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IN THE SUPREME COURT OF FLORIDA

ROBERT B. POWER, JR., Appellant,	)	
vs.	)	CASE NUMBER: 77,157
STATE OF FLORIDA, Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

ROBERT B. POWER, Appellant,	)	
vs.	)	CASE NO. 77,157
STATE OF FLORIDA, Appellee.	)	

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On February 24, 1989, the 1988, Fall Term Grand Jury, Ninth Judicial Circuit, Orange County, Florida, returned a five count indictment charging Robert Bueller Power with murder in the first-degree [§782.04, Fla. Stat.]; sexual battery [§794.011(3), Fla. Stat.]; kidnapping of a child under the age of thirteen [§787.01(3)(a), Fla. Stat.]; armed burglary of a dwelling [§810.02(2), Fla. Stat.]; and, armed robbery [§812.13(2)(a), Fla. Stat.] (R2676-78)

Numerous pre-trial motions were filed in this case, only some of which are pertinent to this direct appeal. Additionally, the trial court made many evidentiary rulings during the dourse of these proceedings. The pertinent motions and issues will be noted in the argument portion of the brief.

Pursuant to a defense motion, the trial judge changed venue to Lee County. (R2824-36,2973-4)

On June 2, 1990, the jury returned with verdicts of guilty as charged on all five counts. (R3110-14) Following a penalty phase, the jury recommended the execution of Robert Bueller Power, Jr. (R2344-2606,3254)

On November 8, 1990, the trial court concurred in the jury's recommendation and imposed a death sentence. The court found four aggravating circumstances and two mitigating circumstances. (R3258-74) The trial court

sentenced Power to life imprisonment on the other four counts. (R3257,3275-79)

Power filed a timely notice of appeal on December 4, 1990. (R3295-6) The trial court denied Power's previously filed motion for new trial and supplemental motion for new trial. (R3115-18,3120-22,3297) The state filed a notice of cross-appeal on November 19, 1990, and another on December 21, 1990. (R3292,3298) This Court has jurisdiction. Art. V, §3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

In October, 1987, the Bare family lived at 7622 Boice Street in Orlando, Florida. On October 6, Gary Lee Bare, a/k/a Butch Bare left the house at 7:20 a.m. and drove his son Dustin to school. Gary arrived at his dive shop about 7:45. (R655-8) Margaret Lynn Bare left the house about 7:15 that morning in order to drop off some repaired wet suits at Sea World. She returned to the house about 8:15 a.m. Margaret found her twelve-year-old daughter, Angeli, still at home putting on her makeup. Margaret did some chores around the house for approximately thirty minutes, while Angeli prepared for school. Margaret left the house and headed for the family business at approximately 8:35 a.m. (R698-705)

As was his usual practice, Frank Miller, a friend of the Bares, left his house at approximately 8:45 a.m. that morning with his own daughter and drove the four to five blocks to the Bare residence. When he arrived at the house, Miller honked his horn twice. He then glanced at the house where he saw a man standing inside the doorway with his back to the street. Miller assumed that the man was Butch Bare, since he was approximately the same build. The man in the doorway made a gesture which Miller interpreted as, "Wait a minute." Miller remained in his car and, when he next looked, noticed that the front door was closed with no one in sight. In a couple of minutes, Angeli came out of the house and walked down the front walk toward Miller's car. She was dressed for school and did not appear disheveled. She approached the passenger side of the car (which was the side closest to the

house), came within three or four feet of Miller's car, and stopped. At that point, Miller noticed that Angeli appeared very nervous.

Angeli told Miller that there was a man in the house who she believed wanted to rob her. Miller told Angeli to get into his car immediately, but she refused. Miller asked her three or four more times, but she remained steadfast. Angeli asked Miller if his car could "beat a bullet." Miller answered negatively, and Angeli explained that, if she got into the car, the man in the house would kill all three of them. Miller replied that he would go get help and, as good as his word, he drove back to his house and called the Bares at their shop. At the Bare's suggestion, Miller also called 911. Miller then drove back and parked four or five houses away from the Bare's home. (R727-40)

Orange County Deputy Sheriff Richard Welty received a radio dispatch at approximately 9:10 a.m. and drove to 7622 Boise Street. En route, Frank Miller flagged down Deputy Welty and related what he had observed a few minutes before. Miller described the man he had seen as a white male with reddish hair. (R753-63) Mr. and Mrs. Bare arrived as Miller described the man to Welty. Mrs. Bare revealed that Angeli's biological father, who lived in California, also had reddish hair. (R763-4)

Deputy Welty went to the Bare home and searched it. He noticed nothing unusual other than the strong odor of urine in one of the bedrooms. (R764-6) Corporal Lewis arrived at the Bare home as Welty was leaving. Corporal Lewis stayed at the house, while Deputy Welty went to check the field in back of the canal area behind the Bare home. (R766) Welty had to walk around the front of the house next door, so he could get to the field on the other side of the canal. (R767-8) Welty looked for, but saw no drag marks or footprints in the canal area. He then scanned the wooded field, but saw no movement. Welty walked west into an area filled with heavy brush and trees. He followed a path with his revolver drawn in one hand and his two-way radio in the other. The footing was rather treacherous, due to the shrubbery, rotting wood, garbage, and holes. Welty holstered his gun as a safety

precaution. (R768-9) Welty was concerned about his gun accidentally discharging, since the field was adjacent to areas of great human activity. In addition to the rush-hour traffic on South Orange Blossom Trail, Welty noticed many laborers at a construction sight immediately south of the field. (R769) As Welty proceeded down the path, he noticed a white male with sandy blond hair walking casually through the field wearing a dungaree-style, button-up shirt with the long sleeves rolled up to his elbows. The man also sported worn blue jeans. He had what appeared to be a sandwich in his right hand. When Welty first observed the man he was approximately sixty-five yards away walking toward the construction site. Apparently due to the terrain, the man was "high-stepping''through the field. (R769-71,783,867-74)

Since Welty was looking for a man with red hair, he barely gave the individual in the field a second thought. (R876-7) Welty called Corporal Lewis on his radio and asked for a better description. (R772) While talking on the radio, Welty became unsure of his footing, looked down and, when he looked up again, found himself looking at the man he had seen earlier now pointing a gun at him. (R774-5) Welty subsequently identified that individual as Robert Power. [1]

Power told Welty to hand over his sidearm. Welty described Power's gun as either a nine millimeter or a .45 caliber semi-automatic pistol. (R774-5) Welty thrust his hands into the air and slowly reached for his pistol. Power then ordered Welty's hands into the air once again and retrieved Welty's pistol himself. (R774-82) Power asked Welty, "How many others are there?" Deputy Welty lied and told Power that there were six deputies on the scene. After a lengthy pause, Power asked for and received Welty's radio. Power then ordered the deputy to run in the direction of the construction site, and warned him, "If you turn around, I will kill you." Welty jogged about thirty feet, stopped, looked back, and saw Power running

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[1] About a week after the murder, police developed Power as a suspect. Welty selected a photo of a much younger, clean-shaven Robert Power from a photographic line-up (his picture appeared first). (R836-7,1251-66,1261-4; state's #70)

west very hard and fast towards U.S. 441 (South Orange Blossom Trail). West was also the same general direction where Angeli Bare's body was found later that morning. (R779-82)

Welty ran back to the Bare home and reported that the culprit had his radio and service revolver. The police set up a perimeter and, constantly changing radio channels, sealed the area. (R784-5) Despite establishing at least a partial perimeter within a minute after Welty's return to the Bare home, police were unable to apprehend the fleeing suspect. (R582-6)

It was late morning or early afternoon (R524,568-9,574) before authorities found the body of Angeli Bare in the tall grass of the field behind her home. (R561-78) Deputy Otterbacker was less than ten feet from the body before he was able to see it through the vegetation. (R575-6) The body was lying on its right side, gagged, and "hog-tied" by the wrists and ankles. The body was nude from the waist down. (R455-73,1091-97,1105-6)

Evidence technicians wrapped the body in a shroud to preserve trace evidence and transported it to the medical examiner's office for an autopsy. (R1097-8) The victim's left eye was blackened. The medical examiner also found superficial contusions on her neck. (R1108-9) In the medical examiner's opinion, the death of Angeli Bare resulted from shock following exsanguination due to the severance of the right carotid artery. The artery was cut by a stab wound on the right side of her neck. (R1112-15) The autopsy also revealed injuries to the vaginal and anal area. (R1116-17) The doctor opined that these injuries were the result of the insertion of an oversized foreign object, perhaps a human penis. (R1118) The doctor approximated the time of death as 9:15 a.m. with thirty minutes leeway either side. (R1137-8) The crime lab serologist found no semen on the victim's underwear. (R1606-10) Vaginal, rectal, and oral swabs revealed no spermatozoa. (R1613-15) Blood stains found on the victim's underwear were the same blood type as the victim. (R1610-11,1615-17)

Using Officer Welty as his source, Neil McDonald, a composite artist with the Orlando Police Department, prepared a sketch of the man Welty

saw in the field. The team made further refinements of the sketch in the two days following the crime. (R1029-71, State's Exhibits #48 and #54) Both composites were exhibited by the media throughout the Central Florida area. (R1049)

Police conducted a thorough search of the Bare home. They found no signs of a struggle, nor of forced entry. (R598,602,609) Angeli Bare's bed had a rubber sheet on it with some damp sheets, smelling of urine, piled in a heap. (R606-7;State's Exhibit 38) Angeli's bank had been pried open (R671-5), and a screwdriver was found in the kitchen sink. (R671) The crime scene technicians gathered voluminous amounts of evidence. They attempted to lift latent prints from a multitude of items in the house. Using the laser beam technique, the cyanoachrlick glue method, the dye method, in addition to more mundane tests, the team found many latent prints. (R611-13) None of them matched Robert Power. (R611-13,972-89,1073-89) Latent fingerprints found on Officer Welty's service revolver found in the field near the scene of the robbery, also did not match Robert Power. **(R455-500,976)**[2]

The body of the victim was also carefully scrutinized in an attempt to obtain any trace evidence. Police found no latent fingerprints of any kind on the body even though they used the laser technique, the superglue process, the silver iodine transfer method, and the black magnetic powder process. (R955-8)

Police eventually developed Robert Power as a suspect. Approximately ten days after the murder, Officer Welty selected an eight-year-old photograph of a clean-shaven Robert Power. (R836-7,842-3,1251-6,1261-4; State's #70) Power's photograph was the first in the line-up.

On October 14, 1987, a swat team executed a search warrant at the residence located at 2220 Vine Street. Robert Power lived at this house with his mother, her youngest daughter, her oldest son, that son's wife and their three children. [Defense Exhibit #3 (Osceola suppression hearing) p.489]

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[2] Officer Welty testified that the man who robbed him of his gun in the field behind the Bare home was **not** wearing gloves. (R889)

Robert Power was found in the attic and arrested. (R1268-79) Police seized a maroon duffle bag fromn the attic which was in close proximity to Power. (R1288-9) The duffle bag contained a pistol, some ammunition, a pair of tan driving gloves, a red bandanna, at least three documents with Robert Power's name on them, and a folding knife. (R1334-43,1566-7)

Police found a Yahtzee box in the front bedroom, just inside the jalousie door that the swat team broke to gain entrance. (R1281-5,1301-2) The box contained a multitude of various electronic parts, one of which ostensibly was from the inside of Welty's stolen radio. (R753-6,779-82,795-834,1227-31,1319-24,1572-82) An exhaustive examination of the Yahtzee box revealed numerous latent fingerprints, none of which matched Robert Power's. The crime lab was unable to find any useful latent prints on the radio parts inside the box. (R1227-33) Police also seized some green, hooded sweatshirts and several denim, work shirts from the front bedroom. (R1343-6) According to two of the state's experts, two of three head hairs recovered from the sweatshirts were "consistent" with the known standards from Angeli Bare. (R1534,1629-75) The witness could not say that the "matched" hairs belonged to Angeli Bare to the exclusion of all others. (R1562)

Police also carefully combed the Bare home for evidence pointing to Robert Power's guilt. As previously mentioned, police found no fingerprints in the Bare home or on the body that matched Robert Power. However, according to the State's experts, three pubic hairs from Angeli's bedspread were indistinguishable from Power's known pubic hairs. (R1535,1629-75) Also, one pubic hair from Angeli's fitted bed sheet was indistinguishable from Power's. (R1538,1629-75) Additionaly, a single hair recovered during the autopsy from Angeli's pubic area was indistinguishable from Robert Power's pubic hair. (R1538, 1629-75)[3]

Even the State's experts agreed that a number of head hairs of unknown origin found in the sheets of Angeli's bedding did not match Power's.

[3] Again, these conclusions were made by two state witnesses. A defense expert found that none of the questioned hairs could have come from Power.

(R1546-7,1565) The crime lab analyst did not find any of Robert Power's head hair in Angeli's bedding or clothing. (R1550) Numerous hairs recovered from the bedding and clothing remained unidentified at the time of trial. (R1550,1565) Robert Power's pubic hair was the only adult pubic hair compared to the foreign hair recovered from Angeli's pubic region. (R1547-8)

The state experts admitted that hair evidence was unlike fingerprint or DNA evidence. Hair experts can only conclude that a hair originated from a particular person or someone else whose hair displayed exactly the same characteristics. (R1539-41,1556-7) Unlike fingerprints and DNA evidence, one person's hair can be indistinguishable from another person's. The state experts insisted that finding hair indistinguishable from the victim's in Robert Power's home coupled with the finding of hair indistinguishable from Robert Power's on the victim and in her bedding, resulted in a stronger association. The "cross-transfer" of two supposedly random events allegedly strengthen the association of Robert Power with the victim. (R1541-2)

A witness qualified as an expert in the area of hair analysis testified for the defense concluding that none of the hairs found on the victim or in her bedding originated from Robert Power. (R1695-1803) The two hairs found on the green sweatshirt recovered from Power's home were more heavily pigmented and were not quite as flattened as the victim's hair. (R1735-6) Additionally, the victim's hair had surface deposits, probably of a cosmetic nature, while the sweatshirt hair was quite clean. (R1736) The pubic hair recovered from the victim's bedding was more pigmented than Power's and lacked discontinuous medulla, which Power's contained. (R1739) Additionally, the unknown pubic hairs had smoothly pointed distal ends with no surface features on the tips. In contrast, Power's pubic hair was moderately kinked and some contained no medulla, while others contained fragmented medulla. The hairs recovered from the victim's bedding contained discontinuous medulla. (R1740-1) The defense hair expert also found a number of dissimilarities when comparing Power's hair with the foreign hair recovered from the victim's body.

(R1742-7) Although he admitted that there was a possibility that the foreign hair originally belonged to Robert Power, it probably did not. (R1745-9)

Penaltv Phase

At the penalty phase, the state presented the testimony of four witnesses. Their testimony revealed that Robert Power committed an armed robbery in 1979 and pleaded guilty. (R2386-95) In September, 1987, he committed sexual batteries on three different victims. (R2396-2427) The state submitted documents establishing that Power had been convicted of these offenses and several other violent felonies. (R2375-85; State's Exhibits number 108,109,110,111) The documents also clearly established that Power was to serve, inter alia, at least eight consecutive life sentences. (State's Exhibit #111)

When the state was unsuccessful in its attempt to prevent the defense from presenting the videotaped, perpetuated testimony of Dr. Sashi Gore, the prosecutor chose to introduce the testimony himself. (R2427-32) Dr. Gore opined that the bruise around the victim's eye and the injuries to her vaginal and anal area occurred prior to her death. (R3310-11) The doctor was unable to tell whether the head injury occurred prior to the vaginal and anal injuries. (R3317) If the head injury occurred first, the victim could very well have been unconscious during the sexual battery and at the time of the stabbing. (R3313-17) If she had been unconscious, she would not have felt any pain. (R3317) The doctor admitted that it was just as likely as not that the victim felt no pain.

The defense presented an expert in the areas of sociology, criminology, and capital sentencing. (R2468) Dr. Radelet pointed out that Power had already been sentenced to ten consecutive life sentences followed by 200 years incarceration. (R2473-7) All of these cases had been appealed and affirmed. (R2507) Dr. Radelet explained the concept of life sentences with a minimum-mandatory twenty-five years without parole and also expalined the abolition of parole. (R2479-80) Dr. Radelet expressed a very strong opinion that Power would never be released from prison. (R2482-3) Dr. Radelet

testified about several United States studies which all revealed that the cost of life imprisonment is about one-sixth the cost of execution. (R2514) Dr. Radelet told the jury that sixty percent of this Court's time is spent on the review of capital cases. The appellate system is extremely expensive, time-consuming, and frustrating to taxpayers. (R2522) Dr. Radelet was allowed to testify without objection that lawyers handling capital appeals for both the defense and the state are typically well-paid. (R2522-3)

SUMMARY OF ARGUMENTS

Mr. Power challenges the sufficiency of the evidence. The State attempted to link Power to the murder using only seven hairs. As the experts testified, hair comparison evidence is not a positive means of identification. Power's proximity to the body is insufficient in this case.

Reversible error occurred when the trial court failed to sequester the jury. Additionally, Power challenges the venire due to the under-representation of African-Americans. Power also objected to the complete absence of any venireman that expressed any qualms whatsoever about the death penalty.

In a case as circumstantial as this one, the prosecutor committed reversible error when, during closing argument, he pointed out Power's failure to "explain away" the few circumstances that pointed towards Power's guilt.

Power challenges the admissibility of certain hearsay evidence that erroneously indicated that Power possessed a radio part stolen from Deputy Welty.

There was insufficient evidence of Power's flight to justify a flight instruction. This Court has recently pointed out that, the hasty departure from the scene of a crime, is insufficient to warrant a jury instruction on flight.

In an unfortunate incident during the trial, a bailiff "drew down" on Robert Power in full view of the jury. The bailiff's unwarranted action clearly suggested to the jury that Robert Power was an extremely dangerous and

untrustworthy individual.

Frank Miller was the only witness to actually see the assailant at the Bare home. At trial he gave a vague description, but could not recall the color of the man's hair. Deputy Welty was allowed to testify that Miller told him that the individual had red hair. This testimony constituted blatant hearsay and should have been excluded.

Power also attacks the grand jury proceedings and resulting indictment. Power contends that the selection of the grand jury foreperson in Orange County is discriminatory. Power also contends that, under a special, local law, his grand jury should have contained twenty-three members instead of eighteen. Power also attacks certain irregularities in the impanelment of the grand jury.

Pursuant to a search warrant, police seized certain physical evidence from Power's home. Power argues that the affidavit (on which the warrant was issued) contained misleading information and omitted certain material facts. Power also challenges the SWAT team's violation of the "knock and announce" provisions of Florida law. Power also contends that the search warrant was insufficient, where the warrant named the wrong homeowner.

The trial court also committed reversible error in allowing the State to introduce several items of physical evidence that were irrelevant and prejudicial. A knife found in Power's possession was admitted despite evidence that it could not have been the weapon that killed Angeli Bare. The judge improperly instructed the jury that there was no evidence indicating an absence of blood on the knife. The instruction constituted an improper judicial comment on the evidence.

The trial court improperly restricted Power's cross-examination of Officer Welty concerning material facts that he omitted from his supplemental police report. The trial court also improperly limited Power's peremptory challenges during jury selection.

In this appeal, Power contests the admissibility of only one photograph. State's Exhibit #65 was a close-up photograph of the twelve-year-

old's distended and lacerated anal and vaginal orifices.

Power contests the trial court's refusal to give two special jury instructions. One deals with hair comparison and the other with the pyramiding of assumptions in the consideration of circumstantial evidence. Both accurately state the law and are not covered by the standard instruction. Power also questions the reliability of the trial transcript.

At the penalty phase, Dr. Radelet was qualified as an expert in the areas of sociology, criminology and capital sentencing. The State elicited the fact that Radelet personally opposed the death penalty. The trial court rebuffed Power's attempt to rehabilitate Radelet's impeached credibility by showing that his opposition was based on reason.

Power contends that the State failed to prove beyond a reasonable doubt that the murder of Angeli Bare was especially heinous, atrocious, or cruel, where the evidence indicated that she was probably unconscious during most, if not all, of the episode. Power also attacks the trial court's finding that the murder was cold, calculated, and premeditated. The trial court applied an erroneous standard.

Finally, Power attacks the constitutionality of Florida's death penalty scheme on various grounds. Recognizing that this Court has rejected such attacks in the past, Power is concerned about procedural bar.

