his interests at the purported "effective assistance of counsel" hearing. (R. 8/1290-93; 27/4259-65). The hearing was held following Valdes' pro se motion to discharge his present court appointed attorneys, shortly before trial commenced. (R. 8/1268; 26/3976-92, 4231-47).

As grounds for his motion, Valdes maintained that the appointed attorneys were incompetent to present his defense because their lengthy involvement with other first degree murder trials precluded their spending any time with Valdes or preparing his case, and because they failed to investigate certain leads that Valdes believed meritorious. In addition, Valdes' motion alleged that an ongoing conflict between Valdes and the attorneys resulted in an altercation wherein one of the attorneys struck, and the other threatened Valdes.

As more fully argued supra, upon Valdes' motion alleging his appointed attorneys' incompetence, the trial court was required to conduct a Nelson-Hardwick inquiry. The focus of the inquiry was supposed to be the competency of the attorneys in question in

light of the testimony of both the movant and the attorneys. As argued supra, a Nelson-Hardwick hearing is necessary to protect a criminal defendant's constitutional right to effective counsel. In the instant case, the trial court never conducted an appropriate hearing and no record in support of Valdes' claims of attorney incompetency/ineffectiveness, or the attorneys' responses thereto, was made.[21]

Rather, the purported "effective assistance" hearing focused solely on Valdes' claim regarding the attorneys' tortious conduct. In light of the focus of this hearing, the inadequacy of which is error in and of itself, Valdes was put in the position of being represented at this critical stage by attorneys with conflicting interests in violation of the federal and state constitutions. Valdes' attorneys were "defending" against claims implicating their ethical and pecuniary interests; the attorneys did not, and could not, ensure Valdes' interest were protected.

B. Counsel for Appellant was Ineffective to Represent Appellant at the Hearing on Appellant's Motion to Discharge Counsel Due to a Conflict of Interest.

An attorney has an ethical obligation to avoid conflicts of interest. Barclay v. Wainwright, 444 So.2d 956, 958 (Fla. 1984).

> An actual conflict of interest that adversely affects a lawyer's performance violates the Sixth Amendment and cannot be harmless error.

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[21] Moreover, as argued supra, because an appropriate Nelson-Hardwick inquiry was never conducted, Valdes was never informed of his right of self-representation. In turn, Valdes was precluded from exercising his essential right and submitting to a Faretta inquiry.

Id. citing Glasser v. United States, 315 U.S. 60 (1942) and Foster v. State, 387 So.2d 344 (Fla. 1980).

The vast majority of the cases addressing the above-mentioned principle of law concern those conflicts of interest which may arise where a single attorney represents either co-defendants or multiple clients with competing interests, i.e., representing a state's witness against a defendant and the defendant. See for eg., Glasser and Foster, supra.

Nonetheless, the "personal conflict" apparent in the instant case is equally offensive to the concept of an accused's entitlement of effective assistance of counsel at a critical state of the criminal prosecution against him. See Morales v. State, 513 So.2d 695 (Fla. 3d DCA 1987) (Pearson, J., concurring; Schwartz, Chief J., dissenting) (denial of post-conviction relief on the basis of ineffective assistance of counsel reversed and remanded).

In Morales, defendant's attorney failed to use a certain tape recording of a telephone conversation between defendant and Reynaldo Batista (a co-defendant at the time of the phone call and, subsequently, the state's chief witness against defendant), in cross-examining Batista. The attorney believed that his conduct would be subject to criminal action against him because he prompted defendant to record the call in violation of Florida Statute 934.03(1)(a) (1981).[22] Morales, 513 So.2d at 695-96 (Pearson, J., concurring).

The Third District Court of Appeal determined that the attorney:

> labored under a conflict of interest in his representation, depriving Morales of effectiveness of counsel....The record indicates that Morales' counsel was subject to personal concerns

[22] This section provides that any person who procures any other person to intercept a wire communication, including the recording of a conversation without the other party's permission, shall be guilty of a third degree felony.

> regarding the effect of his trial conduct. Those concerns constituted the active representation of "'conflicting interest'" which "'adversely affected his...performance,'" (citations omitted) and inhibited the zealous representation required of attorneys. (Citations omitted).

Morales, 513 So.2d at 695, quoting Strickland v. Washington, 466 U.S. 688, 692 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) and citing Von Moltke v. Gillies, 332 U.S. 708 (1948).

The key to whether an attorney is subject to a conflict of interest such as would deprive a defendant of effective assistance of counsel is whether the attorney "must serve a dual and adverse stewardship". Bellows v. State, 508 So.2d 1330, 1332 (Fla. 2d DCA 1987) (a conflict which adversely affects an attorney's performance violates a defendant's Sixth Amendment rights and cannot be held harmless error.)

In Bellows, the Second District Court of Appeal determined that the trial court erred in denying the public defender's motion to withdraw and reversed defendant's conviction. The public defender moved to withdraw because of an alleged conflict between "co-defendants". Id. at 1331.

Following Bellows' arrest on narcotics charges, the public defender's office was appointed to represent him. In addition, the public defender was appointed to represent Colleen Collins on a charge that she violated her probation. Not only was Collins a client of the public defender, she was to be a state's witness against Bellows. Thus, the public defender claimed that Bellows' defense would be hampered because in defending his client, Bellows, the public defender would be required to cross-examine Collins, also his client. Id. The appellate court rejected the trial court's finding that the public defender's alleged

conflict was too speculative, stating that even though Bellows and Collins were no co-defendants in the same matter, the public defender was placed in the position of representing clients with "significantly competing interests." Id. at 1331-32.

As in Bellows, the attorneys in the instant case served a "dual and adverse stewardship" at the effective assistance of counsel hearing: The State presented three witnesses who contradicted Valdes' claim regarding the attorneys' conduct. No cross-examination was conducted as to any of the State's witnesses. (R. 8/1292-1303). To be effective, any cross-examination of the State's witnesses had to refute the State's position that the attorneys did not strike/threaten Valdes: in other words, to be effective, the attorneys had to attempt to establish that they did strike/threaten Valdes. As in Morales, in the instant case, the attorneys' representation of Valdes at the effective assistance of counsel hearing was subject to personal concerns.

Due to the conflict of interest under which Valdes' appointed attorneys labored at the effective assistance of counsel hearing, the trial court should have appointed a disinterested attorney for the limited purpose of representing Valdes at the hearing. Cf., Adams v. State, 380 So.2d 421 (Fla. 1980) (It was error to appoint public defender for the Nineteenth Circuit to represent petitioner in a post-conviction proceeding concerning the effectiveness of that office; the public defender would be faced with the dilemma of vigorously defending petitioner's claim or defending the reputation of his office).

In order to demonstrate an actual conflict, a complainant must show that a different attorney, not laboring under a conflict, could have employed a different defense

strategy, thereby benefitting the defense. United States v. Mers, 701 F.2d 1321, 1328-30 (11th Cir. 1983) cert. den., 464 U.S. 991.

A disinterested attorney, appointed for the limited purpose of representing Valdes at the effective assistance of counsel hearing, could have employed a different and beneficial defense strategy: a disinterested attorney could have developed effective cross-examination of the State's witnesses and, more importantly, the attorney could have presented evidence in support of Valdes' other claims regarding his present attorneys' pre-trial investigation and defense strategy. It was Valdes' other claims, those pertaining to the effectiveness and competence of the appointed attorneys, that were of paramount import at the hearing; those claims were never addressed.

