IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 78,337

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant, Emanuel Johnson, has four pending appeals, two in this Court and two in the Second District Court of Appeal:

Appeal number 78,336 (victim White)
Appeal number 78,337 (victim McCahon)
Appeal number 91-2368 (victim Cornell)
Appeal number 91-2373 (victim Giddens)

References to the records in these cases use the letter "W," "M," "C," and "G," respectively. Rather than tediously make certain that everything in one record is also in the other records, Appellant relies on all records. Courts may take judicial notice of their own records. Foxworth v. Wainwright, 167 So. 2d 868 (Fla. 1964); Stark v. Frayer, 67 So. 2d 237 (Fla. 1953). The few references to the records in the Second District are for informational purposes only. Appellant also relies on his brief in case number 78,336.

STATEMENT OF THE CASE AND FACTS

Around 2 a.m. on September 22, 1988, the Sarasota police found Jackie McCahon's body on a sidewalk with a broken knife blade nearby. (M4864-66, 4959-60, 5049) Her body had nineteen stab wounds, including five in the lungs, two in the heart, and three in the neck. (M5434-36) Twelve of the wounds were fatal and would have caused death quickly, but she could have remained conscious for several minutes and left the house. (M5436-41) The doctor thought that cuts on the back of her left elbow and her finger were defensive wounds. (M5438-39) Several of the wounds went through or hit the breast or neck bones and could have caused the knife to break. (M5441) He found no evidence of manual strangulation.

(M5442) Blood spatter around the body on bushes less than three feet off the ground indicated that she was stabbed often there and was probably near the ground at the time. (M5272-73)

McCahon managed nearby apartments, and the police had been to her apartment several times. (M4867-68, 4920) Her door was unlocked. (M4946) Fingerprints on the outside screendoor, bathroom door, and telephone were not Emanuel Johnson's prints. (M4993, 5029, 5031, 5221-22) The police found money in a book in the closet. (M5000)

Inside, the police found blood on the floor, carpet, chair, bed, bathroom, telephone handset, and the numbers 9 and 1 on the telephone. (M4969, 4965-71, 5278) Bloody footprints matched McCahon's feet. (M4999-5000) The telephone wire was cut, and the handset was off the cradle. (M4970) The blood spatter expert believed that the stabbing occurred when McCahon opened the door. (M5286) It might also have occurred in the bathroom. (M5286) Less blood dropped near the desk, which suggested that she had already bled considerably by the time she reached the desk. (M5277-78)

The police obtained information about Phillipe Samuell, Daniel Underwood, and Jessie Phillips. When Johnson confessed, the police ended their investigations of these other suspects. (M5328) Samuell was McCahon's boyfriend, and he showed up at the murder scene. (M4872) McCahon had made numerous complaints to the police about him. (M5591)

At 1 p.m. on the day before McCahon died, Underwood had returned a check that belonged to one of her tenants, and she told several people that he had frightened her. (M5308, 5579, 5593,

5405, 5416) McCahon paid Underwood a twenty dollar reward. (M5308, 5315-16, 5594)

Underwood and Phillips were together that night and planned a burglary of Phillips's grandmother's house near McCahon's apartment. (M5312-16, 5580, 5583) Underwood would receive cocaine in return for lending his car to Phillips to complete the burglary. (M5583) They were seen going west on 5th Street near McCahon's apartment around 1:00 a.m. (M5320, 5583-84) Afterward, Phillips turned himself in to the police for a theft, and he had Underwood's car. (M5579) When the police went to Underwood's house that morning, he ran to a back bedroom before coming to the door. (M5581)

On October 11-12, 1988, after the police arrested Johnson, he told them he had known McCahon. (M5068, 5300) For two weeks, he had rented an apartment from her across the street from her apartment. (M5070, 5077, 5299) He had also rented an apartment from her five years earlier for six or seven months. (M5070-71) He moved to Orlando when McCahon evicted him then, but they parted on good terms. (M5071)

Johnson told the police that, on the night McCahon died, around 5:30 p.m., he had paid McCahon $120 as rent and as part of his security deposit. (M5077, 5300) That night at 2 a.m., he heard police cars arriving. (M5073, 5081, 5301) He went outside and saw her body surrounded by police cars but was too far away to see who she was. (M5073-74, 5301) He gave his name to a police officer. (M5110) He did not learn who she was until the next day when a coworker who lived nearby told him. (M5074-76, 5301)