ARGUMENT

Robe:t Power discusses below the reasons which, he respectfully submits, compel the reversal of his conviction and death sentence. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I of the Florida Constitution, and such other authority as is set forth.

POINT I

THE CONVICTION FOR FIRST-DEGREE MURDER VIOLATES THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

At the conclusion of the state's case-in-chief, defense counsel moved for a judgment of acquittal contending that the state failed to present a prima facie case as to counts one through four (murder, sexual battery, kidnapping, and burglary). Counsel conceded that the evidence, viewed in a light most favorable to the state, supported count five (the robbery of officer Welty). (R1677-80) Counsel pointed out that the state's case was circumstantial in nature and was insufficient as a matter of law to survive a motion for judgment of acquittal. The court and both sides agreed that an in-depth argument on the motion would follow the presentation of the defendant's evidence. The court agreed to reserve ruling until that point. (R1679-80) After hearing argument at the conclusion of the evidence, the trial court denied the motion. (R1883-1935,1940)

The trial judge erred by not granting an acquittal as to the charges relating to Angeli Bare, because the state's evidence is legally insufficient to support a guilty verdict. The proof fails to exclude the reasonable possibility that someone other than Robert Power killed Angeli Bare. The evidence of Power's guilt is entirely circumstantial.

Certain facts are not in dispute. On October 6, 1987, shortly before nine a.m., Frank Miller went to the Bare home to pick Angeli up for school. Miller saw the back of a man standing in the doorway whom he thought was Angeli's step-father. At approximately 8:55 a.m., Angeli Bare came out of

her house and walked down the sidewalk to Miller's car. Although she appeared upset, her clothes were neat and clean. Angeli returned to the house after telling Miller that there was a man inside who was going to rob her. (R727-40) Miller left and notified the police.

The sheriff's office dispatched deputies at 9:09 a.m. and Deputy Welty was the first to arrive at 9:13. Deputy Welty was robbed in the field behind the Bare home at approximately 9:25. (R580) The tall grass of the field hid the body. The body could not be seen by anyone, unless they got within approximately ten feet of the location. (R557) The medical examiner estimated the time of death as 9:15 a.m. with thirty minutes leeway either side. (R1137-8)

A thorough search of the Bare home revealed numerous latent fingerprints, none of which matched Robert Power. (R611-13,972-89,1073-89) Officer Welty seemed certain that the man who robbed him in the field (who he identified as Power) was not wearing gloves. (R889)

Frank Miller was the only person who actually saw the culprit at the Bare home. (R727-40) He could not identify that individual as Robert Power. In fact, Miller initially thought the man at the doorway was Angeli's step-father, Butch Bare. When Deputy Welty arrived in the neighborhood, Miller flagged him down and described the assailant as a white male with reddish hair. (R753-63) Angeli's biological father, who lived in California, also has red hair. (R763-4)

When Deputy Welty was searching the field behind the Bare home, he noticed a white male with sandy-blond hair walking casually through the field. The man appeared to have a sandwich in his right hand. (R769-70) Since Deputy Welty was looking for a man with red hair, he barely gave the individual in the field a second look. (R876-7) This man subsequently robbed Deputy Welty of his gun and police radio. (R774-82) Deputy Welty subsequently identified his assailant as Robert Power. Welty selected an eight-year-old picture of a much younger, clean-shaven Robert Power from a photographic line-up about one week after the robbery. (R836-7,842-3,1251-6,1261-4; state's #70)

When Power encountered Welty in the filed, Power asked, "How many others are there?" (R779-82) Power took Welty's service revolver (which he subsequently abandoned in the field), and his police radio. (R784-5)

Despite an exhaustive examination of Angeli Bare's body, crime lab technicians were unable to locate any physical evidence linking Robert Power to the rape or murder. (R955-8,1606-17) An exhaustive examination of the Bare home revealed no fingerprints or palm prints matching Robert Power. (R611-13,972-89,1073-89) The state's case at trial rests entirely on hair evidence and Power's proximity to the scene of the crime. At trial, Power did not contest the sufficiency of the evidence to allow the robbery charge to go to the jury. Although Power casts significant doubt on Welty's identification of Robert Power in the field behind the home, that evidence, viewed in the light most favorable to the state, supports the robbery **conviction.**[4]

"(T)he due process clause protects the accused against conviction except upon proof beyond a reasonable doubt about every fact necessary to constitute the crime with which he is charged." In Re: Winship, 397 **U.S.** 358, 364 (1970). Power's conviction violates the Due Process Clause and, as a matter of law, the trial judge erred in denying the motion for judgment of acquittal, because the circumstantial evidence is legally insufficient to overcome the presumption of innocence.

> Under Florida law, where there is no direct evidence of guilt and the state seeks a conviction based wholly upon circumstantial evidence, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. (citation omitted). The basic proposition of our law is that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt, and it is the responsibility of the state to carry its burden. (citation omitted). It would be impermissible to allow the state to meet its burden through a succession of inferences that required a pyramiding of assumptions in order to

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[4] Since Power concedes the sufficiency of the evidence to support the robbery conviction, finding the radio part in the unclaimed Yahtzee box found in the Power home is irrelevant in the consideration of the other four charges.

> arrive at the conclusion necessary for conviction. (citations omitted).

Torres v. State, 520 So.2d 78, 80 (Fla. 3d DCA 1988). **See** Posnell v. State, 393 So.2d 635, 636 (Fla. 4th DCA 1981)("Where the state fails to met its burden of proving each and every necessary element of the offense charged beyond a reasonable doubt the case should not be submitted to the jury and a judgment of acquittal should be granted."); Kicksola v. State, **405** So.2d 200, 201 (Fla. 3d DCA 1981)("[E]vidence which furnished nothing stronger than a suspicion; even though it tends to justify the suspicion that the defendant committed the crime, is insufficient to sustain a conviction.")(emphasis added).

It is well established in Florida that a case that rests exclusively on circumstantial evidence must exclude all reasonable hypothesis of innocence.

> It is the responsibility of the state to carry its burden. When the state relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. (citations omitted).
>
> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even thoush the circumstantial evidence is sufficient to sussest a probability of quilt, it is not thereby adeauate to suoport a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956)(emphasis added). The case against Power is entirely circumstantial. There is **NO** direct evidence of his guilt. There was no motive shown for Power to commit the crime, which is a valid consideration in circumstantial evidence cases. **See** Daniels v. State, 108 So.2d 755,759 (Fla. 1959)("Where proof of the crime is circumstantial,

motive may become both important and potential.")

The state proved and it is undisputed that Angeli Bare is dead. It is expressly submitted, however, that the state failed as a matter of law to sufficiently prove that Bare's death was caused by the criminal act or agency of Robert Power. Accordingly, as a matter of law, Power is entitled to reversal of four of his convictions.

Hair Comparison

Two of three head hairs recovered from several sweatshirts found in Power's house were "consistent" with the known standards from Angeli Bare. **(R1534,1629-75)** The state's expert could not say that the "matched" hairs belonged to Robert Power to the exclusion of all others. **(R1562)** Additionally, three pubic hairs from Angeli Bare's bedspread were indistinguishable from Robert Power's known pubic hairs. **(R1535,1629-75)** One pubic hair from her fitted bed sheet was indistinguishable from Power's. **(R1538,1629-75)** Finally, a single hair recovered from Angeli's pubic area during the autopsy was indistinguishable from Robert Power's pubic hair. **(R1538,1629-75)**

A total of seven hairs implicated Robert Power. Actually, only five hairs implicated Robert Power. The state never proved who owned the green sweatshirts from which two hairs indistinguishable from Angeli Bare's were recovered. Robert Power lived at the house with his mother, her youngest daughter, her oldest son, that son's wife, and their three children. [Defense Exhibit **#3** (Osceola suppression hearing) **p.489]** The state never proved who, of the many people living in the house, owned the sweatshirts.

As the experts at trial admitted and as this Court well knows, while admissible, hair comparison testimony does not establish certain identification like fingerprints. See, e.g., Bundv v. State, **455** So.2d **330** (Fla. **1984)** and Horstman v. State, **530** So.2d **368** (Fla. 2d DCA **1988).** The Horstman court stated:

> Although hair comparison analysis may be persuasive, it is not 100% reliable. Unlike fingerprints, certainty is not possible. Hair comparison analysis, for example, cannot

> determine the age or sex of the person from whom the hair came. The state emphasizes that its expert, Agent Malone, testified that the chances were almost non-existent that the hairs found on the body originated from anyone other than Horstman. We do not share Mr. Malone's conviction in the infallibility of hair comparison evidence. Thus, we cannot uphold a conviction dependant on such evidence.

Horstman, 530 So.2d at **370.**

Florida courts have not hesitated to reverse convictions that are founded upon such equivocal identification evidence. Horstman reversed a second-degree murder conviction because the circumstantial evidence proving identification (hair and blood comparison testimony) was too equivocal to negate the possibility that someone other than the accused shot the victim. Horstman was observed over a two and one-half hour period frequenting numerous bars in the company of the victim. Both Horstman and the victim appeared intoxicated and, on more than one occasion, seemed to be arguing. The victim abandoned Horstman at the last bar of the evening and was found dead in a dumpster the next morning. Horstman successfully argued that the only evidence against him was that he was seen on the night of the murder at three separate bars making apparently unsuccessful sexual advances toward the victim, and the head and pubic hairs found on her corpse were indistinguishable from his hair and indicated close intimate contact. The Second District Court of Appeal agreed they must reverse the conviction when the evidence, even if strongly suggestive of guilt, fails to eliminate any reasonable hypothesis of innocence. Jaramillo v. State, 417 So.2d 257 (Fla. 1982). See also Jackson v. State, 511 So.2d 1047 (Fla. 2d DCA 1987) [First-degree murder conviction reversed due to the legal insufficiency of identification of murderer based on bite-mark comparison, hair comparison, and statement of the accused).

In Cox **v.** State, **555** So.2d **353** (Fla. 1989), this Court reversed a first-degree murder conviction and death sentence where the state's case consisted of circumstantial evidence of a hair, some 0-type blood, and a bootprint, none of which belonged to the victim. Those items, along with

bite-mark testimony and Cox's presence in the area, comprised the state's circumstantial evidence. This Court pointed out that Cox did not know the victim, and no one testified that they had been seen together. The state's evidence "could have created only a suspicion, rather than proving beyond a reasonable doubt, that Cox, and only Cox, murdered the victim." **Cox,** 555 So.2d at 353. Even if hair comparison evidence provided a positive means of identification, the state would still be required to show that the hairs could only have been left durina the commission of the crime. **See** Jaramillo v. State, 417 So.2d 257 (Fla. 1982).

Recently, this Court reversed a first-degree murder conviction and resulting death sentence based, in part, on the insufficiency of the circumstantial evidence. Scott v. State, 581 So.2d 887 (Fla. 1991). In denying the motion for judgment of acquittal, the Scott trial judge relied heavily on the hair comparison evidence. This Court found such evidence not sufficiently persuasive under the circumstances of the case. This Court concluded that the hair evidence was even less persuasive then the hair comparisons rejected as insufficient in Horstman and Jackson.

Further doubt is cast upon the state's hair comparison evidence when one examines the testimony of an expert presented by the defense. That expert concluded that none of the hairs found on the victim or in her bedding originated from Robert Power. (R1695-1803) The expert also concluded that the two hairs found on the green sweatshirt recovered from Power's home were more heavily pigmented and were not quite as flattened as the victim's hair. (R1735-6) Additionally, the victim's hair had surface deposits, probably of a cosmetic nature, while the sweatshirt hair was quite clean. (R1736) The pubic hair recovered from the victim's bedding was more pigmented than Power's and lacked discontinuous medulla, which Power's contained. (R1739) Additionally, the unknown pubic hairs had smoothly pointed distal ends with no surface features on the tips. In contrast, Power's pubic hair was moderately kinked and some contained no medulla, while others contained fragmented medulla. The hairs recovered from the victim's bedding contained discontinuous medulla.

(R1740-1) The defense hair expert also found a number of dissimilarities when comparing Power's hair with the foreign hair recovered from the victim's body. (R1742-7) Although admitting that there was a possibility that the foreign hair originally belonged to Robert Power, the expert concluded that it probably did not. (R1745-9)

Hair comparison evidence is not a positive means of identification. Additionally, the state failed to show that the hairs could only have been left during the commission of the crime. There is no way of knowing how long the hairs were present prior to their discovery. This equivocal identification evidence, viewed in a light most favorable to the state, shows at most that, at some point in time, a person with hair consistent with Robert Power's might[5] have been in contact with Angeli Bare in her bed.

Power anticipates that the state will attempt to place great emphasis on the additional fact that hair, consistent with Angeli Bare's was discovered on the sweatshirts found in the Power home. Although both state experts contended that the occurrence of two such random events increased the probability of guilt, they could offer no statistics or studies to support that conclusion. There is simply insufficient physical evidence to support Robert Power's convictions for the crimes against Angeli Bare.

Power's Proximity to Angeli Bare's Body

Viewing the evidence in the light most favorable to the state, Power must concede that he robbed Welty in the large field across the canal behind the Bare home. Welty first spotted Power from a distance of approximately sixty-five yards walking toward the nearby construction site. Apparently due to the terrain, Power was "high-stepping" through the field. (R769-71,783,867-74) Welty did not notice anything suspicious about Power's gait. Since Frank Miller described the man in the Bare's doorway as having red hair, Welty barely gave Power a second look. (R876-7) He felt comfortable

[5] Significantly different than a fingerprint, a hair can originate with an individual and thereafter be transferred in his or her absence. (R1647)

enough to holster his gun. (R768-9) The robbery occurred at approximately 9:25 a.m. Angeli Bare was apparently killed between 8:55 a.m. and 9:45 a.m. (R1137-8) Welty estimated that the closest that he observed Robert Power to the location where the body was eventually found was approximately 75 yards. (R845-50) No one disputed that the body was "hidden" by the extremely high vegetation in the field. In fact, one witness testified that one needed to come very close to the body (within ten feet) before one was able to spot it. (R575-6)

There was absolutely no evidence to connect Robert Power to the body or its location. Welty testified that Power wore no gloves during the robbery. (R889) An exhaustive search by crime scene technicians turned up **no** latents that matched Robert Power. (R455-500,611-13,972-89,976,1073-89) Additionally, Power had no blood on his clothing. (R944-5) The medical examiner testified that the burn marks on Angeli's thighs indicated that her rapist merely unzipped his pants. Even though she was virginal and would have bled profusely, Welty observed absolutely no blood on Power's jeans. (R944-5,1153) Although Angeli Bare's carotid artery was severed, Welty saw no blood on Power's clothes. (R1115) Although Deputy Welty observed a gun in Power's hand, he saw no knife. (R945)

Power expects the state to attempt to make hay of his statement to Welty in the field, "How many others are there?" (R779-82) Although the jury was unaware, the trial court was cognizant of the fact that Robert Power had been mistakenly released from the Brevard Correctional Institution. (R2327-8) Power knew that law enforcement officers were probably looking for him. Additionally, Power had committed numerous other offenses in Osceola and Seminole Counties for which authorities very well could have been seeking him. Furthermore, Power obviously saw Welty communicating on his radio just prior to the robbery. This would also explain Power's question. Any of these facts could have prompted Power's query of Welty.

The state failed to present competent evidence that Robert Power was any closer than approximately **225** feet to the area where the body was

hidden. The evidence placing Power in that distant proximity fails to disclose whether or not Angeli Bare's body was actually present at the time Power was near. Her body was found hours after the robbery of Welty.

In circumstantial evidence cases, the consistently critical factor in determining the sufficiency of evidence to allow the question to go to the jury, is the presence of direct evidence placing the defendant with the victim at or very near the time of death. Bundv v. State, 471 So.2d 9, 12 (Fla. 1985) [Two witnesses identified Bundy as person at scene of abduction driving white van stained with victim's blood type]; Heinev v. State, 447 So.2d 210, 211 (Fla. 1984)("The victim's mother and his wife later positively identified Heiney as having been with the victim the day prior to his death. They both testified at trial.") Bundv v. State, 455 So.2d 330 (Fla. 1984)("The principal items of evidence [include] the identification testimony of a resident of the Chi Omega sorority house who briefly saw Bundy in the house."); Peavev v. State, 442 So.2d 200, 201 (Fla. 1983)(unexplained presence of defendant's fingerprints on victim's cashbox); Williams v. State, 437 So.2d 133 (Fla. 1983)(Defendant called victim's sister from scene and reported finding victim murdered); Rose v. State, **425** So.2d 521, 522 (Fla. 1983)("The evidence reveals that the defendant was the last person seen with [the victim] at the bowling alley on the night she disappeared:): Weltv v. State, 402 So.2d 1159, 1163 (Fla. 1981)("Welty's own statement to the authorities which was introduced into evidence placed him in [the victim's] bedroom at the exact time of the murder."); Clark v. State, 379 So.2d 97, 101 (Fla. 1980)("There was no question as to the identification of Clark or the fact that Clark's Blazer was identified as being in the bank's parking lot at the precise time that the victim was abducted."); North v. State, 65 So.2d 77, 78 (Fla. 1952)("Only the appellant and [the victim] were present at the time of her death"); Green v. State, 408 So.2d 1086, 1087 (Fla. 4th DCA 1982)("Ms. Parillo testified that when she entered the lot, there was no one in the parking lot other than the appellant and the elderly man that was killed. Ms. Parillo positively identified the appellant, both at the lineup and in court[.]").

In each of the foregoing cases where the circumstantial evidence was found legally sufficient to support the verdict, the state was able to unequivocally establish through direct evidence (eyewitness, fingerprint, or admission) that the defendant was with the victim at or near the time of death. In cases where the circumstantial evidence was found to be legally insufficient for the case to have been submitted to the jury, the state was unable by direct evidence to unequivocally place the defendant in the presence of the victim at or near the time of death. Cf. Jaramillo v. State, 417 So.2d 257, 258 (Fla. 1982)(First-degree murder convictions reversed where state failed to prove that accused's fingerprints had been left at murder scene at time of the crime and no other); Davis v. State, 90 So.2d 629, 630 (Fla. 1956)(Murder conviction reversed where "There is not one item of direct evidence that connects him with the crime for which he was convicted."); **Head v. State**, 62 So.2d 41, 42 (Fla. 1952) (Manslaughter conviction reversed where accused's automobile was seen being erratically driven at high speed near the scene of a body, but "to conclude from the testimony in this record offered for the purpose of showing that the deceased was killed by being struck by an automobile, would be at best a haphazard guess.")

Conclusion

The direct evidence presented in this case is that Robert Power robbed Deputy Welty in the large field adjacent to a construction site, a neighborhood, and South Orange Blossom Trail. Two hundred feet was the closest that the state could place Power to the area where the body was found several hours later. Frank Miller's description of Angeli's assailant did not match the description of Robert Power. Power was armed with a firearm, while Angeli Bare was killed with a knife. Deputy Welty observed no knife or blood on the person of Robert Power. The body was Angeli Bare was not visible from a distance of more than ten feet. The probative force of all the evidence considered together does not amount to substantial, competent evidence upon which to rest a conviction for first-degree murder. As a matter of law, the evidence in this case is simply inadequate. The conviction rests on pure

speculation. A first-degree murder conviction that rests on such equivocal evidence violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16, of the Florida Constitution. Accordingly, the murder, kidnapping, burglary, and sexual battery convictions must be reversed and remanded for discharge.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR, DURING CLOSING ARGUMENT, POINTED OUT POWER'S FAILURE TO TESTIFY.

The state realized that their entire case was circumstantial. The prosecutor began his argument by pointing out that fact to the jury:

> This is a circumstantial evidence case in some ways. Certainly not circumstantial as to the robbery. . . . Most of the rest of this, kidnapping, the burglary, the sexual battery, murder, that's a circumstantial evidence case.

(R1974) The prosecutor then attempted to explain the standard that the jury must use in dealing with circumstantial evidence:

> Circumstances seldom point to commission of a crime when a person is innocent. Circumstances seldom suggest that a person who has committed no crime has in fact committed a crime. Circumstances seldom point to the wrong person. Occasionally, circumstances may suggest that one is guilty of something that they didn't do. But when the person is innocent, those two or three circum- stances are easily explained away. In this case, Welty saw the defendant, we know who did it, the composite that Welty or that McDonald drew of Welty (sic) directly points to no one but the defendant.