Therefore, because Valdes' appointed attorneys had a personal conflict which rendered them ineffective to represent Valdes at the effective assistance of counsel hearing, Valdes was left unrepresented at this critical stage of the criminal proceedings against him. In denying Valdes' motion for the appointment of a disinterested attorney to represent him at the hearing, the trial court denied Valdes due process and his Sixth Amendment right to effective counsel. Moreover, a disinterested attorney could have benefitted the defense by ensuring that an appropriate Nelson-Hardwick inquiry was conducted. On this ground, all of Valdes' convictions must be reversed.

ISSUE IV. THE TRIAL COURT ERRED IN FAILING TO EXCUSE FOR CAUSE TWO PROSPECTIVE JURORS WHOSE STATE OF MIND PRECLUDED THEM FROM RENDERING A VERDICT SOLELY ON THE EVIDENCE AND THE LAW.

The trial court erred in denying Valdes' motion to excuse for cause juror Stelzel, because Stelzel exhibited a strong bias in favor of the death penalty, and juror Garko, because Garko was not certain whether her exposure to the publicity surrounding the altercation between Valdes and McDaniels caused her to form an opinion as to Valdes' guilt or innocence.

The trial court's error in this regard is not harmless because Valdes was forced to exercise a peremptory challenge to remove juror Garko and, as a result, when Stelzel was seated on the panel, Valdes was unable to back strike because he had exhausted all of his peremptory challenges.

In addition, because Valdes was required to use his last peremptory challenge to remove juror Garko, who should have been stricken for cause based on her exposure to pre-trial publicity, the trial court erred in denying Valdes' motion for additional peremptories. As a result of having no more peremptory challenges and the trial court's repeated refusal to dismiss juror Stelzel for cause, Stelzel was seated on the Valdes jury even though her answers during voir dire revealed a bias in favor of the death penalty for an individual convicted of murder.

> The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.

Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984), cert. denied, 469 U.S. 873 (1984), citing Singer v. State, 109 So.2d 7 (Fla. 1959).

In Singer, this Court set out the rule what a trial court must use in applying the above-mentioned test:

> [I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.

Singer, 109 So.2d at 23-24. See also, Hill v. State, 477 So.2d 533 (Fla. 1985).

In the instant case, there is record evidence that under the test announced by this Court in Lusk and Singer, juror Stelzel was incompetent to sit on the Valdes jury panel. During the individual voir dire regarding her views on the death penalty, juror Stelzel states as follows:

> To me I, in my experience with a father who has been a correctional officer at a maximum security prison, who has his best friend killed, just feel as though sometimes we are to lenient. We really need, if someone has killed someone and all the evidence points to them exclusively, what we need is to treat them in kind.

(R. 11/1642-43).

The above-quoted passage indicates juror Stelzel's "eye-for-an-eye" attitude regarding the sentencing of an individual convicted of murder. This evidence of Stelzel's bias in favor of the death penalty in sentencing an individual convicted of murder is exacerbated by the fact that Stelzel's father was a corrections officer whose best friend was killed.

In an attempt to rehabilitate juror Stelzel, the State Attorney questioned Stelzel regarding her ability to follow the law as announced by the judge, to which she replied "I think I could". (R. 11/1643). In the colloquy that followed however, Stelzel's bias in favor of the death sentence was nonetheless evident:

> Q: [by the State Attorney] ....there are still aggravating factors and mitigating factors the Court sill instruct as to.

> Would you make a recommendation for innocence based on those facts?
>
> A: [by juror Stelzel] I would make my recommendation for the death penalty if that's what it would be based on everything I heard and it I felt that, you know, that he was just simply guilty --
>
> Q: Could you ever recommend a life sentence if a Defendant was found guilty of first degree murder of a correctional officer?
>
> A: I really -- I would have to know the facts involved before I could make that decision.
>
> Q: So, its possible then there may be some mitigating factors that may sway you?
>
> A: It's possible.

(R. 11/1644) (emphasis added).

This colloquy demonstrates that Stelzel would have no problem recommending the death sentence if a defendant "was just simply guilty", but that it was only "possible" that evidence of mitigating factors might sway her toward recommending life.

> A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

Singer, 477 So.2d at 556.

The colloquy between counsel and juror Stelzel that is quoted above reveals that in order for juror Stelzel to overcome her preconceived opinion regarding the imposition of the death sentence for an individual convicted of murder, the defense would have to conclusively

establish evidence of mitigating factors; even then, according to her answers, Stelzel's recommendation of life was only "possible". As such, there is a reasonable doubt as to juror Stelzel's impartiality in the sentencing phase of a capital case. C.f., Hamilton v. State, 547 So.2d 630 (Fla. 1989) (A juror is not impartial where his answers during voir dire reveal that rather than requiring the state to prove a defendant's guilt, the juror would require a defendant to prove his innocence in order to overcome a preconceived opinion of guilt).

Confirming statements from earlier cases, this Court stated in Hill, supra, that "jurors should if possible be not only impartial, but beyond even the suspicion of partiality," and "[i]f there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused." Hill, 477 So.2d at 556, citing O'Connor v. State, 9 Fla. 215, 222 (1860) and Johnson v. Reynolds, 121 So.793, 796 (Fla. 1929).

In the instant case, the record supports a determination that juror Stelzel's impartiality was doubtful, or, at the very least, that her impartiality was suspect. As such, Stelzel should have been excused for cause and the trial court's failure to grant Valdes' request in this regard was error.

Moreover, even though Stelzel's voir dire is, arguably, peppered with responses indicating a willingness on her part to try and follow the law as announced by the judge, this alone is insufficient to justify the denial of Valdes' motion to excuse Stelzel for cause. The "true test" of a potential juror's competency to serve is whether the juror is completely free of opinion or bias, or whether he is certain of his ability to put the opinion or bias completely out of his mind. Singer, 109 So.2d at 24; see also, Garcia v. State, 570 So.2d 1082, 1082-83 (Fla. 3d DCA 1990).

In the instant case, defense counsel was forced to exercise its last peremptory challenge to remove juror Garko. (R. 12/1758, 1766). The record reveals that juror Garko was not certain whether or not her exposure to the publicity caused her to form an opinion regarding Valdes' guilt or innocence. To each question posed in this regard, juror Garko responded, "I don't think so". (R. 12/1744). Counsel requested that, based on Garko's exposure to the pre-trial publicity surrounding the altercation between Valdes and McDaniels, Garko be stricken for cause; this request was denied.

In light of the authority posited above, juror Garko's equivocal response to whether or not she had formed an opinion regarding Valdes' guilt or innocence created a reasonable doubt as to her impartiality. As such, juror Garko should have been stricken for cause. Nonetheless, defense counsel was forced to exercise its last peremptory challenge to remove Garko. As a result, counsel had no remaining challenges when juror Stelzel was seated.

It is a well-settled rule that it is reversible error for a trial court to force a defendant to use a peremptory challenge to remove a juror who should have been removed for cause. Hill, 477 So.2d at 556 and the authorities cited therein; see also, Swain v. Alabama, 380 U.S. 202 (1965). In the instant case, one of the primary reasons that Valdes had no more peremptory challenges to use to remove juror Stelzel, who clearly should have been removed for cause, was that counsel was forced to use the last challenge to remove juror Garko. The trial court's refusal to grant Valdes' motion to strike juror Garko forced Valdes to use a peremptory challenge and resulted in Valdes having no challenges remaining when juror Stelzel was seated on the panel. This error deprived Valdes of his constitutionally protected

right to a fair and impartial jury. U.S. Const. Amends V and VI; Fla. Const. Art. 1, Section 16.