After further lengthy interrogation, however, Johnson told the

officers on tape that he had knocked on McCahon's door around midnight or 1 a.m. to say he needed to use the telephone because his wife might soon have her baby. (M5086, 5304, 5368) McCahon knew his wife was expecting to give birth at any time. (M5086) When she let him in, he grabbed her around the neck and choked her to semi-consciousness. (M5087, 5304) He laid her on the bathroom floor, while she was groggy. (M5087) He went to the kitchen for a knife and returned to stab her several times. (M5087, 5304) He cut the phone cord. (M5304) He took twenty dollars from a brown book in her apartment. (M5087, 5304) According to one officer (but not the other officer), Johnson added that he watched the front of the house and saw McCahon leave her apartment and collapse on the sidewalk. (M5304)

As the police walked him across the street to the jail, Johnson told the officer that he preferred to have a shot. (M5100) When the officer asked what he meant, he said he would rather have a shot than the electric chair. (M5101) A few hours later, the police asked him why McCahon's body was outside and near a knife blade, when he had said that he stabbed her inside. (M5101-03, 5151) He responded that he had gone across the street to his apartment. (M5103) Shortly thereafter, he looked out the window and saw McCahon stagger from her apartment to the sidewalk. (M5103, 5390) Johnson had already thrown away the first knife. (M5103, 5390) He took a knife from his apartment, ran outside, and stabbed her again many times. (M5104, 5390) The knife blade broke. (M5104, 5390) He threw the knife handle into a field near where he had thrown the first knife. (M5104-05, 5390)

A person could see McCahon's apartment either from Johnson's porch and by leaning out his bathroom window but not by merely looking through the window. (M5218-20, 5476-78) Later that day, the police went to a field just east of Johnson's home and found a knife but did not find a knife handle to match the broken knife near McCahon's body. (M5178-81, 5392) On October 18, the police returned with a road gang which cut the grass and removed trash. (M5182-83) Eventually, they found a broken kitchen knife. (M5184, 5188) An expert determined that it had the same kind of metal and fractures as the blade found by McCahon's body. (M5240-44) He believed that they were parts of the same knife. (M5244) The break occurred when the knife was bent through excessive force consistent with a stabbing motion. (M5244-45)

On November 4, 1988, a grand jury indicted Johnson for first degree murder. (M6210) On November 7, 1988, he was charged by information with armed burglary. (M6214) On June 7, 1991, a jury found him guilty as charged. (M8122) At the penalty phase, the prosecution introduced evidence concerning White, Cornell, and Giddens. On June 18, 1991, the jury recommended death by a vote of 10-2. (M8531) On June 28, 1991, Judge Owens imposed death, finding the aggravating circumstances of (1) prior violent felony, (2) murder committed during a burglary for pecuniary gain, and (3) murder was especially heinous, atrocious, or cruel. (M8790-94) The judge found fifteen nonstatutory mitigators. He imposed a life sentence for the burglary charge. (M8799) The written reasons for departure were an escalating pattern of criminal activity and an unscored capital conviction. (M8614) Johnson now appeals.

SUMMARY OF THE ARGUMENT

I. The police lacked probable cause, and the fellow officer rule did not allow officer Castro to arrest Johnson.

II. The judge should have suppressed the confessions because the police did not tell Johnson the cause of the arrest. They also did not take him immediately to jail. The ambiguous statement afterward was part of the entire interrogation and required fresh Miranda warnings if considered to be separate. The police violated due process and the right to counsel by snatching Johnson from the jail during the first appearance procedure to obtain the second statement about the knife.

III - VII. A clerk improperly swore, qualified, and excused jurors outside the presence of a judge. The same improper procedure was used for the grand jury. The judge improperly delayed the trials for weeks after jury selection, to permit other trials to occur. The judge should have excused for cause two jurors who had a preconceived opinion that death was the appropriate penalty. The defense presented a prima facie case of discrimination when, in case after case, the venire contained no more than one black prospective juror.

VIII. The trial court improperly moved the trial dates forward by one month, denied motions for continuances, and forced the defense to go to trial when it had only recently received discovery, merely to give the state more convictions to use as aggravating circumstances.

IX. This Court's page limits for briefs have denied the Appellant his right to effective assistance of appellate counsel.