(R1982-3) At this point, defense counsel approached the bench and moved for a mistrial:

> My motion is that I object to your comments that when a person is innocent, the circumstances indicating guilty can easily be explained away is an improper comment at least indirectly on the defendant's right to remain silent. I move for a mistrial at this time. If the Court denies that, I ask for a curative instruction. . . [I]f a person is innocent, it can generally be explained away. I ask the Court to consider that very carefully what is

> meant by that. What that condones. For the jury to think we have offered no explanation and I suggest that that means a comment on explanation by the defendant. This particular matter, I don't think it can be cured. So I object strenuously to it. I am asking the court at this point to grant a mistrial.

(R1983-4) The trial court denied the motion for mistrial, which prompted defense counsel to request a curative instruction. **(R1984)** The court asked defense counsel to write out a curative instruction and, if appropriate, the court would give it. The trial court pointed out that the standard instructions included one on circumstantial evidence and one on the reasonable hypothesis of innocence. Defense counsel contended that these did not cure the error created by the State. **(R1984)** Apparently defense counsel maintained his belief that no instruction could cure the error as no further mention was made of a proposed instruction. After hearing this improper and prejudicial argument, the jury returned with verdicts of guilty as charged on all counts and later recommended the death penalty.

Comment on a defendant's exercise of his right to remain silent is the ultimate and unpardonable sin €or a prosecutor. Rule **3.250,** Florida Rules **of** Criminal Procedure, points out that:

> . . . (B)ut no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, ...

Robert Power exercised his Fifth Amendment right to remain silent. It is improper for the prosecution to use the exercise of that right against the defendant. Griffin v. California, **380** U.S. 609 **(1965);** United States v. Griggs, **735** F.2d **1318** (11th Cir. **1984).** As a result of their special role, prosecutors owe a higher duty to the justice system. Those duties were well-stated in the classic opinion of Justice Sutherland fifty-five years ago. The interest of the prosecutor, he wrote:

> is not that he shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may

> prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not a liberty to strike foul ones.

Burser v. United States, 295 U.S. 78, 88 (1935). The **ABA** Standards on the Prosecution Function, state that "The duty of the prosecutor is to seek justice, not merely to convict." Standard **3-1.1(a);** see also State v. Locklear, 241 S.E.2d 65, 69 (N.C. 1978)("[p]rosecuting attorneys owe honest and fervor to the State **and** fairness to the defendant") (emphasis supplied)]. Simply put, the defense may do many things in a capital trial which are forbidden to the prosecution, for the Eighth Amendment "Create[s] asymmetry weighted on the side of mercy." Stanley v. Zant, 697 F.2d 955, 960 (11th Cir. 1983).

Florida utilizes the "fairly susceptible" test adopted in David v. State, 369 So.2d 943 (Fla. 1979). Any comment which is "fairly susceptible" of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error. David v. State, 369 So.2d at 944. This Court has refused to abandon the "fairly susceptible" test and adopt the federal test ("naturally and necessarily"). Pointing out that a comment on the defendant's failure to testify is a serious error, this Court retained the "fairly susceptible" test and acknowledged that it provided more protection to the defendants than the federal test. State v. Kinchen, 490 So.2d 21, 22 (Fla. 1985).

The offending portion of the State's argument below focused on an innocent person being able to "explain away" two or three items of circumstantial evidence that point guilt at the wrong person. (R1982-3) Several Florida cases have condemned similar comments on an accused's "explanation" or lack thereof. Roberts v. State, 443 So.2d 192 (Fla. 3d DCA 1983), reversed a defendant's conviction €or burglary where the prosecutor, in his opening statement, pointed out that the defendant "will not be able to explain . . .". The Third District Court of Appeal held that the comment, without doubt was fairly susceptible of being interpreted by the jury as referring to the defendant's exercise of his right to remain silent.

Cunninaham v. State, 404 So.2d 759 (Fla. 3d DCA 1981), reversed a burglary conviction where the prosecutor stated:

> That raises two questions: The position that the fingerprint, was found inside the door - keep that in mind - approxi- mately the middle of the door in the inside portion. That is very important, how that left hand, little finger got in there. That has not been explained in this case and I think that counsel owes you an explanation for that.

Cunninaham v. State, 404 So.2d at 759; (emphasis added). The Third District Court of Appeal found the comment clearly susceptible of being interpreted as referring to the defendant's failure to testify. The court also pointed out that the error could not be cured by cautionary instructions.

When considering the comment made at Power's trial, an extremely helpful case is Childers v. State, 277 So.2d 594 (Fla. 4th DCA 1973). The reviewing court pointed out that circumstantial evidence was an essential part of the case against Childers. In commenting upon the circumstantial evidence the prosecutor said:

> The Judge will also instruct you, and I will tell you right now, that if a man can offer you a reasonable hypothesis of innocence, than you should look to that reasonable hypothesis of innocence when you are dealing with circumstantial evidence.
>
> I submit to you, what reasonable hypothesis has been offered to you, other than the one which indicates....

Childers v. State, 277 So.2d at 595. The court believed it clear that the prosecutor's comment was subject to an interpretation which would bring it within the prohibited area:

> The prosecutor's statement of the applicable law, followed immediately by his rhetorical question, "What reasonable hypothesis has been offered to you. . . " is fairly susceptible of being interpreted by the jury as a statement to the effect that "an innocent man would attempt to explain the circumstances but the defendant offered no such explanation."

Id. (emphasis added). The district court pointed out that it did not matter that the prosecutor did not intend the above interpretation, nor that the comment is also susceptible of a construction which is non-violative of the

rule. The trial court should have granted the motion for mistrial. The district court accordingly reversed and ordered a new trial.

Flaherty v. State, 183 So.2d 607 (Fla. 4th DCA 1966), reversed a conviction where the prosecutor argued that there was "nothing to rebut [the state's] evidence" and later pointed out that defense counsel offered no innocent explanation as to how the defendant's fingerprints got on the spoon in the burglarized drugstore. Likewise, in Ard v. State, 108 So.2d 38 (Fla. 1959), this Court reversed a conviction where the prosecutor reminded the jury that the defendant had the burden of giving "a reasonable explanation" of his possession of recently stolen property. This Court held that the comment had the effect of reminding the jury that the defendant did not testify in his own behalf. Such a comment constituted reversible error.

The comment made by Power's prosecutor is very similar to the comments condemned in the cases cited above. The state's argument is certainly susceptible of an interpretation by the jury as a comment on Robert Power's failure to "explain" (as an innocent person would certainly do) the circumstantial evidence which pointed a finger of guilt.

Much less egregious comments have resulted in new trials. **See e.g.** Lons v. State, 469 So.2d 1 (Fla. 5th DCA 1985), following remand, 498 So.2d 570 (Fla. 5th DCA 1986); Andres v. State, 468 So.2d 1084 (Fla. 3d DCA 1985); Knox v. State, 471 So.2d 59 (Fla. 4th DCA 1985); Brazil v. State, 429 So.2d 1339 (Fla. 4th DCA 1983); Brock v. State, 446 So.2d 1170 (Fla. 5th DCA 1984); Samoskv v. State, 448 So.2d 509 (Fla. 3d DCA 1983); and, Fernandez v. State, 427 So.2d 265 (Fla. 2d DCA 1983). Robert Power is entitled to the same application of the law. The prosecutor's comment was, directly or indirectly, a comment on Robert Power's failure to testify. The timely and specific motion for mistrial should have been granted.

Until very recently, a prosecutor's comment on an accused failure to testify resulted in a per se rule of reversal. David v. State, 369 So.2d 943 (Fla. 1979) and Trafficante v. State, 92 So.2d 811 (Fla. 1957). In State v. DiGuillio, 491 So.2d 1129 (Fla. 1986), this Court receded from its previous

holdings and ruled that comments on a defendant's silence are subject to harmless error analysis. The proper test that appellate courts must apply is set forth below:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, than the error is by definition harmful.

State v. DiGuillio, 491 So.2d at 1139. The State certainly cannot meet that burden in Power's case. The prosecutor admitted that the state's case (except for the robbery) was entirely circumstantial. In fact, the prosecutor made the improper comment in his attempt to convince the jury that the circumstantial evidence was consistent with guilt and inconsistent with innocence. Certainly in this case, the State cannot meet its weighty burden of proving to this Court beyond a reasonable doubt, that the egregious comment did not affect the verdict.

POINT III

THE TRIAL COURT ERRED IN OVERRULING POWER'S NUMEROUS OBJECTIONS AND ALLOWING THE INTRODUCTION OF INCOMPETENT, IRRELEVANT, HEARSAY EVIDENCE THAT ERRONEOUSLY INDICATED THAT POWER STOLE WELTY'S RADIO.

On October 6, 1987, Deputy Welty went on duty at approximately 6:00 a.m. He was assigned car #236 which was Deputy Armondo Gonzales' car. Welty was given a different radio by the public service officer at the front desk for operations on 33rd Street. That radio was normally assigned to car #69. Pool cars were for the general use of deputies that did not have an assigned vehicle. Each car has an assigned radio. (R801-2) Welty signed for

the radio assigned to car #69. (R802) Welty did not use car #69 that day, since it was an older car. The radio assigned to Welty that day had a serial number affixed to the back, an FCC identification number, a model number, and a plate with an Orange County Sheriff's property number. (R753-7) Needless to say, Deputy Welty had no reason to make note of any of the identification numbers.

Welty explained that all equipment issued to deputies was listed on a property card. The deputy signed the card indicating that he had received the listed property and accepted responsibility for it. (R789) If equipment is lost or stolen, the deputy must fill out special property loss forms. (R789-90) Welty testified that a card for each employee was kept on file with the inventory issued to that employee listed. (R789-90)

After his radio was stolen, Welty filled out a "green form standardized original request incident of loss or damage or stolen items." (R795-6; State's #68) Welty explained that, in filling out the report, he called the sheriff's supply center and got the serial number from whoever answered the phone. Welty could not remember whom he talked to, nor could he vouch that the information was correct. (R797-800) Welty did not know what documents the person he talked to on the phone referred to in giving him the radio's serial number. (R803)

Although the State could prove that Welty reported a particular radio (serial #579AHJ0837) as stolen, they could not verify that that particular radio was the one actually stolen from Welty. (R804-19) After Welty testified, the trial court sustained Power's objection and refused to allow either the loss report or the inventory receipts into evidence without testimony from the records custodian. (R821-2)

Officer Welty subsequently clarified the procedure for checking out radios. The radios are kept by the public service officer at the front of the sheriff's office. Deputy Welty signed for his radio that day next to the Orange County Sheriff's identification number in a log book kept for that purpose. When Welty filled out the loss report form, he obtained the Orange

County property number from the log that he signed that day. (R823-6) When Deputy Welty signed out the radio that day (Orange County Sheriff property I.D. #145615), he verified that the property number on the radio matched the number that he signed for in the log book. (R834)

In 1983, when the stolen radio was purchased by the sheriff's department, Donald J. Hulse was one of several assistant supply supervisors for the department. (R1180,1187) Hulse conducted inventories of all sheriff's office equipment, tagged new equipment, and ran the warehouse. (R1180) Once new radios arrived at the warehouse, Hulse and other employees set them up in serial number sequence.[6] Hulse then assigned Orange County Sheriff's property numbers to aid tracking and identification. (R1181-2) Using epoxy-like glue, employees affixed Orange County property stickers on the radios. (R1182) Back in 1983, Hulse prepared State's Exhibit #67 which purported to reflect that Orange County Sheriff's property identification #145615 was assigned to a radio with the serial number 579AHJ0837. (R1183-4; State's Exhibit #67)

When Hulse testified at Power's trial, he held the position of fleet maintenance manager for the Orange County Sheriff's Office. He had been in that job for a week. Prior to the reassignment, Hulse was the supply supervisor. (R1185-6) Hulse admitted that, at the time of trial, he was not custodian of records for the Orange County Sheriff's Office. (R1186) Hulse admitted that in August, 1983, when he filled out State's Exhibit #67, he was assistant supply supervisor. His supervisor was custodian of records for supply. (R1186-7) Hulse was just one of several assistants. (R1187)

When the State attempted to introduce Exhibit #67, Power objected on the grounds that the custodian of records had not testified. (R1187-8) Defense counsel argued that strict compliance with the evidence code was required. The trial court overruled the objection and allowed State's Exhibit #67 into evidence. The trial court stated that Hulse was an assistant

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[6] The radios' serial numbers appeared on gummed labels on the backs of the radios. (R1181)

supervisor and had actual custody of the record and, in fact, actually prepared the business record in question. **(R1189-90)** Hulse then testified that the record indicated that Orange County Identification **#145615** had been assigned to a radio with the serial **#579AHJ0837. (R1190-1)** Power objected to the State's introduction of Exhibits **67** and **68. (R1187-94)** The trial court overruled the various objections voiced by defense counsel and allowed the documents into evidence.

The admissibility of those exhibits was a close question, but Power concedes that the trial court did not commit reversible error in permitting the introduction of that evidence. State's Exhibit **#69** is quite a different story. Exhibit **#69** is a copy of microfilm records kept in the ordinary course of business in the sheriff's office. **(R1195-6)** The document is titled "Vehicle and Equipment Receipt." The defense counsel objected to the introduction of the document based, inter alia, on the numerous portions of the form that were crossed out with changes made in several serial numbers. **(R1196)** Defense counsel pointed out that the State's witness had no knowledge of who altered the document nor of when the changes were made. **(R1196)**

During a proffer, Mr. Hulse testified that, at the time the document was prepared (May **28, 1985),** Hulse was an assistant custodian of records for the Orange County Sheriff's Office. Hulse admitted that he had nothing to do with preparing that particular document. **(R1198)** Hulse testified that the document was apparently altered on February 24, **1986. (R1199)** It was altered again on October **29, 1987. (R1199)** The document indicated that, on July **27, 1988,** the department disposed of the vehicle and took it off of the records. **(R1199)** Hulse admitted that he had no knowledge who made the changes on the document, but opined that it was "probably one of the supply persons who took care of the car at the time." **(R1199)** Hulse admitted that the document did not clearly reflect which radio was in car unit **#69** on October **6, 1987. (R1199-1200)** Hulse claimed that the original notation on the document indicated that a radio with number **145615** was put in the car. **(R1201)** Hulse testified that that identification number was crossed

out and another number placed above it. Hulse testified that the notation to the right of the alteration indicates that the radio was stolen and removed to the expense account for accounting purposes. (R1201) Hulse testified that the notation was made by a person with knowledge at the time of the inventory of car #69. (R1201) Hulse did not testify who that person was. The document also seemed to indicate that the serial number of the radio was 579AHJ and ended with 837. (R1201-2)[7] Hulse candidly admitted that he could not tell from the document which radio was in car #69 on October 6, 1987. (R1204) At that point, defense counsel added a relevance objection. (R1204) The trial court overruled all of Power's objections and the document was entered into evidence as State's Exhibit #69. (R1205) Hulse then proceeded to testify in some detail about the contents of the document. (R1205-9)

The trial court clearly erred in allowing the introduction of State's Exhibit #69. The document constituted unadulterated hearsay. The State failed to authenticate the document as a business record. The document was confusing, in that it was altered by unknown persons at unknown times.

Section 90.803(6)(a), Florida Statutes (1989), provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Power recognizes that the question of whether an adequate foundation had been laid for the introduction under the business records exception to the hearsay rule rests largely within the discretion of the trial

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[7] A portion of this serial number is difficult to read, as is the entire document.

court. Lea Industries, Inc. v. Raelvn International Inc., 363 So.2d 49, 52 (Fla. 3d DCA 1978). However, both the statute and case law indicate that, if the circumstances show a lack of trustworthiness, business records are inadmissible. Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F.Supp. 1190, 1237-38 (E.D. Pa. 1980).

The document is clearly untrustworthy. To put it bluntly, Exhibit #69 is a mess. It appears to have eleven alterations. (State's Exhibit #69) The State could not establish when these alterations were made. The State could not establish who made these alterations. The closest they could come was Hulse's testimony that, "It was probably one of the supply persons that took care of the car at the time." (Emphasis supplied) Additionally, the evidence was completely irrelevant. Hulse's testimony clearly revealed that the document did not establish which police car contained the radio in question on October 6, 1987. (R1199-1200)

The State obviously needed to bootstrap their case with this evidence. Power submits that they went one step too far. The document was blatant hearsay that was not admissible under the business records exception. The document was not properly authenticated. Hulse had practically no knowledge of how the document was prepared. He had absolutely no knowledge of who made the numerous changes nor when they were made. The incompetent evidence tended to support the State's theory that a radio part found in Power's home originated in Welty's stolen radio. The prejudice is obvious and reversal is required. Amd. V,VI,XIV, U.S. Const; Art. I, §§ 9 and 16, Fla.Const.

POINT IV

THE TRIAL COURT ERRED IN GRANTING THE STATE'S REQUEST FOR A SPECIAL "FLIGHT" INSTRUCTION AND IN DENYING POWER'S REQUEST TO AT LEAST GIVE A LIMITING INSTRUCTION AS WELL.

The trial court agreed with the state's argument that a flight instruction was justified since the evidence indicated that Power ran away

after he robbed Welty in the field behind the Bare home. The state pointed out that Angeli Bare's body was found seventy-five paces from the spot where Power robbed Welty of his radio and weapon. (R1841-2) Defense counsel pointed out that when Welty first spotted Power in the field, he was walking casually. (R1842) The trial court overruled the objections which defense counsel later renewed several times. (R1842-3,1845,1936-7,2075-6,2097-8) Prior to jury instructions, defense counsel asked the court to narrow the flight instruction by informing the jury that the instruction applied only to the robbery of Deputy Welty. (R1936-7) Defense counsel pointed out that there was insufficient evidence to show flight from the murder, burglary, sexual battery, and kidnapping. The trial court disagreed and instructed the jury:

> Evidence of an accused's flight, escape from custody, resistance to arrest, concealment, are admissible as evidence of the accused's consciousness of guilt and thus of guilt itself.

(R2089,3243)

A flight instruction is an exception to the generally iron-clad rule prohibiting a trial court from commenting on the evidence. Whitfield v. State, 452 So.2d 548 (Fla. 1984). In a criminal prosecution, a trial court should take great care not to intimate to the jury the court's opinion as to the weight, character, or credibility of any evidence adduced. Seward v. State, 59 So.2d 529 (Fla. 1952). However, an instruction on flight is permitted in the limited circumstance where there is significantly more evidence against the defendant than flight standing alone. **Id.** Flight alone does not support an instruction that such flight is evidence of consciousness of guilt, as it would be no more consistent with guilt than with innocence. Whitfield, 452 So.2d at 550. See also Proffitt v. State, 315 So.2d 461 (Fla. 1975).

Jackson v. State, 575 So.2d 181 (Fla. 1991) is a recent and helpful pronouncement by this Court. The only evidence of flight was that two unidentified men ran from the store, and a witness saw Jackson driving away from the general direction of the store, possibly in excess of the speed

limit. This Court held:

> Departure from the scene of a crime, albeit hastily done, is not the flight to which the jury instruction refers. Otherwise, the instruction would be given every time a perpetrator leaves the scene, and it would be omitted only in those cases where the perpetrator waited for the police to arrive. The evidence in this case did not warrant an instruction of flight.

Jackson, 575 So.2d at 188-9. Prophetically, Power's defense counsel uttered similar words in arguing against the instruction, "Your Honor, in that case, the flight would be admissible in every single crime because when you commit the crime, you always leave." (R1841)

Powers flight after robbing Officer Welty of his gun and radio was the evidence cited by the trial court in justifying the instruction. The defense theory[8] was that, even if Welty's robber was Robert Power, the robbery and questioning of Welty about other police in the area stemmed from Power's knowledge that he was wanted by Brevard County law enforcement. **See** transcript of trial proceedings before the Honorable C. Vernon Mize, Jr., March 9, 1989, pp. 1041-4.