In Hill, defendant was required to use a peremptory challenge on a biased juror when the trial court denied defendant's motion to excuse the juror for cause. In addition, after exercising a peremptory challenge to the biased juror, the court denied defendant's request for additional peremptories as well as defendant's subsequent challenges for cause as to the remaining jurors. Hill, 477 So.2d at 555.

This Court determined that a review of the transcript wherein the biased juror was questioned by counsel and the court showed that the trial court's denial of defendant's motion to excuse the juror for cause was error. In vacating defendant's death sentence and remanding for a new sentencing, this Court states as follows:

> We find that such error cannot be harmless because it abridged [the defendant's] right to peremptory challenges by reducing the number of those challenges available to him. Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.

Hill, 477 So.2d at 556 (citations omitted).

In the instant case, the trial court not only denied Valdes' motion and renewed motion to excuse juror Stelzel for cause, the court denied Valdes' motion for additional peremptory challenges. As a result, juror Stelzel was seated on the Valdes jury panel because Valdes had used all of his peremptory challenges on other jurors, including juror Garko, who was equivocal as to the effect of pre-trial publicity on her opinion regarding Valdes' guilt or innocence. Thus, under the facts sub judice, the error is as egregious as that

in Hill and Valdes' convictions on all counts must be reversed.

ISSUE V. THE FUNDAMENTAL FAIRNESS OF THE PROCEEDINGS WAS FRUSTRATED WHEN THE COURT ORDERED THAT APPELLANT BE SEQUESTERED IN AN UNNECESSARILY RESTRICTIVE FASHION DURING A CRITICAL STATE OF THE PROCEEDINGS, OUT OF THE REACH OF HIS ATTORNEYS.

In Illinois v. Allen, 397 U.S. 337, 343-44 (1970) the Supreme Court stated that there are three (3) constitutionally permissible ways to handle a disruptive defendant:

1. Bind and gag the defendant, thereby keeping him present;

2. Cite the defendant for contempt; or

3. Take the defendant out of the courtroom until he promises to behave.

The first "option" expressly contemplates the defendant's continued presence in court; the second option apparently contemplates the defendant's continued presence. Only the third option expressly addresses removing the defendant from the courtroom, and it is clear that this method intends to limit the duration of the defendant's absence.

This Court has expressly approved use of the first option as a method of handling disruptive defendants. See for eg. Derrick v. State, 581 So.2d 31 (Fla. 1991); Jones v. State, 449 So.2d 253 (Fla. 1984).

In Jones, this Court approved the trial court's decision to shackle the defendant to his chair when the defendant insisted on interrupting the proceedings, refused to remain seated and burst into song during the state's examination of a witness. Jones, 449 So.2d at 259-60.

> Binding or shackling the defendant is not only a constitutionally permissible method of handling an obstreperous defendant but, under the circumstances here, it was the least restrictive method available to the trial court.

Id. at 262.

This Court also approved the Derrick trial court's decision to shackle the defendant to his chair when a screw driver was found in the defendant's possession. Derrick, 581 So.2d at 35. The trial court's decision was a justified means of ensuring the "security and safety" of the courtroom. Id., quoting Stewart v. State, 549 So.2d 171, 174 (Fla. 1989).

Under the above-cited authority, shackling a defendant to his chair and permitting him to remain in court is an approved method of handling a defendant's disruptive conduct, even where the defendant's vocal outbursts and his antics threaten the orderly prosecution of the case, and even where the threat of physical harm looms in the balance.

In the instant case, removing Valdes from the courtroom following the altercation between Valdes and McDaniels was a constitutionally permissible option under Illinois v. Allen. However, keeping Valdes from the courtroom for an extended period of time, during a critical stage of the proceedings, and out of the reach of his attorneys, was not the least restrictive means of controlling Valdes. The prejudice to Valdes by virtue of his absence and inability to communicate with his attorneys outweighs the court's exercise of its discretion in controlling Valdes' conduct under the facts of this case.

Valdes' outburst was directed toward McDaniels; Valdes believed that McDaniels lied under oath regarding the events which transpired between Valdes and his attorneys at the jail. (R. 8/1303). Valdes was frustrated at the direction of the proceedings which were, ostensibly, to determine the effectiveness of his appointed attorneys. (R. 8/1290-1303). The

State paraded witnesses before the court to refute Valdes' allegation that the defense attorneys struck/threatened Valdes; Valdes' attorneys, the parties accused of striking/threatening their client, did not defend Valdes' position because that would have required the attorneys to establish the truth of Valdes' allegation regarding their tortious conduct. Finally, unable to control himself, Valdes jumped up, swore at and physically assaulted McDaniels. This was the only time in more than two (2) years of courtroom appearances that Valdes' conduct exceeded the bounds of acceptable courtroom demeanor. As in Jones and Derrick, in the instant case, shackling was the least restrictive method of control available to the trial court, a method which would have permitted Valdes to remain in court, in contact with his attorneys.

Constitutionally permissible "option" three, under Illinois v. Allen, provides that a defendant may be removed until he promises to behave. In the instant case, following his removal, Valdes was brought back before the Court in several occasions and asked whether or not he would behave. (R. 8/1303-05, 1318-21; 10/1430-32). On each occasion, the court was dissatisfied with Valdes' responses and Valdes was removed and held in an adjoining room. The responses that the court did not like included Valdes' statement that he did not recognize his attorneys and that he objected to the proceedings because he was unrepresented. There is no record that Valdes was violent or that he threatened to assault anyone, physically or verbally; Valdes merely objected for the record to the proceedings. Merely because the court was not pleased with Valdes' responses is insufficient to deny him the right to be present in court and to communicate with counsel. See the argument and

reasoning presented supra, under Issues I, II and III. Under the circumstances of this case, the court abused its discretion in keeping Valdes from the courtroom and his attorneys.

Valdes had a constitutional right to be present in court during all critical stages of the proceedings. Garcia v. State, 492 So.2d 360, 363 (Fla. 1986) citing Faretta v. California, 422 U.S. 806; Florida Rule of Criminal Procedure 3.180(s). The record in this case shows that the trial court abused its discretion in sequestering Valdes during voir dire, a critical stage of the proceedings. See Francis v. State, 413 So.2d 1175 (Fla. 1982).

Moreover, the record shows that the trial court's actions abridges Valdes' right to communicate with his attorneys. The record shows that the court instructed Valdes and the attorneys to communicate through one of the sheriffs. Because the court would not allow Valdes a writing implement, Valdes was ordered to tell the sheriff what he wished to say to the attorneys, and the sheriff would write down the message and deliver it. As defense counsel noted, this method of communication is inconsistent with a meaningful attorney-client relationship because the sheriff, to whom Valdes was to speak regarding confidential matters, was an officer of the State. (R. 8/1310-11; 9/1344; 10/1430-32). Contrary to Valdes' constitutional right to effective representation, the conditions of Valdes' sequestration were unnecessarily restrictive because the conditions precluded Valdes' right to communicate with his attorneys during voir dire.