ARGUMENT

ISSUE I

THE ARREST WAS ILLEGAL, AND THE JUDGE SHOULD HAVE SUPPRESSED ITS FRUITS.

A. Factual background

When the police arrested Johnson, they knew that White was found on her bed naked from the waist down and had a bruised vaginal area. Sperm was in her vagina, and some pubic hairs were on the inside of her thigh. One hair was negroid but not necessarily male or female. (W113-14, 122, 127-28, 139, 146, 161-62)

The ajar front door was normally locked. (W157-58) An outside window screen was cut, and the outside of the window had fingerprints which were smeared slightly as if someone had pushed up on the window. (W127, 164, 173) The bedspread underneath the window was rumpled, and dirt and footprints were on the floor, suggesting that this might have been the point of entry. (W142, 180) Dirt outside the window was consistent with the dirt inside. (W180)

Johnson's house was six blocks from White's house, and her purse was found between the two houses. Johnson's name had come up in a canvass after McCahon's death; he lived on property that she managed. McCahon and White lived close to each other, and the methods of attack were similar. (W129-31)

The police distributed Johnson's picture and told detectives to maintain surveillance over various addresses where Johnson might be, but this information was only to be given to the detective bureau. (W48-49, 110, 149) According to detective Sutton, the detectives were to arrest Johnson if they saw him. (W155) Line

officer Castro was not present at the meetings. (W40, 47)

Sarasota city officers arrived at Judge Silvertooth's house with the warrant and affidavit at 9 p.m. (W55, 72) The affidavit did not mention fingerprints on the lamp near White's body which were not Johnson's fingerprints, did not say that Johnson's fingerprints were found outside the house, and said that the fingerprints were found at the point of entry but did not mention the open front door which could have been the point of entry instead of the window. (W140-45, 165-66, 170-71, 6451-52)

The affidavit's jurat was: "the facts as stated herein are true to his best knowledge and belief at the present time." (W72, 6452) The warrant's jurat was: "facts contained in the attached affidavit are true to the best of my knowledge." (W72, 6456) Judge Silvertooth read this oath to detective Sutton, who swore to it. (W100) The judge signed the warrant at approximately 9:15 p.m. and wrote on it, "No bond. To be set by Court." (W57, 512, 1006, 6450)

The officers left about 9:30 p.m. Over the radio, detective Sutton told other detectives working on the case that the warrant was signed. This message was not intended for line officers, because Sutton wanted to talk to them first. On the way back, Sutton was surprised to hear that line officer Castro had arrested Johnson. (W57-60, 149)

At 8 p.m., Castro had seen detective Redden at the front desk of the station. When Castro asked what was going on, Redden showed him Johnson's picture and said that arrest warrants were being prepared. Redden denied telling Castro to arrest Johnson and did not think she told him about the fingerprint match. Castro, how-

ever, testified she did tell him about the fingerprints and told him to arrest Johnson, but she also told him not to tell anyone else, because they were waiting for the arrest warrants and would later issue a BOLO. (W31-33, 42-43, 116-19)

Castro saw Johnson on the street and arrested him at 9:48 p.m.. Castro had not heard a BOLO. After Castro read him the Miranda warnings, Johnson said he understood them, but Castro said he did not want to talk to Johnson then. When Johnson asked what he was being arrested for, Castro said the detectives at the station would tell him. Castro did not himself have probable cause to arrest Johnson and knew only of the fingerprint match. He brought Johnson to the station within five minutes. (W31-41, 460-62)

Judge Owens ruled that the arrest warrant and affidavits were invalid because the jurats was invalid. The officers, however, had probable cause to arrest apart from the warrant, and the arrest was otherwise proper. (W6507-11) At trial, Judge Owens denied renewed motions to suppress. (W5242-43)

B. Unsworn arrest warrant

Judge Owens correctly ruled that the arrest warrant was invalid because the sworn jurats on the affidavit and warrant were not proper oaths. Judges may issue arrest warrants when "a complaint is made in writing and sworn to before a person authorized to administer oaths." Fla. R. Crim. P. 3.120. The Fourth Amendment likewise requires an oath for warrants to seize (arrest), while article I, section 12, of the Florida Constitution requires an affidavit, which by definition necessitates an oath. Youngker v. State, 125 So. 2d 318 (Fla. 4th DCA 1968).