Appellant acknowledges that this Court has held that a flight instruction is proper even if a defendant's motivation for fleeing may have been avoidance of prosecution for a different crime of which the jury was unaware. **See** Bundv v. State, 455 So.2d **330** (Fla. 1984). Bundy relied on United States v. Mvers, 550 F.2d **1036** (5th Cir. 1977) in arguing to the contrary. In rejecting Bundy's claim, this Court pointed out that the holding in Mvers had been subsequently limited "to hold only that because the flight instruction was erroneous 'because the allegations of flight were without support in the [Mvers] record."' Bundv, 455 So.2d at 348. This Court pointed out that there was sufficient evidence to support the conclusion that Bundy actually attempted to evade prosecution by resisting arrest. **Id.**

In Bundv v. State, 471 So.2d 9 (Fla. 1985), this Court expounded on evidence of flight and instructions thereon:

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[8] Although not presented to the jury.

> The probative value of flight evidence as circumstantial evidence of guilt has been analyzed by the Fifth Circuit Court of Appeals a5 depending upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. United States v. Mvers, 550 F.2d 1036, 1949 (5th Cir. 1977). These criteria have also been applied to the Eleventh Circuit Court of Appeals in United States v. Borders, 693 F.2d 1318, 1325 (11th Cir. 1982), cert. denied, 461 U.S. 905, 103 S.Ct. 1875, 76 L.Ed.2d 807 (1983). In Borders, the Court noted that the cases in which flight evidence has been held inadmissible have contained particular facts which tend to detract from the probative value of such evidence. For instance, the probative value of flight evidence is weakened: (1) if the suspect was unaware at the time of the flight that he was the subject of a criminal investigation for the particular crime charged, United States v. Beahm, 664 F.2d 414, 419-20 (4th Cir. 1981); (2) where there were not clear indications that the defendant had in fact fled, Mvers, 550 F.2d at 1049-50; or, (3) where there was a significant time delay from the commission of the crime to the flight. **See**, e.g., United States v. Howze, 668 F.2d 322, 324-25 (7th Cir. 1982); Mvers; United States v. White, 488 F.2d 660, 663 (8th Cir. 1973). The interpretation to be gleaned from an act of flight should be made with a sensitivity to the facts of the particular case. Borders, 693 F.2d at 1325.

Bundv v. State, 471 So.2d at 20-21. The Bundv Court analyzed the evidence and concluded that a jury could reasonably infer that the flight evidence was circumstantial evidence of guilt.

In Whitfield v. State, 452 So.2d 548 (Fla. 1984), this Court expressed concern about instructions of this very type. The Whitfield Court pointed out that an instruction on flight is an exception to the general rule prohibiting the trial court from commenting on the evidence. This Court declined to extend that rule to a defendant's refusal to submit to fingerprinting. In so doing, this Court pointed out that an instruction on flight is permitted "in the limited circumstance where there is significantly more evidence against the defendant than flight standing alone, ..." Whitfield v. State, 452 So.2d at 549.

Appellant contends that there is very little additional evidence against him in this case. The state's case was entirely circumstantial and the trial court should not have bolstered the state's case by granting the state's request for a flight instruction. In this situation the instruction amounted to an impermissible comment on the evidence.

At the very least, the trial court should have granted Power's request €or an instruction that would have limited the flight instruction to the robbery charge. The request for a limiting instruction was reasonable under these circumstances where Power clearly did run from Officer Welty after he robbed him. The refusal of the limiting instruction allowed the jury to consider that flight in their deliberations on the four charges involving Angeli Bare. The flight instruction was applicable only to the robbery of Welty and not to the crimes against Angeli Bare and her family. Defense counsel pointed out that Power was walking casually through the field after the murder and took flight only after the robbery of Welty. (R1842)

A limiting instruction could have easily been fashioned by the trial judge or by defense counsel. A limiting instruction is routinely given when a jury is considering evidence of collateral crimes. Section **90.404(2)(b (2),** Florida Statutes **(1989)** provides that when Williams evidence is admitted "the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered." See also Fla.Std.Jury.Instr. (Crim.) p.50.

The fact that, unknown to the jury, Robert Power was wanted in Brevard County on unrelated charges, coupled with the paucity of the evidence linking Power with the abduction and murder of Angeli Bare, made a limiting instruction entirely appropriate in this case. The jury should have been instructed that they could consider Robert Power's flight from the scene of the robbery as circumstantial evidence of his guilt for that crime alone. The broad, unlimited flight instruction unfairly skewed the balance of the case in the state's direction. The instruction deprived Robert Power of a fair trial.

POINT V

ROBERT POWER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN A DEPUTY SHERIFF PREPARED TO "DRAW DOWN" ON THE DEFENDANT IN FULL VIEW OF THE JURY.

Deputy Richard Welty's testimony was absolutely critical to the state's case. His identification of Robert Power as the man in the field behind the Bare home, was the only testimony or evidence which placed Robert Power **near** the scene of the crime. Although Deputy Welty selected Power's picture from a photographic line-up eight days after the encounter, defense counsel did an excellent job of impeaching Welty's identification on cross-examination. (R853-74,889-95)

On October 11, 1987, Detective Hinkey conducted a written interview of Deputy Welty. (R857-61) At that time, Welty told Hinkey that the man's face appeared to be very clean cut. Welty opined that the man had either shaved that morning or was still in the puberty stage. (R895) Welty came to this conclusion, in part, because he noticed that the man had no chest hair. (R895)[9] Pursuant to defense counsel's request, Robert Power stood up at counsel table and opened his shirt to display his chest. (R896-7)[10] Despite defense counsel's previous warning to the head bailiff that this procedure would occur, a deputy jumped up from his seat approximately twenty feet away, walked directly in front of Power, and unsnapped his holster containing his nine millimeter handgun. The bailiff placed his hand on the butt of the gun in a show of force and readiness. (R897,1862-73) Defense counsel immediately moved for a mistrial pointing out the prejudicial effect of such a display. (R897) The trial court took the motion under advisement (R897) and, after a hearing held at the close of the evidence, denied the motion for mistrial. (R1862-73) During the hearing, the trial judge observed a re-enactment of the scene from various vantage points in the jury box and found that the display

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[9] His shirt was unbuttoned allowing Welty to get a clear view of his chest. (R778)

[10] The display evidently revealed Power's chest hair.

was not necessarily threatening from the point of view of the jury (emphasis added). The court stated that he understood why defense counsel and the defendant felt threatened from their point of view.

Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." Taylor v. Kentucky, **436 U.S. 478, 485 (1978).** Although it impossible and unrealistic to eliminate every reminder that an accused is not on trial by choice or happenstance, the United States Supreme Court has recognized that certain practices pose such a threat to the "fairness of the fact-finding process" that they must be subjected to "close judicial scrutiny." Estelle v. Williams, **425** U.S. 501 **(1976).** In Estelle v. Williams, the Court noted that where a defendant is forced to wear prison clothes when appearing before the jury, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." **Id.** at **504-5.** Since there was no "essential state policy" served by compelling a defendant to dress in prison garb, the Court concluded that the practice is unconstitutional.

Similarly, in Illinois v. Allen, **397** U.S. **337 (1970),** the United States Supreme Court condemned the practice of binding and gagging a defendant in sight of the jury. The Court nonetheless concluded that, in certain extreme situations involving a particularly obstreperous and disruptive defendant, such a procedure might be the fairest way to handle the situation.

Counsel cannot find any cases dealing with a situation exactly like the one that occurred at Power's trial. Appellant submits that this is an indication how rare such an occurrence is. **As** previously mentioned, the cases usually deal with defendant's being tried in prison garb or while wearing shackles. See e.g. Estelle v. Williams, **425** U.S. 501 **(1976);** Shultz v. State, **131** Fla. **757, 179** So. **764 (1938).** This line of cases as well as

others dealing with increased security at criminal trials, focus on an accused's constitutional right to a fair trial.

In Holbrook v. Flynn, 475 U.S. 560 (1986), the United States Supreme Court held that the supplementation of the usual security force with four uniformed, armed state troopers, who sat in the front row of the spectators' section directly behind the six, non-bailable co-defendants, did not violate Mr. Flynn's constitutional right to a fair trial. The Court pointed out:

> The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a jury might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.

Holbrook v. Flynn, 475 U.S. at 569. (emphasis added) The Court acknowledged that, under certain conditions, the sight of a security force in a courtroom might "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." **Id.**; See also, Kennedy v. Cardwell, 487 F.2d 101, 108 (6th Cir. 1973). However, the Court determined that the mere presence of armed, uniformed officers was not inherently prejudicial to one's constitutional right to a fair trial. A case-by-case approach was deemed more appropriate.

Appellant calls this Court's attention to the underlined phrase in

the indented quote set forth above. The United States Supreme Court pointed out that our society has become accustomed to guards in public places. Society doubtless takes such measures for granted "so long as their numbers or weaponry do not suggest particular official concern or alarm." Holbrook v. Flvnn, 475 U.S. at 569.

The episode at Power's trial is precisely the type of incident that the Supreme Court envisioned. Appellant cannot contemplate an event that more readily conveys to the jury "official concern or alarm." The clear message was that Robert Power was a very dangerous individual. Must not this, undoubtedly unarmed defendant be a very bad man, certainly not to be trusted? See Kennedv v. Cardwell, 487 F.2d 101 (6th Cir. 1973). Was he going to unbutton his shirt, pull out some weapon, and kill the deputies, the jury, the lawyers, the judge, and the spectators? The occurrence appears even more egregious, when defense counsel points out that the security chief had been informed earlier that day of Power's planned chest display.

The trial court apparently gave great thought and consideration to Power's motion for mistrial made immediately following the incident. The trial court went so far as to hold a "mini-hearing" at the close of all the evidence. (R1862-73) This included a re-enactment of the event with the trial judge observing the scene from various vantage points in the jury box. In denying the motion for mistrial, the judge focused on and concluded that the incident was not necessarily threatening from the point of view of the jury. The judge added that the deputy's action would certainly be more threatening from the point of view of defense counsel and the defendant.

With all due respect, the trial judge completely missed the point of the motion for mistrial. A mistrial was not necessitated due to the perceived threat of the jury's own safety. Rather, Holbrook v. Flvnn, clearly reveals that the focus should be on the jury's perception of the defendant as a "particularly dangerous or culpable" individual. Holbrook v. Flvnn, at 569. The jury undoubtedly got that very impression from the deputy's complete and utter over-reaction. As a result, Robert Power was denied his constitutional

right to a fair trial. Amend. V, VI, VIII, and IVX, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

POINT VI

THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S TIMELY AND SPECIFIC OBJECTION AND ALLOWING OFFICER WELTY TO TESTIFY TO BLATANT HEARSAY INADMISSIBLE UNDER ANY EXCEPTION TO THE RULES OF EVIDENCE.

As was his usual practice, Frank Miller drove to the Bare home shortly before nine a.m. on October 6, 1987, to pick up Angeli Bare for school. (R727-30) When he arrived, he saw a man standing inside the doorway with his back turned towards the road. (R730-1) Within a couple of minutes, a frightened Angeli Bare came down the sidewalk and told Miller that there was a man in the house that she thought wanted to rob her. Angeli refused to get into Miller's car, because she was afraid that the man would kill her, Miller, and Miller's daughter (who was also in the car). From the brief look that Miller got of the man, he concluded that it might have been Butch Bare, Angeli's step-father. (R735) During his testimony at trial, Miller was unable to provide much of a description of the man, mentioning only that he "would have to be white" since Miller believed it could have been Butch Bare. (R731)

After Miller called the police, Officer Welty was the first deputy on the scene. (R748, 763-5) On cross-examination, Miller remembered encountering the deputy but could not recall if he told the police what he had observed. (R748) When Officer Welty testified, he recounted that he was flagged down by Mr. Miller, who reported the incident. (R757) When the prosecutor asked if Miller told Welty what he knew about the incident, defense counsel objected on hearsay grounds, but was overruled by the trial court. (R757-8) Welty then testified that Miller explained that he and his daughter would pick up Angeli Bare every morning about nine a.m. to take her to school. Defense counsel interposed another hearsay objection, which the trial court also overruled. (R758) Deputy Welty testified that Miller told him how a frightened Angeli Bare approached his car and told him of the strange man in

the house. (R758-9) The prosecutor then questioned Deputy Welty about any details that Miller provided regarding a description of the man that he saw in front of the Bare home. The prosecutor specifically asked if Miller said anything about the hair color of that person. (R760) Defense counsel again objected on hearsay grounds and pointed out that Miller's testimony revealed nothing about the man's hair color. (R760) The state contended that the testimony was not offered to prove the truth of the matter asserted, rather it was intended to explain subsequent decisions made by Deputy Welty. (R760-1) The state also contended that the testimony was admissible as a spontaneous statement and/or as an excited utterance. After reviewing the cases cited by the defense, the trial court overruled the objection and Officer Welty was permitted to testify that Miller told him the suspect at the door was a white male with reddish-colored hair. (R761-3) At the time of the incident, Robert Power's hair tended toward the sandy-blond/reddish end of the spectrum. (R783,876-7)

Aside from a few limited exceptions, hearsay evidence is inadmissible. 590.802, Fla. Stat. (1989). Hearsay is "an out-of-court statement, other than one made by a declarant who testifies at the trial or hearing, offered in court to prove the truth of the matter contained in the statement." **§90.801(1)(c),** Fla. Stat. (1989). The reasons for the exclusion of hearsay evidence are many. The main justification is the lack of opportunity to cross-examine the person who made the out-of-court statement. Wigmore characterized cross-examination as "beyond any doubt the greatest legal engine, ever intended for the dis- covery of truth." 5 Wigmore, Evidence, Section 1367 (3d.ed 1940)

In Baird v. State, 553 So.2d 187 (Fla. 1st DCA 1989) the First District Court of Appeal pointed out that a police officer could testify as to what he did as a result of information received from others, but should not have been permitted to relate that information to the jury. See also Collins v. State, 65 So.2d 61 (Fla. 1953); Pringle v. State, 553 So.2d 1304 (Fla. 3d DCA 1989); Bianchi v. State, 528 So.2d 1309 (Fla. 2d DCA 1988); Lane v. State,

430 So.2d 989 (Fla. 3d DCA 1983) Hunt v. State, 429 So.2d 811 (Fla. 2d DCA 1983); Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981); Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982); and, Kennedy v. State, 305 So.2d 1020 (Fla. 5th DCA 1980). Given the circumstantial nature of the state's case against Robert Power, this error cannot be deemed harmless. The objectionable evidence obviously contributed to the jury's verdict. Reversal is required.

POINT VII

THE TRIAL COURT ERRED IN DENYING SEVERAL MOTIONS *TO* DISMISS THE INDICTMENT BASED ON FLAWS IN THE GRAND JURY. AT THE VERY LEAST, THE COURT SHOULD HAVE GRANTED POWER'S REQUEST FOR AN EVIDENTIARY HEARING.

Introduction

Prior to trial, Power filed several motions to dismiss the indictment. One motion was based on the discriminatory selection of the grand jury foreperson. (R2752-74) That same motion also requested an evidentiary hearing. Power also filed a motion to dismiss the indictment due to an allegation that the grand jury was improperly impanelled and illegally constituted. (R2740-51) Power also sought to dismiss the indictment based on the discriminatory selection of the grand jury. (R2702-27) Where appropriate, Power requested an evidentiary hearing. (R2717)

Discriminatory Selection of Grand Jury Foreperson

In his motion, Power alleged that the method of selection of grand jury forepersons in Orange County, Florida resulted in the systematic exclusion of blacks and females, thus rendering the indictment unconstitutional under the Fifth and Sixth Amendments. The motion pointed out that women and non-whites constitute a significant percentage of the Orange County community. (R2753) The procedure for selecting a grand jury foreperson in the State of Florida is susceptible to discriminatory abuse, in that judges are empowered to select a foreperson without regard to any articulable standards or guidelines, only that they be grand jurors pursuant to Section

905.08, Florida Statutes (1989). (R2753-4) Power alleged that he was entitled to have his indictment dismissed since the grand jury foreperson was not selected without regard to race and/or sex. (R2754)

Although Robert Power is a white male, he still has standing to challenge his grand and/or petit juries on the grounds that they arbitrarily excluded from service members of any race. See, e.g., Peters v. Kiff, 407 U.S. 493 (1972) and Kibler v. State, 546 So.2d 710 (Fla. 1989). Discrimination in the selection of grand jury forepersons violates the Fourteenth Amendment of the United States Constitution. Guice v. Fortenberrv, 661 F.2d 496 (5th Cir. 1981).

In Rose v. Mitchell, 443 U.S. 545 (1979), the Supreme Court held that the systematic exclusion of African-Americans from service as state grand jury forepersons constitutes grounds for reversal in a federal habeas corpus petition. In order to show an equal protection violation, a defendant must:

> (1) establish that a group whom discrimination is asserted is a recognizable, distinct class, singled out for different treatment; (2) prove the degree of under-representation by comparing the proportion of,the group in the total population to the proportion called to serve, over a significant period of time; and, (3) support the presumption thus created by showing that the selection procedure is susceptible to abuse or is not racially neutral.

Castaneda v. Partida, 430 U.S. 482, 494 (1977). Once such a showing has been made, the burden then shifts to the State to rebut that case. **Id.**

Robert Power alleged that, of the thirty-five grand juries impaneled in Orange County between 1973 and 1989, twenty-eight forepersons were male and only seven were female. Five of the seven female forepersons were white. Of the thirty-five forepersons, only one African-American male was included. Only three of the thirty-five forepersons during that time period were African-Americans. (R2753,2765)

Having shown discrimination of a distinct class and the degree of underrepresentation over a significant period of time, Power must now only show that the selection procedure is susceptible to abuse. Section 905.08,

Florida Statutes (1989) provides for the appointment by the presiding circuit judge of a foreperson from the impaneled grand jury venire. No articulable guidelines for non-discriminatory selection are provided. In a case discussing the selection of grand jury forepersons in the federal system, where a similar procedure is used, one court recognized that:

> The selection of forepersona is susceptible to discrimination since the district judge can observe the race, ethnic background, and sex of the grand jurors before him.

United States v. Cabrera-Carmiento, 533 F.Supp. 799, 805 (S.D. Fla. 1982), quoting United States v. Jenison, 485 F.Supp. 655, 663 (S.D. Fla. 1979).

In Florida, the systematic exclusion of African-Americans, women, young people, poor and deprived people, is further sanctioned under Section 40.013(4), Florida Statutes (1989), which states:

> Any expectant mother and any parent who is not employed full-time and who has custody of a child under six years of age, upon request, shall be excused from jury service.

Not only are blacks and women discriminated against and excluded by use of voter registration roles, but even those who are considered in the jury pool are further decimated by use of the above-cited statutory exemptions. In his motion, Power contended that the statistical number of African-Americans and women falling in the categories set forth in the statute is proportionally higher than the white/male community. (R2761)

It is clear that Power met the three-prong test establishing a prima facie constitutional frame of discrimination. The presumption therefore shifted to the state. When the trial court expressed a reluctance to grant the motion to dismiss, Power reiterated that, at the very least, he was entitled to an evidentiary hearing on the issue. (R2140,2149, 2176-81) Power pointed out that he had documented the race and sex of Orange County, Grand Jury Forepersons from 1973 to 1989. (R2137) Power pointed out that, if granted an evidentiary hearing, he could show that there were absolutely no African-American forepersons between 1955 and 1973. (R2137-8) After hearing argument on the motion, the trial judge took it under advisement. (R2112-81) The court

Discriminatory Selection of Grand Jury

Power filed a motion to dismise the indictment based on the contention that the selection of grand jurors from voter registration **roles** results in a systematic exclusion of African-American and other minorities. **(R2702-27)** Power pointed out that, according to the **1980** census, blacks constituted sixteen percent of the population of Orange County, Florida. However, the percentage of blacks on the voter registration roles in Orange County was only eleven percent. **(R2704)** Power contended that use of the voter registration roles had the effect of excluding thirty-three percent of the eligible blacks. **(R2704)**

Discrimination in the selection of the grand jury panel violates the Fourteenth Amendment to the United States Constitution. Guice v. Fortenberry, **661 F.2d 496** (5th Cir. **1981).** In order to establish a constitutional claim of discrimination, a moving party must establish and prove the three criteria set forth in Castaneda v. Partida, **430** U.S. **482, 494 (1977),** set forth in the previous section. Once such a showing has been made, the burden then shifts to the state to rebut the presumption of unconstitutional action. Castaneda, **420** U.S. at **494.** African-Americans have long been recognized as a distinct class subject to different treatment under the law. **See,** e.g., Tavlor v. Louisiana, **419** U.S. **522 (1975).** Second, Power alleged that no black males were chosen as members of the Orange County grand jury. **(R2708)** In order to satisfy the third prong of the test (underrepresentation due to systematic exclusion), Power alleged that the method of selection (voter-registration roles) was, in and of itself, a discriminatory source. **(R2711)**

A showing of the discriminatory nature of the source of names from which juror selection is made can constitute a prima facie case. In United States v. Burkette, **342** F.Supp. **1264, 1265-6** (Mass. **1972),** a federal judge whose judicial district used voter registration lists alone, said:

> A jury system which is fundamentally based upon voters' registration lists in a state in which . no one is required to register for voting, and in which it is obvious to anyone who scans the voters' lists that the black, those of Oriental origin, those with Spanish surnames, women, young persons, and poor and deprived persons generally tend not to register to vote, in proportions related to their number and the citizenry. . . is a jury system which raises constitutional problems of serious import. The effect of that apparently purposeful emphasis in prejudicing young defendants, victims of denials of civil rights, persons from non-white races, and others needs no elaboration. Here participatory democracy is a sham.