In the instant case, shackling Valdes to a chair would have been a constitutionally permissible method of dealing with Valdes. More importantly however, shackling would have been the least restrictive method. Valdes' right to be present during a critical stage of

the proceedings would not be impermissibly forfeited and Valdes' right to confer with his attorneys would not have been prejudiced.

In light of the foregoing, the trial court erred in sequestering Valdes during voir dire for two reasons; First, sequestration was not the least restrictive method for dealing with Valdes; shackling would have sufficed. Shackling would have preserved Valdes' right to be present during voir dire, and the presence of the shackles could have been hidden from the jury. See Derrick, 581 So.2d at 35. Second, sequestration precluded a meaningful attorney-client relationship during a critical stage of the proceedings, namely, interviewing and selecting a jury in a capital case, where the State sought the death penalty. Sequestering Valdes violated his federal and state constitutional rights. U.S. Const. Amends VI, XIV; Fla. Const. Art. I, Section 16.

ISSUE VI. APPELLANT'S CONVICTION OF ARMED ROBBERY CONSTITUTES DOUBLE JEOPARDY.

Pursuant to the reasoning in Jones v. State, 452 So.2d 643 (Fla. 4th DCA 1984), Valdes' conviction of armed robbery is contrary to the law. Valdes cannot be simultaneously convicted of both "felony-murder and for the underlying felony upon which the felony-murder is based". Jones, 452 So.2d at 646, and the authorities cited therein.

In this case, Valdes was convicted of armed robbery (Count II); Valdes was also convicted of first degree murder (Count I). (R. 28/4323-24). In determining whether Valdes was guilty of first degree murder, the jury was charged under two theories: premeditated murder and felony-murder. (R. 26/3957-63; 28/4294-95). As in Van Poyck v. State, 564 So.2d 1066, 1069 (Fla. 1990), the evidence in the instant case is insufficient to convict Valdes

of premeditated first degree murder. Thus, the conviction of first degree murder is warranted, if at all, as felony-murder.

The jury was instructed that in determining whether Valdes was guilty of first degree felony-murder, the State must prove beyond a reasonable doubt the underlying felony of robbery or attempted robbery, and/or escape or attempted escape. (R. 28/4294-95).

As to the underlying felony of escape or attempted escape, Valdes' conviction is contrary to the law because the State failed to prove the crime beyond a reasonable doubt. See Fla. State. 944.40; Kyser v. State, 533 So.2d 285, 287 (Fla. 1988). Specifically, the State failed to prove that the person inside the GCI van was, in fact, James O'Brien, as charged in the indictment, (R. 26/3957-63; the State did establish, through a judgment and sentence, that a James O'Brien was under lawful custody, but it did not present evidence identifying the person in the back of the GCI van as O'Brien. Thus, the State failed to establish that the person in the GCI van was in the lawful custody of the Department of Corrections, which is a requisite element of the offense. Fla. Stat. 944.40; Kyser, supra; see also, (R. 18/2661-67; 27/4286-88; 28/4303). As such, Valdes' conviction of felony-murder, with escape under section 944.40 as the underlying felony, is contrary to the law.

Valdes' conviction of felony-murder is cognizable, if at all, with the underlying felony of armed robbery. This being so, Valdes' simultaneous conviction under Count II of armed robbery is contrary to the reasoning posited in Jones, supra, and constitutes double jeopardy in violation of the federal and state constitutions. U.S. Const. Amend V; Fla. Const. Art. I, Section 9. In light of the foregoing, Valdes' conviction of armed robbery under Count II must be vacated.

ISSUE VII. APPELLANT'S CONVICTION OF FIRST DEGREE MURDER IS CONTRARY TO THE LAW BECAUSE APPELLANT WAS IMPROPERLY CHARGED WITH ARMED ROBBERY, AN ENUMERATED FELONY, RATHER THAN THE CRIME HE ACTUALLY COMMITTED, WHICH IS NOT AN ENUMERATED FELONY.

As argued more fully supra, Issue VI, Valdes' conviction of first degree murder is sustainable, if at all, under a felony-murder theory, with armed robbery as the underlying felony.

Pursuant to Peterson v. State, 542 So.2d 417 (Fla. 4th DCA 1989), Valdes cannot be charged with armed robbery. Rather, Valdes "should have been charged with precisely the crime which he committed...." - depriving an officer of means of protection. Id.; F.S. Section 843.025. The facts presented in this case show that Van Poyck deprived Officer Turner of his service revolver.

By charging Valdes with armed robbery instead of the precise crime committed, the State was able to obtain a conviction of felony-murder on the basis of a non-enumerated felony: a violation of section 843.025 is not an enumerated felony under section 782.04(1)(a) and cannot support a conviction of felony-murder. Thus, not only did the State fail to charge Valdes with the precise crime he committed, the State sought and obtained a first degree murder conviction based on conduct which is not encompassed in the felony-murder statute.

In light of the foregoing, Valdes' conviction of felony-murder must be vacated.

ISSUE VIII. APPELLANT'S CONVICTION OF ARMED ROBBERY IS CONTRARY TO THE LAW.

As argued under the preceding issue, Peterson required the State to charge Valdes with the precise crime committed - violation of Section 843.025 - rather than armed robbery.

The crime of armed robbery is a first degree felony. F.S. Section 812.13(2)(a). A violation of section 843.025 is a third degree felony, which may be enhanced to a second degree felony upon a determination that the offender carried a firearm. F.S. Section 775.087(1). Thus, by charging Valdes with armed robbery rather than the precise crime committed, the State was able to obtain a conviction on a first degree felony rather than a second degree felony, and Valdes received a greater penalty than that allowed under the law.

In light of the foregoing, the conviction of armed robbery is contrary to the law and must be reversed.

ISSUE IX. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT XI, AGGRAVATED ASSAULT, BECAUSE THE EVIDENCE DOES NOT ESTABLISH BEYOND A REASONABLE DOUBT THAT APPELLANT DID ANY ACTS IN FURTHERANCE THEREOF.

The trial court erred in denying Appellant's motion for judgment of acquittal as to Count XI - aggravated assault - because there exists a reasonable hypothesis of Valdes' innocence. (R. 18/2668-69). The trial judge even agreed that the evidence was arguably insufficient.

Dr. Brown testified that Valdes walked by and passed Brown's car prior to the time that Van Poyck walked up to the car, aimed his gun, then reversed the gun and smashed Brown's car windshield. (R. 14/2145-46). Thus, the evidence failed to show beyond a

reasonable doubt that Valdes intended Dr. Brown to be assaulted, that Valdes was in the area at the time that Van Poyck acted or that Valdes knew that Van Poyck would so act. As such, the conviction of aggravated assault must be reversed. Allowing Valdes to be convicted of aggravated assault on the evidence presented in this case is like convicting a person as a principal to the crime of forgery for simply lending the offender a pen.

ISSUE X. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT XII, AIDING ESCAPE.

Valdes was charged in Count XII of the indictment with aiding/attempting to aid the escape/attempted escape of GCI inmate James O'Brien in violation of Florida Statute 843.12. (R. 26/3957-63). The trial court erred in denying Valdes' motion for judgment of acquittal as to Count XII because the State failed to prove the essential elements of the offense as charged.

Specifically, the State did not establish that anyone being held in lawful custody attempted to escape. Absent proof that a person in custody actually attempted to escape (or actually escaped), a conviction of aiding the person in custody is precluded. In other words, proof that a person in lawful custody actually escaped, or attempted to escape, is a condition precedent to a charge of aiding escape. It is axiomatic that Valdes cannot be convicted of aiding or attempting to aid an escape that was never actually attempted or effectuated.