In this instance, the officer swore only "to his best knowledge and belief" or "to the best of [his] knowledge." This oath was unquestionably insufficient. State v. Rodriguez, 523 So. 2d 1141 (Fla. 1988) ("to the best of his knowledge"); Scott v. State, 464 So. 2d 1171 (Fla. 1985) (same). This qualifying language meant that the officer could swear to the affidavit

> based upon a false allegation of fact without fear of conviction for perjury. If the allegation proved to be false, the [officer] would be able to simply respond that his verification of the false allegation had been "to the best of his knowledge" and that he did not know that the allegation was false. We require more than that. The [officer] must be able to affirmatively say that his allegation is true and correct.

Id. at 1172. Accordingly, the purported oaths in the warrant and affidavit in the present case were "in effect, no oath at all, and thus defective." Rodriguez, 523 So. 2d at 1142.

The constitutional and rule requirement of an oath is not an insignificant technicality. "[A]n oath is not merely a physical, artificial act which is devoid of meaning. Rather, the main purpose of the requirement of obtaining a valid oath is that perjury will lie for its falsity." State v. Johnston, 553 So. 2d 730, 732 (Fla. 2d DCA 1989). In this instance, the officer did not subject himself to perjury charges, and the oath and the warrant were therefore invalid.

The trial judge correctly ruled that the good faith exception of United States v. Leon, 468 U.S. 897 (1984), did not cure the absence of an oath. Leon was inapplicable here because the warrant was governed by Rule 3.120 as well as the state and federal constitutions, and Rule 3.120 did not contain a good faith exception.

See Bonilla v. State, 579 So. 2d 802, 805 (Fla. 5th DCA 1991) ("rules authorizing search and seizure must be strictly construed"). If the oath requirement in Florida Rule of Criminal Procedure 3.850 did not contain a good faith exception (Scott) and if the oath requirement in Florida Rule of Criminal Procedure 3.190(c)(4) likewise did not contain a good faith exception (Rodriguez), then the oath requirement in Rule 3.120 did not contain a good faith exception either.

Four justices of this Court now believe that the 1982 amendment to article I, section 12, of the Florida Constitution only requires this Court to follow the United States Supreme Court cases that were in effect in 1982. Perez v. State, 18 Fla. L. Weekly S361 (Fla. June 24, 1993). Moreover, Leon was decided in 1984, and this Court last revised Rule 3.120 in 1972. Under these circumstances, inserting the Leon good faith exception into a procedural rule last revised more than a decade before Leon would be absurd.

Although Florida Rule of Criminal Procedure 3.121(b) does say that no "arrest warrant shall be dismissed . . . because of any defect as to form in the warrant," the absence of an oath in this case was a defect not of form but of substance. Johnston. It was not a mere technical error which under Rule 3.121(b) could "be amended by the magistrate to remedy such defect" after the fact. The magistrate could not re-swear the officer years later at the suppression hearing, after the officer had obtained additional knowledge that the facts in the affidavit were true and correct.

An oath is fundamental to the validity of a warrant. All officers must know that a warrant without an oath is void. Police

officers and judges are necessarily presumed to have at least as much knowledge of the law's requirements for oaths as 3.850 litigants have, who are often pro se defendants "unskilled in the law." If this Court in Scott could require 3.850 litigants to use proper oaths or suffer dismissal of their post-conviction motions, then it must now likewise require police officers and judges to use proper oaths or suffer dismissal of their warrants. Any other conclusion would be illogical and unfair. Consequently, the second district correctly did "not believe that a search warrant unsupported by an oath is a mere technicality which good faith can cure." Collins v. State, 465 So. 2d 1266, 1268 (Fla. 2d DCA 1985); accord Johnston (same); Bonilla (good faith did not save affidavit that lacked probable cause paragraph); see also State v. Tolmie, 421 So. 2d 1087 (Fla. 4th DCA 1982) (officer's failure to sign the affidavit invalidated the warrant).

C. Facts omitted from the arrest affidavit

The affidavit was defective not only because it was unsworn but also because it omitted important facts. It mentioned that Johnson's fingerprints were found at the supposed point of entry but did not say that these fingerprints were outside and did not mention fingerprints on the lamp near White's body that were not Johnson's. Moreover, it did not mention that the point of entry could have been the open front door rather than the window.