As in the previous argument dealing with the discriminatory selection of the grand jury foreperson, Power cited Section 40.013(4), Florida Statutes (1989), as further evidence of discrimination. (R2711-12)

In addition to the motion to dismiss the indictment on these grounds, Power requested an evidentiary hearing. (R2717) He pointed out that he had established a prima facie showing of discrimination and was thus entitled to an evidentiary hearing. (R2717) At the motion hearing, Power repeatedly emphasized that he was attempting to make a prima facie showing that he was entitled to an evidentiary hearing on this issue. (R2140 2149) After taking the matter under advisement, the trial court denied the motion to dismiss and the request for an evidentiary hearing. (R2181,2983,2985 Power maintains on appeal that the trial court erred in denying the motion to dismiss. At the very least, Power established a prima facie showing of discriminatory selection and was thus entitled to an evidentiary hearing.

Eiahteen Rather than Twenty-Three Member Grand Jury in Violation of Florida Law

Power filed a motion to dismiss the indictment due to an allegation that the grand jury was unlawfully constituted. (R2775-87) The trial court heard argument on this motion (R2153-59), took the matter under advisement (R2181), and eventually denied the motion. (R2989)

Chapter 25554, Laws of Florida (1949) provides under Section 1:

> In all counties having a population of 315,000 or more according to the last state or federal census, the Grand Jury shall consist of twenty-

three jurors. Provided that after a Grand Jury of twenty-three is impaneled and convened, fifteen members of such Grand Jury shall constitute a quorum and may transact business, and an Indictment or presentment shall be found and returned only by the concurrence of twenty or more Grand Jurors.

The 1980 census determined that the population of Orange County, Florida, was 471,016. (R2775,2785-6) The grand jury that returned the indictment of Robert Power consisted of eighteen members. Only sixteen members deliberated on Power's indictment. No record exists as to whether or not twelve of those sixteen deliberating members concurred in the return of the indictment against Robert Power. (R2778)

On March 30, 1989, (after Power's indictment), the Office of the State Attorney, Ninth Judicial Circuit, filed a motion to convene a twenty-three member grand jury for the Spring Term and all succeeding terms of court. (R2779-80) The State Attorney apparently recognized the existing problem and referred to Chapter 25554, Laws of Florida (1949). (R2779) The motion pointed out that the population of Orange County exceeded 639,000. (R2779)

Section 905.01(1), Florida Statutes (1989), provides:

> The Grand Jury shall consist of not fewer than 15 or more than 18 persons
> . . .

The trial court pointed out the above statute and its apparent inconsistency with the population law requiring a 23 person Grand Jury in Orange County. (R2154-5) The state contended that the general law should control over the special law. (R2155) The state later argued that the trial court should give effect to both statutes. (R2157) Power contended that the state should be estopped from arguing that particular point when, on March 30, 1989, the State Attorney filed a motion and memorandum of law that resulted in the implementation of 23 member grand juries in Orange County. (R2158) Power pointed out that a minimum of twelve out of a 23 member grand jury were required to return an indictment. He noted that a lesser number was required for an 18 member grand jury. (R2159) Since only 16 of the 18 grand jurors deliberated on Power's case, we cannot be sure how many voted to indict.

State ex. rel. McClure v. Sullivan, 43 So.2d 438 (Fla. 1949) held that an 18 man grand jury, impaneled on May 10, 1949, could return a lawful indictment and was not discharged by operation of law when Chapter 25554, Laws of Florida (1949), became effective on June 13, 1949. The indictment of McClure was valid in light of the fact that the statute provided that all grand juries should continue in force and effect. Since the indictment arose in Dade County, which had a population of 315,000 or more, McClure challenged its validity. This Court pointed out that the 18 man grand jury was lawfully impaneled and continued in force and effect pursuant to the statute. ". . . [N]o attempt has been made since June 13, 1949, to again summon and impanel another eighteen-man grand jury as provided for in Section 905.01, Florida Statutes 1941, F.S.A." State ex. rel. McClure v. Sullivan, 43 So.2d at 440.

It appears that under State ex. rel. McClure v. Sullivan, Power's motion was well taken. If McClure had been indicted by an eighteen-man grand jury impaneled after the effective date of Chapter 25554, Laws of Florida (1949), it appears that this Court would have reversed. Both Chapter 2554, Laws of Florida (1949) and Section 905.01(1), Florida Statutes can and should be construed in pari materia. **See** State **v.** Diuman, 294 So.2d 325 (Fla. 1974).

Legal Irregularities Pertaining to Impanelment of Grand Jury

Power filed a motion to dismiss the indictment due to a contention that the grand jury was improperly impaneled and illegally constituted. (R2740-51) The trial court heard argument on the motion and took it under advisement. (R2160-7,2181) The court denied the motion on May 17, 1990. (R2986)

Section 26.37, Florida Statutes (1989), provides:

> Each judge of a circuit court is required, unless prevented by sickness or other providential causes to attend on the first day of each term of the circuit court required by law to be held, and upon failure to do so, shall be subject to a deduction of $100 from his salary for each and every such default.

If any judge makes a default pursuant to Section 26.37, it is his duty to state the reasons of such failure, in writing, over his official signature, to

be handed to the clerk of the court, who shall enter the same into the record. §26.38, Fla. Stat. (1989) If a judge does not attend on the first day of any term, the court must stand adjourned until 12 o'clock on the second day. §26.40, Fla. Stat. (1989) If said judge shall not then attend, the clerk must continue all causes, and adjourn the court to such time as the judge may appoint, or to the next regular term. **Id.**

The Orange County Grand Jury, Fall Term, 1988, was impaneled and qualified by the Honorable Jeffords D. Miller, Circuit Judge, and sworn by him at the Orange County Courthouse, Orlando, Florida, on Monday, October 17, 1988. Thereafter, Judge Frederick Pfeiffer instructed the jury concerning the law pertaining to their services as grand jurors. (R2748) The court minutes reflect that the court opened at 9:38 a.m., October 17, 1988, with Judge Pfeiffer presiding. The minutes also state that Judge Pfeiffer impaneled, organized, and charged the grand jury for the fall term. (R2751) However, the Interim Report of the Grand Jury states that Judge Miller impaneled and qualified the Fall Term, Orange County Grand Jury. (R2748)

It thus appears that there is a contradiction between the interim report and the court minutes as to which judge impaneled the grand jury. In any case, there is **no** order from the chief judge convening the Fall Term 1988 grand jury and no authorization from the chief judge designating any other circuit judge, to impanel, qualify, organize, or charge the Grand Jury. This violates Florida law and Rule 2.050, Florida Rules of Judicial Administration.

The court minutes clearly reflect that Judge James S. Byrd, was not present in his respective courtroom, and his absence was excused. (R2751) The clerk's records offer no explanation of Judge Byrd's absence, much less a written reason signed by Judge Byrd. This clearly violates Section 26.38, Florida Statutes (1989).

The indictment is also subject to attack for violation of Section 905.13, Florida Statutes (1989). The Interim Report of the Grand Jury reflects that the court and the jury appointed Shirley Cannon as clerk of the Grand Jury. (R2748-9) Section 905.13 states that the foreman shall appoint

one of the grand jurors as clerk.

Due to the above-cited irregularities in the grand jury proceedings, the trial court erred in denying Power's motion to dismiss the indictment. (R2986) As a result of the above-cited violations of the law, Robert Power's indictment was illegal. The trial court should have granted the motion to dismiss.

POINT VIII

THE TRIAL COURT ERRED IN DENYING POWER'S ATTEMPTS TO SUPPRESS CERTAIN PHYSICAL EVIDENCE BASED UPON *AN* ILLEGAL SEARCH AND SEIZURE.

Facts

Law enforcement developed Robert Power as a suspect in two unrelated incidents involving the rape of two pairs of sisters in Osceola County [**See** Defense exhibit #3 (Osceola suppression hearing) pp. 525-7]. Power eventually became a suspect in the Angeli Bare case as well as another unrelated rape of an adult female.

Detective Pamela Massie prepared an affidavit for a search warrant in which she described the aforementioned crimes. The affidavit concludes:

> On October 14, 1987, information was received on a possible suspect, Robert Bueller Power, Jr. A photo line up was done with the 2 victims in the first case and the Orange County Deputy. All picked Mr. Power out of a photo line up. Mr. Power lives at 2220 West Vine Street which is a few blocks from where the first sexual battery occurred and a few houses down from where the stolen car from the Longwood case was found. He also spent the night in Longwood the night of the incident. Mr. Power also worked part-time at Auto Credit Sales Anmark Service, 9319 South Orange Blossom Trial which is five blocks from the Orange County homicide.
>
> Due to the beforementioned incidents your affiant believes their (sic) is evidence as stated prior is in the house at 2220 West Vine Street.

[Defense Exhibit #1] Osceola County Judge Ronald A. Legendre issued the search warrant on October 14, 1987. **Id.**

On October 14, 1987, between 9:45 and 10:00 p.m., the search

warrant was executed at the residence located at 2220 Vine Street. The "no-knock" entry **was** made by a SWAT team. Robert Power was found in the attic of the house. The search warrant named Donald McNeal as the owner or custodian of the residence. [Defense Exhibit #3, pp. 483-4}

Prior to trial, Power filed several motions to suppress. (R2942-54,2978-82,3005-10) At a hearing on the motions, all parties agreed that the court could rely on the Osceola County suppression hearing. [Defense Exhibit #3] Two search warrants and the affidavits upon which they were based were also admitted into evidence. [Defense Exhibit #1, and #2}(R2189-96) The parties also agreed that the court could consider depositions of Cynthia and Debbie Warden and Pamela Massie. (R2200,2249)

The evidence, in its entirety, revealed that the affidavit in support of the search warrant omitted several pertinent facts. The affidavit stated that the Warden girls and Deputy Welty had identified Robert Power as their assailant. The affidavit omitted the fact that Debra Warden had identified two other, different individuals prior to her identification of Robert Power. Additionally, the affidavit omitted the fact that the photograph identified by all three individuals was an eight-year-old photograph of Robert Power when his appearance was dramatically different than on the day of the crimes.

The Affidavit Contained Misleadins Information or Omitted Material Facts Which Would Affect a Magistrate's Determination of the Existence of Probable Cause.

The affidavit presented to the issuing magistrate to obtain the search warrant stated that Debra Warden, her sister Cynthia, and Deputy Welty had identified a photograph of Power as their assailant. (Defense Exhibit #1) It omitted, however, the fact that the older girl, Debra, had also identified the picture of another man as the suspect and, at a car lot, had identified a third man, as the culprit. (Defense Exhibits #4, pp.20-24; #5, pp.21-24; #6, pp.41-47) The affidavit also omitted the material fact that the identifying photograph was eight years old. It depicted Power at a point in his life when his appearance was dramatically different. (**See** Defense Exhibits B and C).

In Franks v. Delaware, 438 U.S. 154 (1978), the United States

Supreme Court held that where a warrant affidavit contains a false statement made either knowingly and intentionally or with reckless disregard for the truth, and where the affidavit's remaining content, with the false material set aside, is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Florida courts have upheld the suppression of evidence where the affidavit for search warrants implied that the information being presented was more immediate than it actually was, i.e., the officer stated that they had personally spoken with a confidential informant when in fact they were reporting information obtained by the officers who did speak to the confidential source. State v. Benney, 523 So.2d 744 (Fla. 5th DCA 1988), and State v. Marrow, 459 So.2d 321 (Fla. 3d DCA 1984) In Bennev, the court also recognized that the "good faith exception" of United States v. Leon, 468 U.S. 897 (1984), does not apply, and suppression remains an appropriate remedy, if the issuing magistrate was misled by information in the affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth. 468 U.S. at 923. Most importantly to this case, the Bennev panel said:

> . . . Moreover, the fact that probable cause did exist and could have been established by a truthful affidavit does not cure the error. United States v. Davis, 714 F.2d 896 (9th Cir. 1983).

Likewise, in Rand v. State, 484 So.2d 1367 (Fla. 2d DCA 1986), the District Court said the "good faith exception" could not be made where the deputy who claimed to be acting with "objectively reasonable reliance" on the search warrant he had obtained admitted that he had omitted from his affidavit an allegation of when the contraband was observed on the premises to be searched. See also Dixon v. State, 511 So.2d 1094 (Fla. 2d DCA 1987) (good-faith exception does not apply when affiant is experienced to know that omitted material is essential to establishing probable cause).

It is important to remember that Deputy Welty had originally

described his assailant as "young." Welty told Detective Hinkey that the man's face was very clean cut. Welty concluded that the man had either shaven that morning or was in the puberty stage. (R895) Welty did not describe a mustache and described the man's chest as "hairless." (R891-5,898-900) This description did not fit Robert Power's appearance at the time of the crime. (R899-900) The police were clearly aware of Power's appearance. R.C. Prickett, Power's boss, tipped off police to what he considered suspicious behavior on the part of Robert Power. (R1004-17) Prickett admitted that Power had a noticeable Fu Manchu mustache at the time of the offense, as he did at the time of the trial. (R1000-1,1019)

In spite of the above facts, the state insisted on using a photographic line-up containing a eight-year-old photograph of Robert Power. Officer Lakey, who composed the lineup, admitted that the photograph used depicted a younger Power. (R1235-50) Appellant submits that the state's knowing use of a misleading photograph impermissibly bolstered their case against him. A comparison of the photographs in defendant's Exhibit B and defendant's Exhibit C clearly reveals the obvious discrepancy in Power's age. It is clear that the state was attempting to conform Robert Power as a suspect fitting Welty's description and expectations.

Nor were the Warden girls' identifications "positive." At her deposition, Cynthia Warden was very unsure of which photograph she selected from the line-up. (Defense Exhibit #5, Pp. 21-23) All of the photographic identifications of Robert Power are suspect in some manner. The state's use of an ancient photograph taints all of the identifications.

Here, the police officers knew that it was certainly relevant and bore significantly on the weight to be given the Warden girls' "positive" identification of Power's photograph, that Debra had made two prior identifications of men who were not Robert Power. Also significant was the fact that all three identifications were made from an eight-year-old photograph when Power's physical appearance was dramatically different. The motion to suppress evidence should have been granted. Art. I, §12, Fla.

Const.; Amends. IV and XIV, U.S. Const.

Knock and Announce

Power argued at trial that law enforcement officers violated the "knock and announce" provisions of Sections **901.19** and **933.09,** Florida Statutes **(1987).** (R2942-4) Therefore, Power contended that the evidence seized from the residence should have been suppressed at trial. The part es stipulated that the trial court could rely on, inter alia, the suppression hearing held in the Osceola case. [Defense Exhibit **#3]** While the state agreed that officers should normally comply with the knock and announce statute, the prosecutor was of the opinion that a no-knock entry was justified in this case. **Id.** at **113-4.** The prosecutor contended that the state had presented evidence establishing probable cause that Robert Power had committed several armed abductions and rapes. The state also believed they had probable cause that Robert Power committed the armed robbery of Deputy Welty and the murder of Angeli Bare. The state contended that police had reason to believe that a gun and a knife were in the residence. They also learned from family members that Power was a black belt in karate. Power's father had warned Lieutenant Taylor that his son was dangerous. **Id., 114-5.**

Section **933.09,** Florida Statutes **(1989),** provides:

> The officer may break open any outer door, inner door, or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of his authority and purpose he is refused admittance to said house and access to anything therein.

Section **901.19(1),** Florida Statutes **(1989),** provides:

> If a peace officer fails to gain admittance after he has announced his authority and purpose in order to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, he may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be.

Courts have recognized that "knock and announce" requirements serve several interests: (1) prevention of injury to the police and to

innocent persons on the premises; and (2) prevention of property damage. People v. Cassias, 563 P.2d 926 (Colo. 1977). The requirement also provides a moment in which the occupant can challenge the authority of the search by pointing out any error in the address or other details of the warrant. Peoole v. Ouellette, 373 N.E.2d 114 (Ill. App. 1978). It is undisputed that the officers in this particular case did not "knock and announce" their identities or purpose. Various courts have recognized that officers may enter without knocking and announcing when there are reasonable grounds to believe that compliance will endanger the officers [Ker v. California, 374 U.S. 23 (1963)]; or if there is a likelihood that the occupants will attempt to escape [Rodriauez v. Jones, 473 F.2d 599 (5th Cir. 1973)]; or destroy the evidence [United States v. Harris, 713 F.2d 623 (11h Cir. 1983)]; or harm someone who is inside [People v. Polito, 355 N.E.2d 725 (Ill. App. 1976)]. Florida courts have concluded that the "knock and announce rule" is designed to protect the right of a citizen in his own home. State v. Clarke, 387 So.2d 980 (Fla. 2d DCA 1980).

There is no dispute that the police officers did not comply with the statute in executing the warrant. Instead, the state argued that execution of the warrant without compliance with the statute was justified under the circumstances. Generally, where a police officer fails to announce his authority and purpose prior to forcible entry into the home to make an arrest or to execute a warrant, the arrest or execution is illegal and the fruits of any attendant search are subject to suppression. State v. Kelly, 287 So.2d 13 (Fla. 1973). See also State v. Drowne, 436 So.2d 916 (Fla. 4th DCA 1983); State v. Collier, 270 So.2d 451 (Fla. 4th DCA 1972); State v. Joseph, 269 So.2d 36 (Fla. DCA 1972); and State v. Moch, 187 So.2d 918 (Fla. 2d DCA 1966).

In Benefield v. State, 160 So.2d 706 (Fla. 1964), this Court concluded that, even if probable cause exists for the arrest of a person, the "knock and announce" statute is violated by an unannounced intrusion in the form of a breaking and entering any building except (1) where the person

within already knows of the officer's authority and purpose; (2) where the officers are justified in the belief that the persons within are in imminent peril of bodily harm; (3) if the officer's peril would have been increased had he demanded entrance and stated the purpose; or **(4)** where those within made aware of the presence of someone outside are then engaged in activities which justify the officers in the belief that an escape or destruction of evidence is being attempted. The Benefield court pointed out that time and experience would undoubtedly suggest other exceptions. The Court concluded that the unannounced entry into Benefield's home violated the statute and justified suppression of the evidence. The Court pointedly stated that, in reaching that conclusion, they did not overlook the state's argument that marked money could have easily been disposed of by "the classic method of flushing it down the drain." 160 So.2d at 711. The Court rejected the state's argument due to the practical difficulties inherent in disposing of $3,000 in small bills by that method.

The only possible Benefield exception that the state could hope to utilize in Power's case is the third exception dealing with an increase in the officers' peril. Robert Power certainly did not already know the purpose or authority of the swat team's actions. The other people in the house were certainly not "in imminent peril," and were, in fact, Power's family. Nor was there anything to lead the officers to believe that an escape or destruction of evidence was being attempted. They had the house surrounded and there was no escape for Robert Power.

This Court must now examine whether the state met their burden of proof in demonstrating that the swat team's peril would have been increased had they demanded entrance and stated their purpose. The only evidence presented by the state in this vein was testimony that the suspect in Bare's murder and rapes of other girls was armed during those incidents. There was also some indication that Power was trained in martial arts as well as a warning to police from Power's father that he considered Robert to be a dangerous individual. In State v. Robinson, 565 So.2d 730 (Fla. 2d DCA 1990),

the testimony contained "vague references to a possibility of guns in the home," but the confidential informant's information and other evidence did not establish a reasonable basis to fear that a gun would be used. 565 So.2d at 732. In State v. Drowne, 436 So.2d 916, 920 (Fla. 4th DCA 1983), the court found that although there was information as to firearms being present, there was nothing in the record to indicate "that a modern day Dillinger-type character was inside ready to use them."