Moreover, Section 777.011 cannot be summoned as authority for Valdes' conviction of aiding escape under section 843.12. Florida law abolishes the common law distinction between aiders/abettors and principals. Fla. Stat. 777.011; see also Peterson v. State, 542

So.2d 417 (Fla. 1989); Potts v. State, 430 So.2d 900, 902 (Fla. 1982). O'Brien was charged and acquitted of escape/attempted escape in violation of section 944.40. At first blush, it appears that under the authority of section 777.011, Valdes may nonetheless be convicted as an aider/abettor of O'Brien's section 944.40 offense, whether or not O'Brien was convicted. However, the statutory dictates of section 777.011 and the reasoning of the above-cited cases do not apply in this case because Valdes was charged with a different crime than the one for which O'Brien was acquitted. (R. 22/3234-38).

Valdes was charged with aiding escape in violation of section 843.12, a crime that, as argued supra, required proof that O'Brien actually escaped or attempted to escape. O'Brien, on the other hand, was charged and acquitted of escape/attempted escape in violation of section 944.40. Valdes was not charged, nor could he have been charged, as a principal or otherwise, with a violation of section 944.40 because Valdes was not in custody at the time. Kyser v. State, 533 So.2d 285, 287 (Fla. 1988).

As the State failed to establish a requisite element of an offense under section 843.12, the trial court's denial of Valdes' motion for judgment of acquittal as to Count XII is contrary to the law and the conviction must be vacated.

ISSUE XI. APPELLANT'S CONVICTION UNDER COUNTS V-X, SIX COUNTS OF ATTEMPTED FIRST DEGREE MURDER IS ERROR BECAUSE THE EVIDENCE SUPPORTING THE CONVICTIONS IS INSUFFICIENT.

Valdes' conviction of six counts of attempted first degree murder is not supported by the evidence. Valdes drove the car and Van Poyck was the passenger. Van Poyck leaned out the window and fired at the ensuing police cars. There is absolutely no evidence that

Valdes, through the way he drove the car or otherwise, assisted Van Poyck's aim or ability to shoot. Valdes merely drove the car; he did nothing to further Van Poyck's activity. The evidence in this regard is as consistent with Valdes' innocence as it is with his guilt, and as such, the State failed to prove the crimes alleged beyond all reasonable doubt.

ISSUE XII. IT IS FUNDAMENTALLY UNFAIR TO CONVICT APPELLANT OF SIX COUNTS OF ATTEMPTED FIRST DEGREE MURDER.

In Van Poyck v. State, 564 So.2d 1066, 1070 (Fla. 1990), this Court stated that Van Poyck was the instigator of and primary participant in the criminal episode in question. Van Poyck was convicted of six counts of attempted manslaughter in connection with the gun shots that Van Poyck fired out of the car window after leaving Dr. Rosenberg's parking lot. In this case however, Valdes was convicted of six counts of attempted first degree murder, based on Van Poyck's actions. It is fundamentally unfair and contrary to the notion that our legal system serves justice to allow Valdes to suffer penal consequences more severe than those imposed on the primary actor.

B. Penalty Phase Issues

ISSUE XIII. APPELLANT'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF THE PROCEEDINGS WAS PREJUDICED BY THE TRIAL COURT'S ERROR IN DENYING APPELLANT'S PRE-TRIAL MOTION TO DISCHARGE APPOINTED COUNSEL.

The record in the instant case demonstrates that the trial court's failure to follow the Nelson-Hardwick procedure prior to trial resulted in the trial court's failure to discover that Valdes' appointed counsel were unprepared to present a case during the penalty phase of

Valdes' trial. As a result of Valdes' counsels' failure to investigate the facts in support of mitigation, Valdes was denied his federal and state constitutional right to effective assistance of counsel, and the death sentence must be reversed. U.S. Const. Amend. VI, XIV; Fla. Const. Art. I, Section 16.

As more fully argued under Issues I and II, supra, the trial court erred under Nelson and Hardwick by failing to make a sufficient inquiry into the effectiveness of Valdes' appointed attorneys following Valdes' timely, pre-trial request to discharge them. In addition, the court erred by failing to advise Valdes of the parameters of his right of representation. The court's pre-trial errors in this regard prejudiced Valdes' constitutional right to effective assistance of counsel during trial. The law and the reasoning posited under Issues I and II apply with equal force to the penalty phase.

Counsels' presentation at the penalty phase was limited to the testimony of Valdes' two (2) sisters. (R. 19/2922-52; 20/2958-73). The sisters related certain aspects of Valdes' childhood, his familial relationships and his mental and physical condition. Were the seeds of the mitigating factors planed by Valdes' sisters' testimony fully investigated and developed, it is a reasonable possibility that they would flower into compelling mitigating factor evidence.

For example, the sisters told the jury that Valdes attempted suicide on at least one occasion, but to the best of their knowledge, he received limited counselling afterwards. (R. 19/2940, 2944-45; 20/2965-66). Further, the sisters told the jury about Valdes' serious car accident and resultant injuries. (R. 19/2938-40; 20/2966-68). Hospital records, physical and psychological diagnoses and related prognoses were not presented. The State elicited

testimony that, to the best of the sisters' knowledge, Valdes was not slow, retarded or mentally disturbed. (R. 19/2943-52; 20/2973). The sisters were competent to answer the State's questions in this regard, but they could not present informed and expert testimony, as a medical doctor, psychiatrist or psychologist might have done. Thus, evidence in mitigation regarding whether Valdes was emotionally disturbed or mentally impaired was not developed.

The sisters told the jury that Valdes had problems at birth that may have affected Valdes' hearing; according to the sisters, these problems resulted in Valdes experiencing difficulty in kindergarten or first grade. (R. 19/2951-52; 20/2959). No school records were presented to confirm and supplement the sisters' limited knowledge. The sisters also told the jury about Valdes' experiences in two military-type schools, including one incident where Valdes was forced to stand and state into the sun for hours. (R. 19/2934-37; 20/2960-64). To the best of the sisters' knowledge, Valdes' problem in the Miami military school was that Valdes' primary language was English, whereas the students and faculty conversed in Spanish. According to the sisters, Valdes was punished for being brazen and difficult when in fact, Valdes simply did not understand the language. No school records were presented to confirm or supplement this information. Moreover, no expert medical or psychological testimony was offered to explain the long-term effects of Valdes' early problems in school, or his physical problems. As related by the sisters, these events in Valdes' background were imparted as vague remembrances, a mere hint at a problem, and not as a complete picture of the facts and circumstances.

The sisters told the jury that when he was sent away to school, Valdes felt unwanted by his parents. (R. 19/2934-37; 20/2961. Again, any long-term effect that this experience might have had on Valdes' emotional development and psychological make-up was never presented through competent expert testimony. Thus, as to the mitigating circumstances of Valdes' background, the jury made its recommendation of the death penalty based on incomplete information.

The sisters told the jury about Valdes' relationship with their abusive, alcoholic father. (R. 19/2928-32, 2934-37; 20/2959-60, 2961-62, 2965, 2974). No expert testimony was presented to inform he jury of the long-term effects of this aspect of Valdes' upbringing. Again, the jury did not hear sufficient, competent evidence in mitigation. Although the sisters did their best to present the negative aspects of Valdes' background, it is a reasonable possibility that the jury considered their testimony biased; on the other hand, it is a reasonable possibility that the jury would find compelling the testimony of a trained specialist.