The rationale of the Leon good faith exception -- which presumes that an impartial magistrate has reviewed all material facts known to the officer -- has little relevance when the police omit important facts from the affidavit which would have or might have

changed the magistrate's probable cause determination. State v. Van Pieterson, 550 So. 2d 1162, 1165 (Fla. 1st DCA 1989) ("Barton's knowledge of material omitted facts precluded application of the good faith exception to the execution of this warrant by another officer.") Instead, when material facts are omitted, the reviewing court must decide for itself whether probable cause existed.

> When a material fact is omitted from the affidavit filed in support of the probable cause determination, such fact constitutes a material omission if a substantial possibility exists that the omission would have altered a reasonable magistrate's probable cause determination. In determining whether a material omitted fact should invalidate a search warrant, the reviewing court should view the affidavit as if it had included the omitted fact and then determine whether the affidavit provides sufficient probable cause.

Id. at 1164 (citation omitted); accord Sotolongo v. State, 530 So. 2d 514 (Fla. 2d DCA 1988). This de novo probable cause determination is the subject of the next section of this brief.

D. Arrest without probable cause

Although the arrest warrant was invalid, Judge Owens found that the arrest was proper because the police had probable cause. This ruling was incorrect. The probable cause evidence consisted solely of the fingerprints on the window by the ripped screen, coupled with an ambiguously rumpled bedspread and dirt on the floor underneath the window. The police also knew that Johnson lived nearby, but this knowledge was a two-edged sword; his proximity meant that he was more likely to have his fingerprints on the window for other reasons. He could have been and in fact had been White's handyman and lawn worker; the fingerprints could have been

placed on the window when he worked on White's lawn.[1] The police did not know when the screen was ripped. The untidiness near the window could have had several other causes; other parts of the house were also untidy. (W4809-17) The open front door suggested that the point of entry might have been the door rather than the window.

Finally, inside the house on a lamp near White's body, the police found other prints which were not White's or Johnson's. Prints found near a dead body are more probative of guilt than prints found outside. Although Johnson's prints on the window gave rise to a suspicion of guilt, they did not justify a finding of probable cause to arrest, because the prints on the window outside could have occurred at any time, and the different prints on the lamp inside suggested that someone else committed the crime. Accordingly, to justify a probable cause finding, the police needed more evidence to (1) incriminate Johnson, (2) establish the time the prints were placed on the window, and/or (3) exclude or explain the prints on the lamp.

This case is similar to Jefferson v. State, 783 S.W.2d 816 (Tex. App. 1990). In Jefferson, the police found a dead body in an apartment, two palmprints on an outside patio window, another palmprint near the inside patio door knob, and a fingerprint on a metal cookie tin inside. The police received a tip that a "Glenn" who lived at a specified apartment building had committed the crime.

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[1] The police did not even see the fingerprints until they were about to leave White's house (W4855-56), which suggested that the prints were located on an out-of-the-way spot and could have remained there a long time.

After the police obtained the name of a Glenn who lived at the apartment building in question, they found that his prints on file matched the prints listed above that were found at the scene.

Although the fingerprints coupled with the tip constituted stronger evidence than the evidence in the present case, the Jefferson court found that this stronger evidence did not establish probable cause. In Texas as in Florida,

> the officer must demonstrate that he had enough information to warrant a man of reasonable caution in believing that a felony had been committed. Mere suspicion that the person arrested committed a crime is not sufficient to justify [an] . . . arrest. We cannot agree with the trial court that there was probable cause to arrest. . . . Even the assistant criminal district attorney had stated to the court ". . . I don't think [the officer] had probable cause because there may have been a logical explanation for his prints to have been there."

Id. at 819 n.1 (emphasis added). An identical conclusion was applicable below.

Numerous Florida cases have held that a fingerprint on a public place, such as an outside window, with no showing of the time the imprinting occurred is insufficient evidence of guilt. For example, the defendant's fingerprints on broken glass outside a broken glass door of a department store did not establish that the defendant was the burglar. Wilkerson v. State, 232 So. 2d 217 (Fla. 2d DCA 1970). Similarly, a fingerprint on a glass jalousie taken from a store's front door did not establish guilt. Ivey v. State, 176 So. 2d 611 (Fla. 3d DCA 1965). In Mobley v. State, 363 So. 2d 170, 172 (Fla. 4th DCA 1978), the defendant's fingerprints on the window of a burglarized car was "legally insufficient evidence to prove even a prima facie case that the defendant was the

burglar." See also A.V.P. v. State, 307 So. 2d 468 (Fla. 1st DCA 1975) (several fingerprints -- one of which was defendant's -- on gasoline-filled soft drink bottle near an arson).