Another similar case is Rodriauez v. State, 484 So.2d 1297 (Fla. 3d DCA 1986). In reversing the trial court's denial of a motion to suppress, the Third District Court of Appeal rejected the trial court's conclusion that the officers' peril was increased where that conclusion was based on the fact that the search warrant specified a stolen gun. Police had already received information that there was cocaine on the premises and that the purpose of the weapon was for use in protecting the cocaine. The trial court agreed to disregard the latter evidence, but still recited that information in its order denying the motion to suppress. The appellate court reversed and remanded with directions to grant the motion to suppress concluding that a search warrant ordering the seizure of a stolen gun cannot, without more, support the "officer-peril exception" to the knock and announce requirements of the statute. 44 So.2d at 1298.

In contrast, State v. Avendano, 540 So.2d 921 (Fla. 1st DCA 1989) applied the officer-peril exception and reversed the trial court's suppression order. The evidence at the suppression hearing established that, on the morning of the execution of the warrant, a confidential informant told a police sergeant that Avendano stated that he and two others in the house would be armed. The confidential informant had proven reliable in the past. In consideration of the violence which surrounds illegal drug trafficking, the appellate court found that it was not reasonable to expect law enforcement officers to risk their lives and the lives of others when possessed of information present in the case.

The SWAT team had no such information in Robert Power's case.

They knew that the suspect carried a gun during the abductions and rapes. There was no indication at all that Robert Power was "lying in wait" for a warrant-serving deputy. Since the state failed to comply with the statute, suppression of the evidence seized at the house is warranted.

Wrona Name on Search Warrant

Power's **Second Supplemental Motion to Suppress** filed on May 10, **1990,** sought to exclude all evidence obtained from the residence. Paragraph seven of that motion specifically addressed the facial defectiveness of the search warrant, particularly that the warrant was issued to the home of an individual by the name of Donald McNeal. (R2952) No person by that name lived at the residence nor was any such person known to the occupants. **See** Defense Exhibit #3 (Osceola suppression hearing), p.37. The test for determining the sufficiency of the description of the place to be searched is whether the place is described with sufficient particularity so as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might mistakenly be searched. United States v. Gitcho, 601 F.2d 369 (8th Cir. **1979).** Where one part of the description of the premises to be searched is inaccurate, but the description has other parts which identify the place to be searched with particularity, searches pursuant to such warrants have been routinely upheld. See, e.g., United States v. Shropshire, 498 F.2d **137** (6th Cir. 1974). Several courts have held that where the address of the premises to be searched is the only description in the warrant and that address is incorrect, evidence seized in the subsequent search must be suppressed. **See** e.g., United States v. Constantino, 201 F.Supp. 160 (W.D.Pa. 1962); United States v. Kennev, 164 F.Supp **891** (D.D.C. **1958).** State v. Martin, 539 So.2d **577** (Fla. 5th DCA 1989) reiterated the constitutional requirement that a search warrant and affidavit must "particularly describ[e] the place to be searched . . . ." Appellant submits that the inaccurate name on the search warrant, either alone or in conjunction with the other flaws in the affidavit and the warrant, renders the search unconstitutional.

POINT IX

THE TRIAL COURT ERRED IN OVERRULING POWER'S OBJECTION AND ALLOWING THE INTRODUCTION OF PHYSICAL EVIDENCE THAT WAS IRRELEVANT AND UNRELATED TO THE MURDER. THE ERROR WAS COMPOUNDED WHEN THE TRIAL COURT INAPPROPRIATELY COMMENTED ON THE IRRELEVANT AND PREJUDICIAL EVIDENCE.

The Bloody Knife

Angeli Bare died from shock following exsanguination due to severance of the right carotid artery. The artery was severed as a result of the stab wound to the right side of the neck. The wound was about 3.5 centimeters in length (approximately one inch plus) and approximately one quarter inch in width. (R1112-15) The medical examiner determined that the actual length of the stab wound was about 2.8 centimeters (about one inch) and testified that the width of the murderous blade would have to have been the same (about one inch). (R1115) The blade also had to have a sharp point. On cross-examination, the doctor became even more precise, testifying that the external wound was 3.8 centimeters by 0.8 centimeters. (R1145) The doctor clarified that, since skin retracts and pulls as a result of muscular activity, the actual stab wound would be smaller than its external appearance of 3.8 centimeters. (R1145) The doctor concluded that the actual stab wound was 2.8 centimeters in length and the width was 0.8 centimeters. (R1145) Dr. Gore testified that 2.8 centimeters was slightly larger than one inch". (R1145-6) when defense counsel questioned Dr. Gore as to the degree of guesswork involved in his estimate, Dr. Gore replied that there was no guesswork involved. (R1146) Dr. Gore stood his ground on the width of the fatal blade, even when confronted with the possibility of a side-to-side cutting motion when the wound was inflicted. (R1146-7) The doctor admitted that such a movement would enlarge the wound slightly (by a very minute amount), but insisted that this would not affect his determination of the actual width of the weapon used. (R1147)

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[11] 2.54 centimeters equal one inch. (R1147)

When Robert Power was arrested in his mother's home, police seized a maroon bag found in close proximity to Power. This bag contained, _inter alia_, a gun, tan gloves, and a knife. The bag, the gun, and the gloves were admitted into evidence over several defense objections. (R1328-30,1340-42) The state called Michael Rafferty, an FDLE crime scene analyst, who testified that the maroon bag contained one folding knife. (R1338-9) Rafferty also testified that the widest part of the blade on that knife was one inch or less. (R1354) On cross-examination of Mike Rafferty (the first time he testified), defense counsel asked about blood stains on the knife:

> Q. Did you find, sir, on that night, any bloodstains whatsoever?
>
> A. I did not examine it for blood stains.
>
> Q. You looked at it, didn't you?
>
> A. Cursory, yes.
>
> Q. See any blood on that, sir?
>
> A. Not that I remember, no.
>
> Q. Crime lab analyzed it, didn't they, sir? You requested it be analyzed?
>
> A. Yes.
>
> Q. Did you get the report back as to any blood stains whatsoever on that knife, sir?
>
> A. I don't get a report back.
>
> Q. Do you know if any blood stains were found on it, sir?
>
> A. No, I don't.

(R1353-4)

Rafferty found approximately eight knives in the house, from pocket knives to sheathed knives. (R1357) However, the state sought to introduce only the Parker brand folding knife found in the maroon bag. (R1567-9) Power objected and argued that the knife was completely irrelevant, since the state's own evidence established that the knife could not have been the murder weapon, as its blade was too narrow. (R1567-9) Although the court admitted that the knife was smaller than the fatal wound, the trial court

remembered the medical examiner's testimony differently than defense counsel. The trial court thought that the doctor had testified that the murder weapon's blade was at least 2.8 centimeters in width. (R1568-9) The court therefore overruled the objection and allowed the state to introduce the knife into evidence. (R1569)

On the morning of May 31, 1990, the state prepared to call Nancy Peterson, a serologist, as a witness. A lengthy discussion ensued when defense counsel pointed out that the state intended to use a serology report dated April 11, 1988, that was prepared by Peterson. (R1585-1605) Defense counsel pointed out that they received only one report from Peterson dated January 11, 1988. Defense counsel stated that he had not seen the April report until that morning. The state admitted that they received the report and attempted to use the report during the redirect examination of Mike Rafferty. **(R1585-7)**[12] The state claimed that the supplemental report had been sent to a branch office in Kissimmee by mistake. (R1586) Defense counsel commented that all of the reports that the state had furnished indicated that there was no blood found on any of the knives seized from Power's home. (R1587) Since all of Peterson's reports had come back negative, defense counsel saw no need to depose Peterson. (R1588) Defense counsel pointed out that they would not have questioned Rafferty about the lack of blood stains on the knife, if they had known of this supplemental report that indicated to the contrary. Both the state and the defense found out about supplemental report in the middle of Rafferty's testimony, but after Jaeger had already cross-examined him on this issue. (R1592-3)

After hearing lengthy argument, the trial court decided to exclude the undisclosed report and any testimony from Ms. Peterson indicating that there was, in fact, human blood on the knife. (R1602) The trial court was still concerned about the jury's impression (now proven erroneous) that there

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[12] The state did attempt to use the later report during Rafferty's testimony (which indicated that blood was found on the knife in question), but the trial court sustained defense counsel's hearsay objection. (R1357-8)

was no blood found on the knife. (R1598)[13] To cure the "problem", the court offered the state a curative instruction indicating that defense counsel's comments yesterday (implying that there was no blood on the knife) were incorrect. (R1602) The court realized that the instruction would leave the jury to speculate whether or not there was blood on the knife but thought, under the circumstances, that was the only way to minimize the relevancy of the "improper" question by defense counsel. Faced with a Hobson's choice, defense counsel acquiesced in the trial court's announced intention to so instruct the jury. (R1602) Prior to Nancy Peterson's testimony, the trial court gave the following instruction:

> One of the matters I need to address is a question asked by the defense counsel yesterday when Mr. Mike Rafferty was being examined regarding a knife that was presented in evidence. Has been admitted into evidence. Exhibit 100, which was the folding knife that was found in the bag in the attic. Mr. Jaeger asked Mr. Rafferty a leading question regarding there was a report that indicated there was no blood upon that knife. I must correct this. There is no evidence that there was not blood upon the knife.

(R1605) Peterson then testified without incident.

The initial introduction of the irrelevant and prejudicial knife constituted clear error. The state's own evidence established that the knife found in Power's maroon bag (which the state liked to call a rape kit) could not have been the murder weapon. Defense counsel pointed out that the knife was much more likely to have been used in the collateral crimes which the state attempted to introduce as similar fact **evidence.**[14] (R1596-7,1600-2) Faced with a remarkably similar fact pattern, in another capital case, this Court held:

> We do agree, however, that the court erred in admitting the testimony of William Kohler.

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[13] In fact, the jury was never given this impression. Rafferty testified that he did not know if any blood was found on the knife, since he never saw the lab report. (R1353-4)

[14] The trial court rebuffed the state's attempts to introduce evidence of collateral crimes.

> William Kohler was an owner of the apartment house where the murder occurred and was permitted to testify that several days after the murder he found a steak knife outside Castro's apartment building. There is no question that the knife found by Kohler was irrelevant. It was undisputed that Castro had broken the murder weapon into pieces and thrown it out the window during the trip to Lake City.

Castro v. State, 547 So.2d 111, 114 (Fla. 1989). This Court concluded that evidence of the irrelevant steak knife, inter alia, prejudiced Castro's right to a fair penalty phase. The erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla. 1981). Accord Peek v. State, 488 So.2d 52, 56 (Fla. 1986).

In Irizarry v. State, 496 So.2d 822 (Fla. 1986), this Court concluded that no error occurred in the admission of two machetes, neither of which was the murder weapon, since the testimony established that Irizarry favored machetes as both tools and weapons. The state presented no such evidence in Power's trial. Instead, they introduced evidence that Robert Power carried an athletic bag containing a knife which could not have been the murder weapon. The evidence left the jury with the distinct impression that Robert Power made a habit of carrying a knife. Since Angeli Bare was stabbed to death, the prejudice is obvious.

The prejudice was compounded by the trial court's inappropriate and unnecessary comment on the evidence. Defense counsel obviously relied (detrimentally it turns out) on the state's full compliance with the discovery rules." When the only report of an expert disclosed by the state during discovery indicates exculpatory comments, a defense attorney should be able to

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[15] The state attempted to make hay of the fact that Mr. Blanker represented Power in an unrelated Osceola County case. (R1589) The offensive, undisclosed report clearly referred to the Osceola case, and the trial judge was prepared to exclude the report on that basis. (R1589-90) Mr. Jaeger, the attorney who cross-examined Rafferty about the absence of blood on the knife, was not-part of the Osceola defense: (R1603)

conclude that there is no reason to depose that **witness.**[16] Under the circumstances, the trial court should have excluded the report and testimony thereon,[17] but should have also omitted the unnecessary, prejudicial jury instruction read in a game, but misguided, attempt to correct the jury's "erroneous" impression of the evidence.[18] The state's failure to disclose this critical evidence resulted in a detrimental reliance by defense counsel during the cross-examination of Mike Rafferty. This was the state's fault and Robert Power should not have been prejudiced by it.

The "special jury instruction" was a clear comment on the evidence. The jury was undoubtedly left with the distinct impression that there probably was blood found on Power's knife. They also probably concluded that defense counsel had misled them by atempting to suggest **otherwise.**[19] This Court is well aware of the dominant position occupied by a judge during a jury trial. Any remarks and comments that a judge makes are listened to closely and given great weight. Ehrhart, Florida Evidence, §106.1, p.22 (2d ed. 1984). Indeed, Section 90.106, Florida Statutes (1989) recognizes that a judge is prohibited from commenting on the weight of the evidence, the credibility of witnesses, and from summing up the evidence. See also, Gordon v. State, 449 So.2d 1302 (Fla. 4th DCA 1984).

The error in admitting the irrelevant, bloody knife denied Robert Power his constitutional right to a fair trial. Unfortunately, the trial judge compounded the problem by directly commenting on the evidence in a misguided attempt to correct the perceived error. The jury unquestionably thought that defense counsel was attempting to mislead them, and that the

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[16] The state disclosed Peterson as a witness in a list filed on May 15, 1990, less than a week before trial. (R1588,1591)

[17] Which the court correctly did.

[18] **As** previously mentioned, the jury actually had no such "erroneous" perception of the evidence. (R1353-4) and footnote 6.

[19] Such a conclusion is inescapable upon examination of the trial court's remark that defense counsel "asked . . . a leading question . . . that indicated there was no blood . . . . I must correct this." **(R1605)**

knife had blood on it after all. In a case as circumstantial as this one, the error cannot be called harmless. Error is harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988). The state cannot make such a claim in this case.

The Gun and Gloves

Police arrested Power in his mother's home. They found Power squatting in an attic crawlspace. (R1274-82,1288-92) Police seized a maroon duffle bag that was next to Power in the attic. (R1288-92,1327) Over Power's objection, the court allowed the state to introduce the bag and the contents thereof. (R1328-42) Defense counsel pointed out that, like the knife in the preceding section of this point, the gun and gloves were irrelevant and prejudicial. At the very least their slight probative value was outweighed by unfair prejudice. (R1340) S90.403 Fla. Stat. (1989).

The items were irrelevant and certainly prejudicial. Deputy Welty was positive that his assailant was not wearing gloves during the robbery. (R889) It is thus clear that the gloves had absolutely no relevance to the state's case. They could not tie them to the offense.

The same is true of the gun. Deputy Welty could not identify Power's gun as the one used to rob him. Welty could not remember what kind of gun it was or even what color it was. (R886)

The prejudice is obvious. The state had to admit that none of the latent fingerprints found at the scene of the crime matched Robert Power's. Obviously, the state's theory rested on the contention that Power wore gloves during the commission of the crime. However, this contention is directly refuted by the state's star witness, Deputy Welty. (R889)

The gun has no relevance either. Welty could not identify Power's gun as the one used in the robbery. The jury was left with the distinct and prejudicial impression that Robert Power toted a duffle bag containing items suited to commit violent crimes without detection. (State's Exhibit #82) In

fact, the state liked to refer to the bag **as** Power's rape kit. The evidence was patently irrelevant and completely prejudicial. **See** Castro v. State, 547 So.2d 111 (Fla. 1989).

POINT X

IN CONTRAVENTION OF POWER'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT, THE TRIAL COURT ERRED IN RESTRICTING CROSS-EXAMINATION OF A KEY STATE WITNESS ABOUT A MATERIAL FACT.

During cross-examination, Officer Welty identified a supplemental report that he wrote about five thirty p.m. on the date of the offense. (R852-4) On direct examination, Officer Welty testified (over defense objection, see Point VII) that Frank Miller told him that the man in the doorway of the Bare home had reddish hair. (R757-63) Defense counsel pointed out that the supplemental report made no mention of this unusual hair coloring. (R855) The state objected based on State v. Johnson, 284 So.2d 198 (Fla. 1973). Based upon a reading of that case, the trial court ruled that Power could not impeach Officer Welty based on information that he left out of a police report. (R855-6) The court granted the state's motion to strike and instructed the jury to disregard the question. (R856) Defense counsel tried one more time to elicit this pertinent omission, but the court sustained the state's objection before the witness could answer. (R877)

The right of a criminal defendant to cross-examine adverse witnesses is derived from the Sixth Amendment and its due process right to confront ones accusers. A person accused of a crime has an absolute right to full and fair cross-examination. Coco v. State, 62 So.2d 892 (Fla. 1953). A limitation on this right is especially critical in a capital case. Coxwell v. State, 361 So.2d 148 (Fla. 1978). In Davis v. Alaska, 415 U.S. 308 (1974), the Supreme Court of the United States held that the right to cross-examination includes as its essential ingredient the right to impeach one's accusers by showing bias, impartiality, and by discrediting the witness:

> Cross-examination is the principal means by which the believability of the witness and the truth of his testimony are tested. Subject

> always to broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner had traditionally been allowed to impeach, i.e., discredit, the witness.

415 U.S. at 316.

State v. Johnson, 284 So.2d 198 (Fla. 1973), relied upon by the state and the trial court below, is clearly distinguishable in its application to this set of facts. The Johnson trial judge ruled a police report "not amenable to subpoena; that it was inadmissible; and could not be used €or impeachment purposes." State v. Johnson, 284 So.2d at 199. The vast majority of subsequent Florida cases that cite Johnson deal with opposing counsel's right to discover and utilize police reports. See, e.g., Breedlove v. State, 413 So.2d 1 (Fla. 1982); and Miller v. State, 360 So.2d 46 (Fla. 2d DCA 1978). [although it is not cited with much frequency, especially recently]. The Johnson court held that production and use in evidence of police reports depends up (1) being critical; (2) upon a material and vital point; (3) reasonably exculpatory of defendant, within sound judicial discretion; and, (4) after "in camera" review and deletion of any impropero matter. State v. Johnson, 284 So.2d at 201. The basis of the holding was, in part, a recognition of the pressures of an investigation. It is also important to note that Johnson, specifically deals with a police officer's initial, police report of the incident. In contrast, Power attempted to impeach Officer Welty with the omission of a critical fact in Welty's supplemental report prepared later that day. (R852-4)

Another point that the state seems to overlook at trial is the fact that State v. Johnson, held that the trial court abused its discretion in not allowing the use of police reports to impeach the officer. In a simple burglary, where the evidence was entirely circumstantial, this Court held that the trial court abused its discretion in denying defense counsel an opportunity to impeach the arresting officer using his police report. The report made no mention of the white powdery substance on the defendant's

jacket or the order to "halt." This Court held that the omission of this material and vital point was critical and reasonably exculpatory of the defendant.

A Johnson analysis of Power's attempted impeachment of Welty resulted in a compelling conclusion that the trial court abused its discretion in excluding the critical omission of a vital point which pointed to the innocence of Robert Power in this largely circumstantial case. The sole issue at trial was the perpetrator's identity. As such, critical information that Welty received about the man's unusual hair color cannot be called a "collateral matter." Since the defendant was not allowed the opportunity to impeach Officer Welty on this critical issue and the trial court instructed the jury to disregard what little information they heard (855-6), Power was effectively denied his constitutional right to fully cross-examine an essential state witness. United States v. Balliviero, 708 F.2d 934, 940 (5th Cir. 1983). See also Nelson v. Thieret, 793 F.2d 146 7th Cir. 1986).

In a capital case as weak as this one, the opportunity to cross-examine and impeach Officer Welty was essential to the defense. Officer Welty was the only direct evidence which placed Robert Power near the scene of the crime. His credibility was the "linch-pin of the Government's case." Levin v. Katzenbach, 363 F.2d 287, 292 (D.C. Cir. 1966). The state's case would largely "stand or fall on the jury's belief or disbelief" of Welty's testimony. Napue v. Illinois, 360 U.S. 264, 269 (1959). Any infringement upon the opportunity to effectively cross-examine this key prosecution witness constitutes "error of the first magnitude." **See** Davis v. Alaska, 415 U.S. at 318.