Appointed counsel left unexplored and undeveloped the avenues of mitigation opened by the sisters' testimony at the penalty phase of the trial; even though there was a clear indication that mitigating circumstances evidence existed, appointed counsel failed to fully develop it.

As a further example of the attorneys' unpreparedness for the penalty phase proceedings, note that the attorneys failed to recall Valdes' ex-girlfriend, Lorrie Sondick, in order to fully explore and clarify for the jury the extent of Van Poyck's domination and

influence over Valdes. (R. 17/2599-2602, 2611). Again, the attorneys left unexplored a relevant avenue of mitigation.

The trial court was obligated to question the appointed attorneys as to the reasonableness of their investigation of the facts of the case and their knowledge of the law as it pertains to the facts. Nelson v. State, 274 So.2d at 258. Had the trial court properly safeguarded Valdes' right to effective assistance of counsel by making the requisite inquiry, the court would have ben aware prior to the penalty phase of the proceedings that the appointed attorneys were unfamiliar with the facts relevant to the issue of mitigation and unprepared to present sufficient mitigating factor evidence.

It is a reasonable possibility that the court's error in subjecting Valdes to a trial and then the penalty phase with ineffective and unprepared attorneys contributed to the imposition of the death sentence: the attorneys' penalty phase case in mitigation was insufficient and undeveloped, even though there was an indication that such evidence existed. As such, the error is not harmless and the death sentence must be reversed. Ciccarelli v. State, 531 So.2d 129 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Moreover, in accepting the recommendation of the jury in sentencing Valdes to death, the trial judge expressly stated that the evidence offered to support mitigating circumstances lacked "magnitude" and that there was "no compelling or exigent reason to support" a finding of mitigating circumstances. (R. 21/3164-65). As the attorneys failed to develop and present mitigating circumstances, the judge's statement in this regard is not surprising.

Valdes wad prejudiced in the penalty phase and at the sentencing by the trial court's failure to follow the Nelson-Hardwick procedure prior to trial, or at least, prior to the penalty phase, when the attorneys told the court that they were unprepared to proceed. (R. 19/2879, 8/2976-77). The trial court committed reversible error and the sentence of death must be reversed.

ISSUE XIV. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE BECAUSE THE RECORD SHOWS THAT EVIDENCE OF MITIGATING CIRCUMSTANCES EXISTED, BUT APPELLANT'S ATTORNEYS FAILED TO FULLY DEVELOP AND PRESENT IT.

Valdes was denied his federal and state constitutional right to effective assistance of counsel because his appointed attorneys failed to fully develop and present evidence of mitigating circumstances. U.S. Const. Amend VI, XIV; Fla. Const. Art I, Section 16.

The two-prong test to be applied to a claim of ineffective assistance of counsel was announced by the United States Supreme Court in Strickland v. Washington, 466 U.S. 104 (1984). This Court characterized the Strickland test as requiring a claimant to show: (1) that counsel's performance was deficient and (2) that the deficiency affected the outcome of the trial proceedings. Pope v. State, 569 So.2d 1241 (Fla. 1990).

In the instant case, Valdes' appointed attorneys were ineffective in failing to fully develop and present mitigating circumstance evidence. As more fully argued supra Issue XIII, defense counsel's presentation at the penalty phase proceedings was limited to the testimony of Valdes' sisters. The sisters' testimony made reference to certain facts, episodes and occurrences in Valdes' life which could reasonably be considered as an introduction to

mitigating circumstance evidence. However, because the attorneys failed to develop the mitigating circumstances introduced by Valdes' sisters, the jury's recommendation of the death penalty was not based on full and complete evidence.

It is a reasonable possibility that Valdes' attorneys' deficiency in this regard resulted in the trial judge finding that the evidence did not support a finding of any mitigating circumstances and imposing the death penalty at Valdes' sentencing. Mitigating circumstance evidence, the seeds of which were evident in Valdes' sisters' testimony, was not fully investigated and developed through unbiased expert testimony or documentary evidence. The jury could reasonably have discounted the testimony of Valdes' sisters as biased. However, had the jury been apprised of the effects of Valdes' family life and early development through expert testimony, or even through official documentation, the jury could have found sufficient mitigating circumstances to outweigh the aggravating circumstances. Thus, the outcome of the case at bar was affected by the appointed attorneys' deficiency.

For example, the jury was instructed that they could consider as a mitigating circumstance whether or not Valdes committed the offense charged under extreme duress or the substantial influence of another person. (R. 28/4366). Nonetheless, the attorneys failed to recall Lorrie Sondick, Valdes' live-in girlfriend at the time of the crimes, to detail Van Poyck's dominance over Valdes; Sondick was probably the person best situated to explain the relationship between the two men. (R. 17/2599-2602, 2611). Moreover, expert testimony might have explained whether Valdes' background and early life resulted in a heightened susceptibility to pressure from a person like Van Poyck.

The jury was instructed that they could consider as a mitigating circumstance whether the murder of Officer Griffis was committed while Valdes was under the influence of extreme mental or emotional disturbance. (R. 28/4366). Again, the arguably biased testimony of Valdes' sisters regarding Valdes' background and family life was not supported by expert psychological or psychiatric testimony. No documentary evidence regarding Valdes' suicide attempt(s) was offered, nor did counsel present any documentation regarding treatment that he may have received, hospital records, clinical diagnoses and/or evaluations, or the long-term effects in regards thereto. Similarly, no documentation authenticating, or expert testimony supporting the sisters' account of Valdes' car accident and his injuries was presented.

The jury was instructed that they may consider any other aspect or circumstance of Valdes' life and background as mitigating circumstance evidence. (R. 28/4366). Again, the sisters' testimony planted the seeds of many of the tragic episodes in Valdes' early life and development, but the attorneys failed to bring any of this to fruition.

Granted, counsel noted that they encountered difficulty in contacting Valdes' family prior to the penalty phase proceeding, which was held only six (6) days after the guilt phase of the trial. Counsel requested, and was denied, a continuance of the penalty phase proceedings. (R. 19/2879-80).

Although the trial court's denial of the attorneys' motion for a continuance of the penalty phase proceedings may not, in and of itself, constitute reversible error (see infra, Issue XV), that error, in combination with the record evidence of the attorneys' deficient preparation and the trial court's failure to make a sufficient inquiry of Valdes and the

attorneys, suffice to establish a reasonable possibility of prejudice to Valdes, constituting reversible error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The attorneys' conduct was not only deficient at the penalty phase proceedings before the jury, their conduct was deficient a week later at the allocution hearing. (R. 21/3114-42). This fact lends further support to Valdes' position that he was denied effective representation.

Valdes' sisters' testimony alerted defense counsel to the existence of mitigating circumstances evidence prior to the allocution hearing, yet the attorneys failed to act upon the leads they were provided, even though they had an additional week to so proceed. As a result, the trial court found no mitigating circumstances to outweigh the aggravating factors, followed the jury's recommendation and imposed the death penalty.

This court has jurisdiction to entertain Valdes' challenge to the effectiveness of appointed counsel on direct appeal. Sobel v. State, 437 So.2d 144, 145 (Fla. 1983) citing Trushin v. State, 425 So.2d 1126, 1129-30 (Fla. 1982). (Once the Supreme Court has jurisdiction, it may consider any item which may affect the case).

Generally, trial counsel's decision to present or not to present mitigating circumstance evidence is a tactical decision, properly within counsel's discretion. Brown v. State, 439 So.2d 872, 875 (Fla. 1983). In Brown however, counsel's decision not to present certain mitigating circumstance evidence was grounded on counsel's decision that the evidence was contrary to defendant's alibi defense, which was fully developed at the guilt phase of Brown's trial. Id. at 875 citing Straight v. Washington, 422 So.2d 827, 832 (Fla. 1982). (Defense

counsel viewed the mitigation evidence in question as "fundamentally damaging to the integrity of his client's case").

The legitimate tactical decision in Brown finds no counterpart in the instant case. The mitigating circumstance evidence that counsel in the instant case should have investigated and developed is not contrary to any line of defense or theory of the case that was presented in the guilt phase of the trial. Counsel's "decision" not to present mitigating circumstance evidence on behalf of Valdes is an abuse of counsel's discretion and is not subject to the general rule posited in Brown.

Generally, in deciding whether to impose a death sentence, a trial court's finding or not finding the existence of mitigating factors is within the court's domain, even though an appellant views the evidence in a different light. Hansborough v. State, 509 So.2d 1081 (Fla. 1987). Nonetheless, the general rule posited above should not be applied sub judice because in making its findings and sentencing Valdes to death, the court considered insufficient and incomplete mitigating circumstance evidence.

ISSUE XV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A CONTINUANCE OF THE PENALTY PHASE PROCEEDINGS, WHERE APPELLANT'S ATTORNEYS STATED THAT THEY WERE UNPREPARED TO PROCEED.

At the outset of the penalty phase, the defense attorneys requested, and were denied, a continuance. The attorneys stated that they were unprepared to go forward; that they were unable to procure the attendance of several Valdes' family members; and that there may be a need for a psychological examination. (R. 19/2879-80).

The grant or denial of a motion to continue is within the discretion of the trial court. Lusk v. State, 446 So.2d 1038 (Fla. 1984). In the instant case, the trial court abused its discretion in denying his motion to continue the penalty phase of the proceedings because Valdes' attorneys were unprepared to proceed. In light of the fact that Valdes was faced with the possibility of a death sentence, justice and due process required that Valdes be given an adequate opportunity to present mitigating evidence.

In Williams v. State, 438 So.2d 781 (Fla. 1983), this Court determined that the trial court did not abuse its discretion in denying a defense motion for continuance of the penalty phase proceedings. Id. at 785-86. This Court determined that the trial court was not prevented from "familiarizing itself with potentially applicable mitigating circumstances" through the pre-sentence investigation.

Unlike the situation in Williams however, the trial court did not familiarize itself with "potentially applicable mitigating circumstances" because Valdes' attorneys did not present or develop any. In this regard, the situation sub judice is contrary to the situation in Williams.

Valdes concedes that in the instant case, as in Williams, his defense attorneys did not demonstrate due diligence in locating mitigating witnesses, did not allege that the motion for a continuance was made in good faith and not for delay, and did not offer any reasons for the unpreparedness, other than their inability to serve subpoenas on many of Valdes' family members. See Id. at 785. The attorneys' conduct in this regard is compelling evidence in support of Valdes' position supra, under Issues XIII and XIV, relating to ineffective assistance of counsel.

Valdes respectfully requests that this Court depart from the reasoning posited in Williams because of the record evidence of Valdes' attorneys' defective performance in this case and of potentially mitigating circumstances.

Valdes is sentenced to death, the most severe penalty. Condemning Valdes to death, absent a true and meaningful opportunity to present evidence of mitigating circumstances to outweigh the aggravating circumstances, is cruel and unusual punishment in violation of the Eighth Amendment. U.S. Const. Amends VIII, XIV.

ISSUE XVI. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In sentencing Valdes to death, the trial court found four (4) aggravating factors, including that the murder was committed in a cold, calculated and premeditated manner. A review of the record in the instant case shows that this finding was error. (R. 3154-63; 28/4415-39).

This Court has stated that the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner requires a finding of a "heightened premeditation", involving "a careful plan or prearranged design." Rogers v. State, 511 So.2d 526,533 (Fla. 1987) cert denied, 484 U.S. 1020 (1988). See also, Thompson v. State, 565 So.2d 1311 (Fla. 1990).

In Farinas v. State, 569 So.2d 425 (Fla. 1990), this Court determined that the State failed to prove beyond a reasonable doubt that the murder in question was committed in a cold, calculated and premeditated manner. In Farinas, the state argued that heightened

premeditation existed because Farinas shot the victim, his estranged girlfriend, once, and then unjammed his gun three times before firing the fatal shots to the back of her head; as such, the state argued Farinas had sufficient time to contemplate his actions.

In rejecting the State's argument in Farinas, this Court stated that

> [t]he fact that Farinas had to unjam his gun three times before firing the fatal shots does not evidence a heightened premeditation bearing the indicia of a plan or prearranged design.

Farinas, 569 So.2d at 431.

Similarly, in Young v. State, 579 So.2d 721 (Fla. 1991), this Court determined that the evidence was insufficient to support a finding that the murder was committed in a cold, calculated and premeditated manner. In Young, defendant and three young friends were interrupted while attempting to steal a car by a person armed with a handgun; defendant was armed with a sawed-off shotgun. The armed person attempted to hold the youths while his son called the police. A gun fight ensued between defendant and the armed person, wherein the armed person was killed. Defendant claimed self-defense, although the victim's neighbors, including an off-duty state trooper, testified that they heard shotgun blasts first and last, with pistol shots in between. Young, 579 So.2d at 723.

> Although sufficient to support a conviction of premeditated murder, the evidence does not rise to the level needed to support finding the aggravating factor of cold, calculated and premeditated.

Young, 579 So.2d at 724.

The facts in the instant case, like the above-cited cases, simply do not warrant a finding that the murder was committed in a cold, calculated and premeditated manner.

Rather, the facts in the instant case show that the only plan was to effectuate the escape of the GCI inmate.

In Hill v. State, 515 So.2d 176 (Fla. 1987), cert denied 485 U.S. 993 (19990), in a situation analogous to the case sub judice, this Court determined that the fact that a murder occurred during a "hopelessly bungled robbery" was not sufficient to establish that the murder was premeditated.

> We find an absence of any evidence that appellant carefully planned or prearranged to kill a person or persons during the course of this robbery. While there is sufficient evidence to support simple premeditation, we conclude...that there is insufficient evidence to support the heightened premeditation necessary to apply [the cold, calculated and premeditated] aggravating circumstance.

Hill, 515 So.2d at 179.

Drawing on the reasoning posited in Hill, it is clear that the evidence in the instant case negates a finding that the murder of Officer Griffis was "carefully planned or prearranged"; rather, the instant case is an example of a "hopelessly bungled" escape attempt.

In the instant case, prior to the time shots were fired, the contact between Valdes, Van Poyck and Officer Griffis was, according to Officer Turner's testimony, only a few minutes. Based on the facts of this case, and the case law cited above, the aggravating circumstance of a cold, calculated and premeditated murder is not applicable in the instant case as a matter of law. Thus, to impose the death sentence on Valdes would be a denial of due process and cruel and unusual punishment under the Eighth and Fourteenth

Amendments to the United States Constitution, and Article I, Section 9 of the Florida Constitution.