POINT XI

THE INTRODUCTION OF *AN* EXCEPTIONALLY GRUESOME AUTOPSY PHOTOGRAPH OF THE TWELVE-YEAR-OLD VICTIM DENIED ROBERT POWER HIS RIGHT TO A FAIR TRIAL.

Although the parties agreed, for the most part, on which photographs of the victim would be admitted into evidence, the defense

objected to one photograph in particular. (R1023-6) State's exhibit MMMMM which was ultimately admitted as state's exhibit 65 was a close-up photograph of the twelve-year-old victim's distended and lacerated anal and vaginal orifices. (R1099-1100,1122) The photograph was taken in the mortuary during the autopsy procedure. (R1122) Defense counsel objected, pointing out that any potential relevance was outweighed by the extreme prejudice that would occur when the jury viewed the photograph and became inflamed. (R1025-6,1099) The state contended that the photograph was evidence of the sexual battery since it showed lacerations and abrasions and also provided proof of penetration. (R1025) Defense counsel observed that the prejudicial nature "just overwhelms the relevance." (R1026) Defense counsel pointed out that there was no argument that the child was raped both rectally and vaginally. "The sole argument in this case is identity of the perpetrator." (R1026) Pointing out that the state's case was a circumstantial one, defense counsel expressed his concern that the jury would become so inflamed by the photograph that they would not fairly and impartially weigh the issue of identity. (R1026) The trial court overruled defense objections and allowed the state to introduce the offensive photograph. (R1027,1099)

The medical examiner stepped down from the witness box and joined the prosecutor in close proximity of the jury where they displayed and explained the photographs. (R1100,1119,1122-3) As to state's exhibit 65 (the objectionable picture), the doctor testified:

> A. Yes, sir. Now, this is the photograph that I had taken in the mortuary after checking the body and this shows the anal orifice and the perianal orifice. You can see the labial stretching marks. Now this one is very peculiar. Widening stretch. And you can also see the stretched perianal markings of the vaginal area.
>
> Q. What is the significance?
>
> A. As I mentioned that the labial majora and minora were contused. These are the ones contused and had a pinkish appearance.
>
> Q. Is this contusion area over here to the side -- this is actually on the inside of the thigh?

> A. That's correct. But these are labia, and these are the areas of inside of the top of the thighs.
>
> Q. Do you have an opinion as to what would have caused contusions on the inside of the thigh area?
>
> **A.** Okay. The inside contusions probably, again, were caused during the sexual molestation. That is, at the time when there is a friction between the male and the female skins, and the rough area perhaps from some contact and produces creasing, compression, friction and that will produce these types of contusions on the inner thighs as well.

(R1122-3) The objectionable photograph was the last in a series of eight or nine pictures that the doctor showed to the jury at close range and testified about in some detail. (R1100-23) The photograph's gruesome nature, as well as its strategic placement at the end, undoubtedly left the jury smoldering.

The issue of gruesome photographs is one of the most troubling in capital cases today. Too often, appellate courts are asked to rubber stamp the admission of truly revolting pictures, even though "[i]t is unrealistic to believe, even after a limited view, that the horror engendered by these slides could ever be erased from the minds of the jurors. . . ." Commonwealth v. Garrison, 331 A.2d 186, 188 (Pa. 1975); Young v. State, 234 So.2d 341 (Fla. 1970); Walker v. **City** of Miami, 337 So.2d 1002 (Fla. 3d DCA 1976).

The initial test for the admissibility of photographic evidence is one of relevance. Straight v. State, 397 So.2d 903 (Fla. 1981). However, even "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice." §90.403, Fla. Stat. (1989). Thus, even though technically relevant, before photographs can be admitted into evidence, "the trial judge in the first instance and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury." Leach **v.** State, 132 So.2d 329, 332 (Fla. 1961).

The probative value of state's exhibit 65 was slight. The pathologist's testimony clearly documented that someone had sexually battered Angeli Bare's vagina and anus. The picture fails to illustrate the facts as

well as the testimony does.

As defense counsel pointed out, the _identity_ of the perpetrator was the key issue at trial. _Someone_ kidnapped, raped, and murdered Angeli Bare. The jury was presented with only one potential candidate (Robert Power) to punish for this dastardly deed.

It is important that identity was the only issue contested by the defense at trial. In _Hoffert v. State_, 559 So.2d 1246 (Fla. 4th DCA 1990), the court held that the introduction of an autopsy photograph was error. Although somewhat relevant to the issues, the District Court pointed out that the record contained other evidence from which the medical examiner could have testified without reference to the photograph. The medical examiner at Power's trial could have used other evidence to testify without reference to the offensively gruesome photograph. This observation is also applicable to Robert Power's trial.

One must remember that a jury of laymen will never have seen anything similar to the ghastly pictures usually introduced in capital murder trials[m]. The idea of a trial is not that the jurors should regurgitate at the evidence, but that they should make a reasoned, informed decision as to guilt. In this case, the jurors were treated to the vivid, color, close-up photograph of the twelve-year-old victim's distended, bloody anus and vagina. As distasteful as it may be, and not unmindful of the possibility of inflaming this Court," Appellant urges the individual members of this Court to pull the offensive photgraph out of the evidence and examine it in some detail. It is clear that Mr. Power was denied a fair trial where the photograph in question was so shocking in nature as to outweigh its relevance. _Bush v. State_, 461

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[20] Apparently, even an experienced crime scene investigator expressed revulsion at one of the photographs of the victim. Although it is not clear which photograph, when confronted with one picture during her testimony the investigator obviously needed a short recess to regain her composure. Defense counsel felt compelled to apologize for asking the witness to examine the gruesome photograph. (R540-1,547)

[21] Power submits that the outrageous photograph in question will even inflame this Court, even though its members see gruesome photographs on a daily basis.

So.2d 936, 940 (Fla. 1984); Alford v. State, 307 So.2d 433 (Fla. 1975).

POINT XII

NUMEROUS ERRORS OCCURRED DURING JURY SELECTION WHICH WHEN CONSIDERED SEPARATELY OR IN COMBINATION JUSTIFY **A** NEW TRIAL.

A. The Trial Improperly Limited Power's Peremptory Challenses.

Florida Rule of Criminal Procedure 3.350(e) provides:

> If an indictment or information contains two or more counts or if two or more indictments are consolidated for trial, the defendant shall be allowed the number of peremptory challenges which would be permissible in a single case, but in the interest of justice, the judge may use his judicial discretion in extenuating circumstances to grant additional challenges to the accumulate maximum based on the number of charges or cases included when it appears that there is a possibility that the State or the defendant may be prejudiced. The State and the defendant shall be allowed an equal number of challenges.

Section 913.08, Florida Statutes (1989) provides that a defendant shall be allowed ten peremptory challenges if the offense charged is punishable by death or imprisonment for life. Federal law authorizes twenty peremptory challenges for capital offenses. Fed.R.Cr.Proc. Rule 24(b) (1991). See also United States v. Vallez, 653 F.2d 403 (9th Cir. 1981). The state charged Robert Power with one capital felony, two life felonies, and two first-degree felonies punishable by life. (R2676-78) SS782.04; 794.011(3); 787.01(3)(a); 810.02(2); 812.13(2)(a), Fla. Stat. (1989).

Using a purely mathematical formula in conjunction with Section 913.08, Florida Statutes (1989), Robert Power would have been entitled to fifty peremptory challenges if each offense had been tried separately. In the federal system, Power would have been permitted a minimum of twenty peremptory challenges even if all five charges were consolidated. Robert Power got only ten peremptory challenges at his trial in Lee County.

The first sixty-one potential jurors had absolutely no moral or ethical problems with the concept of capital punishment. After questioning

this first group of death-scrupled jurors, Power's defense attorney pointed out the oddity of such an occurrence. **(R68-9)** Based upon the extremely conservative views of the jury pool, defense counsel requested additional peremptories. The trial court deferred ruling on that request. **(R68-9)**

This was a highly publicized abduction, rape, and murder of a twelve-year-old girl in Orange County. **As** a result of the extensive publicity this case received, the trial court granted Power's motion for change of venue, and held the trial in Lee County, Florida. **(R2184)** There was television coverage of the case in Lee County the night before and the morning of the first day of jury selection. **(R18)**

Voir dire revealed that many if not most of the jurors either read newspaper accounts of the case or heard about the trial on the radio. **(see e.g. R18-19,76-89,93-4, 96-9,112-17,118-22,** etc.) Defense counsel repeatedly asked the trial court to sequester the jury due to the extensive publicity both before and during the trial. (R119,650-1,1020,2071-75) At least twenty-seven jurors were excused for cause due to media exposure or strong feelings of bias toward the crime.[22] (R71-2,76,94-112,128-37,141-48,161-68,173-83,187-**96,218-25,385, 388-89)** Power unsuccessfully challenged at least three potential jurors based on cause. **(R76-85,112-17,391-3)** Power eventually exhausted all of his peremptory challenges. **(R387-90)**

Defense counsel announced the need for more challenges, but the trial court denied the request. **(R390)** Defense counsel pointed out that he was particularly concerned about juror number four (Edward Jones) who pleaded guilty to accessory after the fact to first-degree murder and was placed on probation. **(R264-5, 391)** He pointed out that since the court had withheld adjudication, Jones was not a convicted felon and was therefore not automatically disqualified from jury service. **(R391-2)** Defense counsel also pointed out that Juror Jones had a ten-year-old daughter. **(R319, 391)** Counsel stated that, if he had an additional peremptory challenge, he would exercise

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[22] Voir dire revealed vehement bias toward anyone even accused of the abduction, rape, and murder of a twelve-year-old girl.

it on Juror Jones immediately. **(R391)** Defense counsel also unsuccessfully challenged Jones for cause. **(R392)** He again requested an additional peremptory challenge which the trial court denied. **(R392)** Defense counsel argued that most of the venire admitted during voir dire that they had some media exposure about the case. Individual voir dire demonstrated that the radio broadcast on the morning of trial revealed that Power was serving consecutive life sentences for Orange County Offenses. **(R3920)** Defense counsel expressed his concern that jurors who may not have remembered during voir dire that they heard or read about the case would, as the trial progressed, have their memories jogged. **(R392)** Defense counsel pointed out that they used a peremptory challenge on Beverly Ann Davidson (juror **#17)** who heard details of the case from another juror during voir dire. **(R170-2,392-3)** When Power attempted to challenge for cause any juror who had heard about the case, the trial court claimed that "shot-gun challenges" were not allowed. **(R393-4)** Despite all Power's attempts to remove him, Edward Jones was on the jury that convicted Robert Power. **(R2103-4)** Jones also voted for Power's execution. **(R2601)**

In Meade v. State, 85 So.2d 613, 615 (Fla. 1956), this Court wrote:

> Of course, the purpose of peremptory challenges is the effectuation of the constitutional guaranty of trial by an impartial jury by the exercise of the right to reject a certain number of jurors whom the defendant for reasons best known to himself does not wish to pass upon his guilt or innocence. In this manner he may eliminate from service jurors who may be objectionable but who may not be shown so prejudiced as to be successfully challenged for cause. Carroll v. State, 139 Fla. 233, 190 So. 437.

In Meade, this Court held that, even if consolidation of two first-degree murder indictments were approved, it was error for the trial court to restrict the number of peremptory challenges to ten. The trial court should have allowed a total of twenty challenges. However, the major holding of Meade, was that the two cases were improperly consolidated.

Appellant can cite no case where a reviewing court found that the

trial court abused its discretion in denying a request for additional peremptory challenges. See e.g., Parker v. State, 456 So.2d 436 (Fla. 1984); Jacobs v. State, 396 So.2d 713 (1980); Knight v. State, 338 So.2d 201 (Fla. 1976); Johnson v. State, 222 So.2d 191 (Fla. 1969); United States v. Springfield, 829 F.2d 860 (9th Cir. 1987). In support of his contention that the trial court abused its discretion in denying his request for additional peremptory challenges, Power points to the dissenting opinion of Judge Waldon in Livingston v. State, 512 So.2d 223 (Fla. 4th DCA 1987). Most of the factors Judge Walton cited in Livingston, justifying additional challenges are present in the instant case: (1) substantial publicity; (2) the case was particularly gruesome in that it involved the abduction, rape, and murder of a child; (3) the juror that defense counsel sought to challenge was particularly objectionable (in Power's case because Juror Jones had a ten-year-old daughter). There are additional reasons unique to Power's case to justify additional peremptory challenges. No one in Power's venire had any moral or ethical qualms that would give them pause in voting to execute someone. Additionally, the racial composition of Power's venire revealed the lack of a fair cross-section of the community. As Judge Waldon said, "if ever there were a case where additional challenges should have been granted, this is it." 512 So.2d at 227. This Court should order a new trial.

B. The Trial Court Erred in Denying Power's Numerous Requests to Sequester the Jury.

Justifiably afraid of the enormous publicity generated by this case, defense counsel filed a pre-trial motion for sequestration of prospective jurors during jury selection, trial, and deliberations. (R3034-5) The trial court denied the motion. (R2324-6) Even though venue was changed to Lee County (R2968-9), most of the potential jurors had heard about the "big trial." (R1-199) Appellant recognizes that sequestration of the jury is a matter within the sound discretion of the trial court. §40.235, Fla.Stat. (1989). However, Appellant submits that as the trial progressed, it became obvious that sequestration was necessary in this case.

During a recess in the middle of the first witness, a juror

reported that, while standing in line at the courthouse snack bar, an unidentified woman told the juror, "Give him the chair." Power moved for a mistrial, but the court denied the motion. **(R541-7)** Although the other jurors denied hearing the comment, the incident illustrates the inflamed mood of the community. Shortly after this incident, Power renewed his motion to sequester the jury. Power expressed his concern about the comment to the juror and the article in the Miami Herald that morning. The court pointed out that the jurors denied reading the article, but defense counsel remained concerned. (R650-1) Defense counsel renewed the motion again prior to the recess for the three-day weekend. **(R1020)**

In the middle of trial, a car appeared in the courthouse parking lot with a sign in the window urging "Castrate baby rapers and wimpy judges." **(R1393)** A deputy sheriff checked the tag and found that the offensive car belonged to Charlie Walters of Fort Myers. **(R1400)** Mr. Walters was not on Power's jury. No one inquired of the jurors if they happened to borrow Charlie Walter's car. Nor did anyone inquire if any of the jurors had seen the inflammatory sign.. Once again, this episode demonstrates that tempers were running high in the community, even though the trial was moved on a change of venue. The community was clamoring for a conviction and death sentence.

After the jury heard all of the evidence at the guilt phase and closing argument from both sides, the trial court gave them the option of returning the next morning for instruction and deliberation. **(R2071-5)** Power renewed his motion for sequestration, pointing out that the jury had heard all of the evidence and argument. The trial court denied the motion, pointing out that the rules of procedure allow a jury to separate prior to beginning deliberations.

Power submits that, under the extraordinary circumstances of this case, the trial court abused its discretion in denying Power's repeated requests to sequester the jury. The two unfortunate incidents that occurred during trial reinforce this conclusion. The trial court's ruling denied

Robert Power his right to a fair trial. Amend. V, VI, XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

C. The Trial Court Erred in Overruling Power's Objection Which Was Based on the Underrepresentation of African-Americans in the Venire and the Absence of Any Veniremen Expressing Reservations About the Death Penalty.

Shortly after jury selection began, defense counsel registered an objection to the general underrepresentation of African-Americans in the venire. (R64-7) A check with the Lee County statistical abstract in the public library revealed that the county had a population of 335,000 people. The racial breakdown was 309,000 Caucasians and 25,000 (8.4 %) African-Americans. Defense counsel announced for the record that there were two African-Americans in the first panel of 61. (R65) Counsel pointed out that the county used voter registration rolls to select jury venires. Counsel argued that using drivers' license records is a better method, particularly in light of the resulting gross underrepresentation of African-Americans when voter registration rolls are used. (R65-6) The trial court overruled counsel's objection, and stated that there was no indication of any bias in selection "other than through the natural process of using the voter [rolls].'' **(R67)**

Discriminatory selection of juries may be challenged under the equal protection clause of the Fourteenth Amendment. Alexander v. Louisiana, 405 U.S. 625 (1972). The right to have a jury venire represent a fair cross-section of the community is also protected by the Sixth Amendment's guarantee of trial by an impartial jury. Taylor v. Louisiana, 419 U.S. 522 (1975). In Castaneda v. Partida, 430 U.S. 482, 494 (1977), the Supreme Court summarized the requirements for proving an equal protection violation:

> The first step is to establish that the group is one that is a recognizable, distinct class, ... Next, the degree of underrepresentation must be proved, by comparing the portion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time . . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

Duren v. Missouri, 439 U.S. 351, 364 (1979), set out the elements of a prima facie violation of the fair-cross-section requirement:

> [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to syste-matic exclusion of the group in the jury-selection process.

Defense counsel pointed out that the number of African-Americans on the venire corresponded to a fifty percent under-representation when compared to the racial composition of the general composition in Lee County. (R65-7) The first part of the prima facie test under Castenada or Duren is clearly satisfied in Power's case because African-Americans constitute a recognizable, distinct class. Strauder v. West Viruinia, 100 U.S. 303 (1879). The United States Supreme Court has been careful not to delineate precise mathematical standards for proving systematic exclusion. Alexander v. Louisiana. However, Davis v. Zant, 721 F.2d 1478 (11th Cir. 1983) examined precedents from the Supreme Court, the Fifth Circuit, and the Eleventh Circuit in judging whether disparities are significant enough to establish an equal protection or fair-cross section claim. In Davis, the Eleventh Circuit found that the disparities in the jury pool (18.1% to 18.4%) were extremely close to the disparities found to be significant in other cases. See e.g. Turner v. Fouche, 396 U.S. 346 (1970) (23% disparity); Hernandez v. Texas, 347 U.S. 475 (1954) (14%); Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983) (21% and 38%); Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982) (36% and 42%); Porter v. Freeman, 577 F.2d 329 (5th Cir. 1978) (20.4%). An important consideration to the Davis court was that the disparities in the 1973 list were in the same range as those in the 1975 list. Davis v. Zant, 721 F.2d at 1483. The court concluded that these figures corroborated Davis' claim that the figures were not coincidental but resulted from discrimination. Power's defense counsel pointed out that he had consulted with the local public defender, a lifelong resident of Lee County, and discovered that the number of African-Americans in

Power's venire was representative. **(R66)**

Having met the first two prongs of the three part test, Power must now show that the underrepresentation of African-Americans was due to the systematic exclusion in the jury-selection process. Defense counsel pointed out that the selection procedure of jury pools was inadequate in that it was based on voter registration rolls rather than driver's license rolls. **(R65-6)** The Florida Legislature has recognized the discrimination inherent in utilizing voter registration rolls to select jury venires. Ch. **91-235(S.B. 678) 1991** Digest of General Laws.

Unfortunately, due to the lack of record development at trial, Power cannot conclusively say that the underrepresenta- tion of African-Americans in his venire was the result of systematic exclusion of the group in the jury-selection process. Power can only point out that the system of selecting juries in Lee County, while not "inherently unfair," Turner v. Fouch, **396** U.S. at **355,** certainly contains the possibility of abuse. **See** e.g., Davis v. Zant, 721 F.2d 1478 (11th Cir. **1983).**

Power also asserts **a** violation of his constitutional rights based on a jury composed from a fair cross-section of the community in that, of the first sixty-one veniremen examined, not a single one expressed any moral or ethical reservations about the death penalty. Defense counsel objected to the panel as a whole based on the same arguments regarding the underrepresentation of African-Americans. **(R68-9)** The trial court agreed that it was unusual not to find "at least a couple" who expressed some dilemma on the prospect of recommending **a** death sentence. **(R68)** Defense counsel renewed his motion for additional peremptory challenges based upon the dearth of veniremen expressing moral objections to the death penalty. **(R69)** The trial court deferred ruling on the motion but ultimately denied it. **(R390)**

POINT XIII

THE TRIAL COURT ERRED IN DENYING TWO SPECIALLY REQUESTED JURY INSTRUCTIONS WHICH WERE CORRECT STATEMENTS OF THE LAW AND WERE NOT COVERED BY THE STANDARD INSTRUCTIONS.

Hair Comparison Instruction

Defense requested a special jury instruction as follows:

> While admissible, hair comparison testimony does not establish certain identification as do fingerprints.