Further, as argued infra, in Issue XXI, Officer Gaglione's testimony cannot be considered evidence of a prearranged plan or design as far as Valdes is concerned. The record shows that Gaglione overheard Valdes state that other people meant for someone to be shot, and not that Valdes so intended.

ISSUE XVII. THE TRIAL COURT ERRED IN FAILING TO FIND THE MITIGATING FACTOR THAT APPELLANT WAS UNDER THE SUBSTANTIAL DOMINATION AND CONTROL OF ANOTHER PERSON AT THE TIME OF THE MURDER.

The trial court failed to find the mitigating factor that Valdes was under the substantial domination and control of Van Poyck at the time of the murder. This determination is contrary to the testimony of Valdes' live-in girlfriend, Lorrie Sondick. Moreover, even were this Court to determine that Sondick's testimony alone is insufficient to support a finding of this mitigating factor, in light of the significant evidence of Valdes' attorneys' failure to develop this line of mitigation, Valdes' death sentence must be reversed.

ISSUE XVIII. THE TRIAL COURT ERRED IN FAILING TO FIND THE MITIGATING FACTOR THAT APPELLANT WAS AN ACCOMPLICE.

In Van Poyck v. State, 564 So.2d 1066, 1070-71 (Fla. 1990), this Court acknowledged that Van Poyck "played the major role in this felony murder...." In line with this determination, Valdes maintains that the evidence in this case shows that Valdes was a minor participant as far as the murder is concerned. In the light most favorable to Valdes, the record supports a determination that Valdes was Van Poyck's accomplice as far as the

escape attempt is concerned. For this reason, the trial court erred in failing to find this mitigating circumstance.

ISSUE XIX. THE TRIAL COURT ERRED IN FAILING TO FIND THE MITIGATING FACTOR THAT APPELLANT ACTED UNDER THE INFLUENCE OF AN EMOTIONAL DISTURBANCE.

The trial court failed to find the mitigating factor that Valdes acted under the influence of an emotional disturbance at the time of the murder. (R. 21-3163; 28/4415-49). The record shows that Valdes' sisters' testimony indicated several sources that would establish, if fully developed, that Valdes was emotionally disturbed as a result of his upbringing and family life. In addition, the sisters' testimony concerning the accident that Valdes was involved in might prove a source of emotional instability, were the same fully developed. Finally, the sisters' uncertainty regarding the extent and nature of Valdes' psychological treatment following his bad experiences in military school and his suicide attempt(s), indicates that additional research and development in this area were necessary in order to accurately portray a case in mitigation. Because all the indications of mitigating circumstances were present, although undeveloped, the trial court's refusal to find any mitigating circumstances is error.

Further, although the errors alleged supra, Issues XVI, XVII, XVIII, when considered in isolation, may not constitute harmful error,when considered together with the error alleged herein, the errors are harmful. Specifically, once the aggravating factor that the murder was committed in a cold, calculated and premeditated manner is eliminated, and the mitigating factors that Valdes was under substantial domination and control; that Valdes was

an accomplice; and that Valdes acted under influence of an emotional disturbance are weighed, it is a reasonable possibility that the death sentence would not be warranted in this case. As such, when considered together, the court's errors as stated supra, Issues XVI, XVII, and XVIII, in combination with the error argued herein, constitute harmful error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE XX. THE TRIAL COURT ERRED IN DENYING APPELLANT'S CHALLENGE FOR CAUSE OF A JUROR WHO WOULD AUTOMATICALLY VOTE FOR THE DEATH PENALTY FOR A PERSON CONVICTED OF MURDER.

As previously noted in supra, Issue IV, if there is any reasonable doubt as to a juror's ability to be fair and impartial, that juror should be dismissed for cause. See Lusk v. State, 446 So.2d 1038 (Fla. 1986), cert denied, 469 U.S. 873 (1984) citing Singer v. State, 109 So.2d 7 (Fla. 1959). This requirement applies with equal force to a juror who is to sit on a penalty phase panel and then recommend a sentence of life or death. Floyd v. State, 569 So.2d 1225 (Fla. 1990).

Juror Stelzel's "eye-for-an-eye" attitude regarding the death penalty for a person convicted of murder was clear. (R. 11/1642-43). The State attempted to rehabilitate juror Stelzel, finally succeeding in getting her to say that "it was possible" that she would recommend a life sentence. (R. 11/1643-44, 1644-48). Her answer to the State's search for the "correct" answer was, at best, equivocal, and is no reason to ignore Stelzel's clear bias in favor of the death penalty. See Hamilton v. State, 547 So.2d 630 (Fla. 1989). In other words, Stelzel would readily recommend death, should Valdes be convicted of murder; in

order to recommend life, however, Stelzel's responses indicate that the defense would have to overcome her strong bias in favor of death.

In this light, the trial court's denial of Valdes' challenge for cause denied Valdes a fair and impartial trial at the penalty phase of the proceedings, in contravention of the federal and state constitutions. U.S. Const. Amends V, VI and XIV; Fla. Const. Art. I, Section 16.

ISSUE XXI. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING OFFICER GAGLIONE'S TESTIMONY WHERE THE TESTIMONY IMPERMISSIBLY MISLED THE JURY.

Officer Gaglione testified that while on duty at the Palm Beach County Jail, he overheard a conversation between Valdes and another inmate. The record clearly shows that Gaglione heard Valdes tell the other man that they planned the escape; that they planned to shoot someone; and that they put Officer Griffis to his knees. Even on re-direct examination by the State, it was made clear that Valdes did not say he was involved: Gaglione did not hear Valdes say "I planned it...." or "We put him to his knees". The record shows that Gaglione heard Valdes explaining to another inmate that persons other than Valdes ("they") planned or intended the crimes which occurred. (R. 17/2626-41).

Gaglione's testimony appears to negate the argument that Valdes was involved in planning the crimes charged. Nonetheless, the State relied on this testimony in arguing that Valdes was involved in planning the crimes charged. In repeating to the jury that Gaglione heard Valdes say "they" planned the crimes, the State included Valdes as a member of the "they" group, even though this is not what Gaglione heard or testified to in court.

The State's misinterpretation, or mischaracterization of Gaglione's testimony misled the jury as far as Valdes' involvement in planning the crimes is concerned. Whether or not Valdes was involved in planning the crime bears directly on the issues of whether or not Valdes was an accomplice (as opposed to a major participant); whether or not Van Poyck dominated and/or controlled Valdes; and whether or not the murder was cold, calculated and premeditated. As a result, Gaglione's testimony had an improper and unfair impact on the minds of the jury as far as aggravating and mitigating circumstances are involved. See Gordon v. State, 104 So.2d 524, 533 (Fla. 1958).

As a result of the trial court's abuse of discretion in admitting Gaglione's testimony, the jury received evidence that had a prejudicial impact of their consideration of aggravating and mitigating circumstances. As a result, the death sentence must be reversed.

IV. CONCLUSION.

Based on the foregoing argument and authorities cited therein, Appellant, Frank Valdes, respectfully requests this Court vacate the judgments and sentences of the trial court, or reverse the convictions and sentences and grant a new trial and preclude the State from seeking the death penalty against him. Alternatively, Appellant requests this Court reduce his sentence of death to life imprisonment without the possibility of parole for twenty-five (25) years, or grant a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Celia Terenzio, Esq., Assistant Attorney General, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by mail, this the 6 day of May, 1992.

JOSEPH S. KARP