(R1850,3103) Defense counsel cited Bundv v. State, 455 So.2d 330 (Fla. 1984) and Horstman v. State, 530 So.2d 368 (Fla. 2d DCA 1988). The State objected, contending that the instruction was a statement of fact, not of law. The State also opined that, given the increasing body of knowledge, that conclusion might change. (R1850-1) The trial court denied the instruction.

Florida Rule of Criminal Procedure 3.390(a) states:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. ...

The sole purpose of a court's instructions is to advise the jury of the Law applicable to the case being tried before them so that the verdict shall be in conformity with the law. Kimmons v. State, 178 So.2d 608 (Fla. 1st DCA 1965). The law is very clear that the court, if timely requested, must give instructions on legal issues for which there exists a foundation in the evidence. Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981). A defendant is entitled to have the jury instructed on the law applicable to his theory of defense if there is *any* evidence introduced to support the instruction. Lavthe v. State, 330 So.2d 113 (Fla. 3d DCA 1976).

Defense counsel's requested instruction went to the crux of the State's case and to the heart of Power's defense. Seven tiny hairs convicted Robert Power. The requested instruction was therefore critical. The instruction contained a correct statement of the law. Florida court's have recognized that, although persuasive, hair comparison analysis is, unlike fingerprints, is not 100% reliable. **See,** e.g., Bundy v. State, 455 So.2d 330

(Fla. 1984) and Horstman v. State, 530 So.2d 368 (Fla. 2d DCA 1988).

Nor is it enough that the testimony revealed the inexact nature of hair comparison. Even where the evidence reveals the law, a defendant is entitled to an instruction thereon. **See**, e.g., Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981). An instruction on this issue was especially appropriate in Power's case. Although one state expert admitted the shortcomings of hair analysis (R1480), the other state witness was somewhat equivocal. Richard Bisbing, a senior research microscopist with McCrone Associates, proudly testified that he was even able to differentiate hairs between identical twins. (R1634)

In light of the critical nature of this evidence and the somewhat equivocal testimony of Mr. Bisbing, Power submits that the trial court abused its discretion in denying his specially requested jury instruction on hair analysis. The instruction contained a correct statement of the law and was absolutely critical to Power's case. **See** Savino v. State, 555 So.2d 1237, 1239 (Fla. 4th DCA 1989). The instruction went directly to Power's theory of defense. The trial court's ruling deprived Power of his constitutional right to a fair trial.

Specially Requested Instruction on Circumstantial Evidence

Although the trial court finally relented and gave the "old" standard jury instruction on circumstantial evidence, the court denied Power's request for the following:

> Circumstantial evidence is not sufficient when it requires pyramiding of assumptions upon assumptions in order to arrive at a conclusion necessary for conviction.

(R1855,3105) The defense relied on Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978) in support of this request. After hearing argument, the trial court denied the requested instruction. (R1855-6)

In light of the evidence presented by the State, the specially requested instruction was necessary in Power's case. Not only was the State's case entirely circumstantial, a finding of guilt would require a pyramiding of

a succession of inferences. See Point I, infra. As defense counsel pointed out at the charge conference, the State was asking the jury to infer that the person that robbed Deputy Welty was the same person that burglarized the house, kidnapped the child, sexually battered the child, and subsequently murdered that child. (R1856) The instruction correctly stated the law and was necessary in view of the evidence. The trial court's denial of the requested instruction deprived Power his constitutional right to a fair trial.

POINT XIV

DURING THE PENALTY PHASE, THE TRIAL COURT ERRED IN RESTRICTING POWER'S ATTEMPTS TO EXPLAIN DR. RADELET'S BIAS, AFTER THE STATE ELICITED TESTIMONY THAT RADELET PERSONALLY OPPOSED THE DEATH PENALTY.

Dr. Michael Radelet was qualified, without objection, as an expert in the areas of sociology, criminology, and capital sentencing. (R2447-68) Over the past decade, Dr. Radelet had published more articles about the death penalty than any other person in this country. (R2469) During voir dire by the State on Dr. Radelet's qualifications as an expert, the following exchange occurred:

> MR. LERNER (Prosecutor): It is true you are against the death penalty, is that correct?
>
> DR. RADELET: Yes, I am. For a number of different reasons.
>
> MR. LERNER: And it is true that you use your expert witness fees to --
>
> MR. JAEGER (Defense counsel): Your Honor, please the Court, I ask if he will be allowed to finish his answer.
>
> THE COURT: He had finished the answer at that point. Counsel, if you need to reinquire, you may do so. Thank you.

(R2466) The State continued by asking Dr. Radelet about any charitable contributions that he had made to groups opposing the death penalty. (R2466-7) Dr. Radelet admitted that he had donated money to Amnesty International, the Nobel Prize and Human Rights Organization, and the Southern Coalition on

Cells and Prisons, all of which could be characterized as groups opposed to the death penalty. The State also explored Dr. Radelet's conclusions in the numerous articles that he had written on the subject. (R2467-8)

After Dr. Radelet's qualification as an expert, defense counsel felt the need to address Dr. Radelet's personal opposition to the death penalty.

> Q: The State asked you about your personal beliefs in death penalties. You said you were personally opposed to it?
>
> A: Yes.
>
> Q: Can you tell us why you personally oppose it?
>
> A: Yes. I had no position on the death penalty a dozen years ago when I first began to study it and look at it. However, over the years, the more I learned about the death penalty --
>
> MR. LERNER: Your Honor, I object. ...

(R2469) Defense counsel pointed out that the State began this line of questioning and defense counsel was simply allowing Dr. Radelet to finish his answer. Defense counsel contended, that if the State was going to use Dr. Radelet's bias against the death penalty, Dr. Radelet should be able to explain to the jury how he came to formulate that opinion. (R2470) The trial court had also indicated that defense counsel would be allowed to reinquire, after defense counsel objected to the state cutting off Radelet's answer. (R2466) The trial court sustained the State's objection, saying:

> The fact of his bias is appropriate. The bias for that I don't think needs to be gone into.

(R2470)

At a subsequent bench conference, defense counsel reiterated his belief that Dr. Radelet's credibility had been placed at issue by the prosecution. Defense counsel took issue with the trial court's conclusion that the fact of the bias alone was important. Defense counsel pointed out that there are reasonable stances on issues and there are unreasonable stances. Since the State impeached Radelet's credibility by eliciting his

bias, Radelet's credibility had been damaged. (R2471)

During closing argument, the State relied on Dr. Radelet's personal opposition to the death penalty in a successful attempt to discredit his testimony.

> ... What this sentence is about is whether the people of the State of Florida are going to follow through with the laws that we have chosen for ourselves. Dr. Radelet, give him credit, has his point of view about that. He doesn't want you to follow through. (R2570-1)
>
> * * *
>
> ... But let's talk about whether there is any aspect of the defendant's character or record or any other circumstance of the offense that is a mitigating circumstance in this case. Dr. Radelet believes so. But he is biased against the death penalty. And he would -- he made it clear he would not want to see it imposed in any case. He is a sociologist. Claims to have some sort of scientific method that leads him to the conclusion that he gave you and that the defendant would stay in prison one way or the other. He would never get out. And if you are reasonably convinced that that is a mitigating circumstance, you should consider it. You should weigh it. I submit to you, though, that for whatever mitigating value that is in Dr. Radelet's opinion, or whatever else you have seen ... (R2583) (Emphasis supplied)

The trial court was wrong. Once the State put in issue Dr. Radelet's personal opposition to the death penalty, his credibility was damaged. Defense counsel had an absolute right to rehabilitate him. As defense counsel pointed out, there **are** unreasonable prejudices and there **is** such a thing as a justifiable bias. Dr. Radelet knew that. Defense counsel knew that. The prosecutor and the trial judge did not see it that way. The jury was undoubtedly left with the impression that Dr. Radelet **was** one of those "flaming liberals" soft on crime and unworthy of belief as to this issue. The jury undoubtedly forgot about the doctor's sterling academic credentials, training, experience, and qualifications. (R2447-68)

The Supreme Court of the United States has recognized that the exposure of a witness's motivation is an important function of the constitutionally protected right of cross-examination. Davis v. Alaska, 415 U.S. 308 (1974). Both common sense and rules of evidence make it clear that a

witness's bias, interest, and motive are proper subjects of inquiry of any witness by any party. §90.608, Fla.Stat. (1989).

The trial court's ruling can be analogized to a Witherspoon inquiry of a potential juror. If a juror expresses some equivocation about the death penalty, a prosecutor should certainly be permitted a chance to "rehabilitate" that juror. Even though the potential juror may express some general doubts about the death penalty, the State can certainly ask if the juror would be able to follow the court's instructions to the contrary. also, Barker **v.** Randolph, 239 So.2d 110 (Fla. 1st DCA 1970). Once the State opened the door and questioned Dr. Radelet's bias incredibility, the trial court should have permitted full and fair questioning in this area by defense counsel. The State brought this issue to the forefront. Dr. Radelet should have been allowed to explain his "bias".

POINT XV

THE TRIAL COURT ERRED IN ITS CONSIDERATION OF AGGRAVATING CIRCUMSTANCES THAT WERE NOT SUPPORTED BY THE EVIDENCE.

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE MURDER OF ANGELI BARE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The trial court recognized that the defense relied upon the testimony of the medical examiner which established that there was a blow to the victim's head which probably rendered the victim unconscious. The medical examiner could not state when, in the sequence of events, the blow occurred. (R3263) Instead of focusing on the motive, the trial court concentrated on the events leading up to the murder. (R3263-6) The court pointed out that the victim was afraid to attempt to escape, even though she had **a** viable opportunity to do so. (R3263) The trial court also believed that the victim's bedding indicated that a struggle may have occurred. (R3264)

In talking about the condition of the body, the trial court wrote:

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[23] Witherspoon v. Illinois, 391 U.S. 510 (1968).

> She was found bound with strips of cloth cut from her pants. Obviously, at the location of her death, the defendant forced the removal of her pants. Was she conscious at that point? If so, her terror was rekindled by the realization she was going to be sexually assaulted, not released. If she was not conscious, it is clear that at some time she regained consciousness and became aware of her state of undress because there is no other reasonable explanation why the defendant would take the time to hog tie and gag her except to prohibit her struggles, escape or alerting others to her presence and need for help.

(R3264)

The language quoted above clearly indicates that the trial court applied an erroneous standard. Aggravating circumstances must be proved beyond a reasonable doubt. **See, e.g.,** Lewis v. State, **377** So.2d **640** (Fla. 1979). The trial court's finding is filled with speculation and the word "if" is prominently featured. **(R3264)** The trial court talks about the location of the abrasions being "more consistent with the conclusion that they occurred before she was bound than after she was bound." **(R3265)** (Emphasis supplied) The court goes on to write:

> If the victim was unconscious during the sexual assault, it is a reasonable conclusion that when she regained consciousness and the defendant determined that he needed to bind her, she would have been aware of and suffered the pain that would have resulted from the sexual assault as testified to by the medical examiner.

(R3265) (Emphasis supplied)

"Reasonable conclusion" and "more consistent" are not words that one uses when applying a "beyond a reasonable doubt" standard of proof. The trial court almost appears to be applying a preponderance of the evidence standard or, at the very most, a "clear and convincing" standard. The evidence presented by the state is just as consistent with the fact that Angeli Bare was unconscious during most, if not all, of the entire episode. **(R3313-17)** The trial court also wrote:

> The victim was found in a wooded area near her house. In close proximity to her body were her school books, jacket, purse and empty lunch bag. It appears when she left the house she expected to ao to school.

(R3264) (Emphasis added) The trial court is correct in his summary of the facts regarding the body. (R455-520) Since she **did** appear to have been expecting to arrive at school that day, this fact scenario is similar to the one in Robinson v. State, 574 So.2d 108, 112 (Fla. 1991).

> Moreover, there was no evidence that St. George labored under the apprehension that she was to be murdered. To the contrary, Fields assured her on several occasions that they did not intend to kill her and planned to release her. Under the totality of the circumstances, we find that the trial court erred in finding that his murder was heinous, atrocious or cruel.

St. George was abducted from her malfunctioning car on the interstate, taken to a remote area, and raped by two strangers. Appellant cannot distinguish the facts and holding in Robinson from those in Power's case. Power's victim clearly thought that she was going to be robbed (R727-40), but there is no indication that she labored under the apprehension that she was going to be murdered. Clearly, the State failed to prove that this murder was especially heinous, atrocious, or cruel. The trial court's findings to the contrary cannot stand.

The State Failed to Prove Beyond a Reasonable Doubt That the Capital Murder Was Cold, Calculated, and Premeditated Without Any Pretense of Moral or Legal Justification.

In finding the applicability of this aggravating circumstance, the trial court focused on the testimony of the victims of Power's prior sexual assaults. (R3266-7) The court pointed out that Power had "thought out, designed, prepared or adapted by forethought his method of attacking females. He subdued them through the use or threat of violence and the use of a deadly weapon, sexually assaulted them in very similar ways and then bound and gagged them with a double gag." (R3266) The trial court concluded that, in this case, Power followed his previously designed method of attack.

The trial court is correct but overlooks a very important fact. Power did not kill any of his other victims. Alison Wallis survived her rape and testified against Power at the penalty phase (R2396-2404); so did the Warden sisters. (R2405-2427) Although the State presented documentary evidence that established numerous prior crimes, not a single one was a

murder. (State's Exhibits #109, 110, 111) Hence, the trial court's reliance on Power's preparation for other rapes is misplaced.

This aggravating circumstance ordinarily applies in murders which can be characterized as executions or contract murders. McCray v. State, 416 So.2d 804, 807 (Fla. 1982). The State has failed to prove the requisite "heightened premeditation" necessary to support this circumstance. An important distinction between this crime and the prior rapes, is that Power was detected by Miller during the commission of the crime. (R727-40) It appears that, recognizing his plight, Power panicked and killed his victim. The evidence is certainly consistent with such a theory. The State has clearly failed to prove this aggravating circumstance beyond a reasonable doubt.

POINT XVI

POWER DOES NOT HAVE EFFECTIVE ASSISTANCE OF COUNSEL AND FULL REVIEW OF THIS COURT DUE TO THE UNRELIABILITY OF THE TRIAL TRANSCRIPT.

Appellant first served his initial brief in this cause on October 22, 1991.[24] The state subsequently filed a motion to supplement the record on October 25, 1991. In response to a point Appellant raised in the initial brief served on October 22, 1991, the state requested that the court reporter compare her stenographic notes to the trial transcript. The court reporter admitted that the trial transcript was inaccurate.[25] Since the court reporter has now admitted that the previously certified transcript is inaccurate (in the only place that she was asked to look), Power contends that the accuracy of the entire trial transcript is called into question. Power is therefore

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[24] Appellant is able to raise this additional point in this initial brief due to this Court's October 31, 1991, order to resubmit an initial brief not exceeding 100 pages in length.

[25] A statement attributed to the prosecutor should have been attributed to defense counsel. This inaccuracy made a critical difference in the point originally raised in Appellant's initial brief served in October. In light of the aforementioned inaccuracy, Appellant has almost completely abandoned a point previously raised in the October brief.

entitled to a new trial or, at the very least, an evidentiary hearing where an independent court reporter can compare the stenographic notes with the existing trial transcript.

Robert Power has a constitutional right to a complete transcript on appeal. Maver v. Chicaao, 404 U.S. 189 (1971). In a capital case, the Fifth, Sixth, Eighth and the Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 21 of the Florida Constitution, demand a verbatim, reliable transcript of all proceedings in the trial court. See also Delap v. State, 350 So.2d 462 (Fla. 1977). The right to a transcript on appeal is meaningless unless it is an accurate, complete, and reliable transcript. New appellate counsel, who was not at the trial proceedings in this cause, has no means to fully review the proceedings below with a defective transcript, and thus, cannot render an effective assistance. Similarly, the rights to appeal and meaningful access to the courts are negated because both appellate counsel and this Court cannot fully review the proceedings below. See, e.q., Bounds v. Smith, 430 U.S. 817 (1977) and Hardy v. United States, 375 U.S. 277 (1964). In United States v. Selva, 559 F.2d 1303 (5th Cir. 1977), the Court held that where counsel on appeal was different then trial counsel, specific prejudice need not be shown from transcript deficiencies. A demonstration of substantial omissions is sufficient to require a new trial.

As this Court well knows, a seemingly minor mistake, like the one that happened in this case, can be absolutely critical to a point. See attached Appendices A and B (consisting of the argument raised in the October initial brief now omitted from this brief, and the state's motion to supplement the record)

POINT XVII

SECTION 921.141(5)(h), FLORIDA STATUTES, (1987) IS UNCONSTITUTIONALLY VAGUE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION AND THE JURY INSTRUCTION THEREON DOES NOT PROVIDE ADEQUATE GUIDANCE.

Power filed a motion to declare Section 921.141(5)(h), Florida Statutes (1987) unconstitutional. (R2853-68) The trial court denied the motion on May 14, 1990. (R2957) Additionally, the trial court instructed the jury on this aggravating circumstance using standard Dixon language.[26] (R2593-4) The trial court ultimately cited this aggravating circumstance in an attempt to justify the imposition of Power's death sentence. (R1,3263-6) Power recognizes that this Court has rejected this contention in previous cases but urges reconsideration nevertheless. See e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989). The jury instruction is so vague that it fails to pass muster under the Eighth Amendment in that it allows unguided, unchanneled discretion in imposing the death penalty. Walton v. Arizona, 110 S.Ct. 347, 357 (1990); Mavnard v. Cartwrisht, 486 U.S. 356 (1988). The United States Supreme Court has recently reiterated the unconstitutionality of an identical jury instruction. Shell v. Mississippi, 111 S.Ct. 313 (1990). See also Mavnard v. Cartwriaht, 486 U.S. 356 (1988).

POINT XVIII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Power filed a motion to declare Section 921.141, Florida Statute (1987) unconstitutional due to its arbitrary application. (R2788-2821) On May 17, 1990, the trial court denied the motion. (R2994) Power points out that the statute is silent as to any limits on the prosecutor's discretion to seek the death penalty in any given first degree murder case. This unbridled

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[26] State v. Dixon, 283 So.2d 1 (Fla. 1973)

prosecutorial discretion renders the statute unconstitutional. **See** United States of America ex. rel. Charles Silahy v. Peters, 713 F.Supp. 1246 (C.D. Ill. 1989).

Power also filed a motion to declare Section 921.141, Florida Statute (1987) unconstitutional due to the unlawful presumption of death. (R2869-74) On May 14, 1990, the trial court denied the motion. (R2956) This Court has consistently stated that a sentence of death is presumed when one or more valid aggravators exist, and no mitigating factors are applicable. **See** e.g. White v. State, 446 So.2d 1031, 1037 (Fla. 1954). Power maintains that such presumption vitiates the individualized sentencing determination required under the Eighth Amendment. Sandstrom v. Montana, 442 U.S. 510 (1979) and Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Power also filed a motion to declare Section 921.141(5)(d), Florida Statutes (1987), unconstitutional due to the "automatic" application of this aggravating circumstance to all felony murders. The trial court denied the motion on May 22, 1990. (R3042) Recognizing that this Court has rejected this argument [see e.g. White v. State, 403 So.2d 331, 335-6 (Fla. 1981)], Power persists in maintaining that this aggravating circumstance fails to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862 (1983)

Finally, Power contends that the trial court erred in denying his motion to strike adjectives from certain mitigating circumstances contained in Section 921.141(6), Florida Statutes (1987). (R2896-2901, 3224) These limiting adjectives ("extreme" and "substantially") infringe upon the right of the accused to present "any aspect of [his) character or record." Lockett v. **Ohio**, 438 U.S. 586, 604 (1978). Such an infringement violates the Eighth and Fourteenth Amendments. Hitchcock v. Dugger, 481 U.S. 393 (1987).

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant requests that this Honorable Court grant the following relief:

As to Point I, reverse his convictions for murder, sexual battery, burglary, and kidnapping, vacate the sentences thereon, and remand for discharge;

As to Points I through XIII, reverse his convictions and remand for a new trial;

As to Point XIV, vacate his death sentence and remand for a new penalty phase;

As to Point XV, vacate his death sentence and remand for imposition of a life sentence or, in the alternative, for reconsideration of sentence by the trial court;

As to Point XVI and XVII, vacate his death sentence and remand for the imposition of a life sentence or, in the alternative, to declare Florida's Death Penalty Statute unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Robert B. Power, Jr., #072550, P.O. Box 747, Starke, FL 32091 on this 20th day of November, 1991.

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