In Knight v. State, 294 So. 2d 387 (Fla. 4th DCA 1974), the defendant's fingerprints were at the base of a service bay door in a burglarized service station. Knight found that this evidence created "only a mere possibility of guilt, or only a wonderment that the accused was implicated." Id. at 388 (emphasis added). A "mere possibility" or "wonderment" is not probable cause. See Thompson v. State, 551 So. 2d 1248, 1249-50 (Fla. 1st DCA 1989) ("testimony that appellant could 'possibly' have had a pocket knife in his shoe did not save search"). A fingerprint by itself is only a "wonderment" and does not establish a prima facie case, Mobley, or probable cause that the defendant committed the crime.

Because the police lacked probable cause, the arrest was illegal. Because no unequivocal break occurred in the chain of illegality, the trial judge should have suppressed the ensuing confessions as the fruit of the poisonous tree. Atkins v. State, 452 So. 2d 529 (Fla. 1984); State v. Rogers, 427 So. 2d 286 (Fla. 1st DCA 1983); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975).

E. Officer Castro and the fellow officer rule

Officer Castro did not have probable cause to arrest Johnson and admitted as much. Moreover, the police had not yet issued a BOLO over the radio, and although they had fortuitously obtained a warrant a few minutes before the arrest, Castro did not know about it. Castro knew only that warrants were being prepared and that

everyone had been told to wait until the warrants were signed. The warrant (assuming arguendo that it was valid) could not justify the arrest when Castro had no knowledge of it. See Carroll v. State, 497 So. 2d 253, 260 n.9 (Fla. 3d DCA 1985). Consequently, assuming arguendo that probable cause to arrest Johnson existed, the arrest must be justified, if at all, on the basis of the fellow officer rule.

According to the fellow officer rule, arresting officers need not themselves have probable cause to arrest when other officers who do have probable cause specifically direct them to arrest the defendant. Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560 (1971). Some nexus of information about the case, however, must exist between the arresting officer and the officer with probable cause.

> [A] BOLO alert does not in and of itself constitute probable cause for an arrest, absent some supporting factual data in the possession of the arresting officer prior to making the arrest which would support a finding of probable cause. Clearly the information in the BOLO did not contain sufficient and actual data as the basis for probable cause for making an arrest or search. The arresting officer must be possessed of information prior to the arrest which would constitute the required probable cause to justify the arrest being made.

D'Agostino v. State, 310 So. 2d 12, 15 (Fla. 1975) (emphasis added).

Moreover, a communicated directive must exist between the arresting officer and the officers with probable cause. Although no specific "magic words" are necessary, "there must be some chain of communication between the arresting officer and the officer who has probable cause to arrest." Carroll, 497 So. 2d at 260. See also

People v. Mitchell, 585 N.Y.S.2d 759, 761 (App. Div. 1992) (arresting officers "cannot be considered to have relied on information possessed by each other without there having been any communication of either the information itself or a direction to arrest"); Haywood v. United States, 584 A.2d 552, 556 (D.C. App. 1990) ("[w]hile the collective knowledge of the police can give rise to a valid arrest, this is so only if the arresting officer acts in response to a broadcast or other directive which is based on the collective information"); People v. Ford, 198 Cal. Rptr. 80, 86 (Cal. App. 1984) ("where an officer makes an arrest without a directive or request from another officer or agency, he may not justify the arrest on the existence of probable cause in the hands of the other officer or agency"); United States v. Webster, 750 F.2d 307, 323 (* Cir. 1984) (arresting officer "simply carries out directions to arrest given by another officer who does have probable cause").

In this case, officers Castro and Redden disagreed on whether Redden told Castro to arrest the defendant. (W33, 117) Either Castro or Redden was lying, and Judge Owens resolved this conflict in detective Redden's favor, finding that she "did not specifically request Officer Castro to arrest the defendant." (W6508)

In any event, the conflict in the evidence was irrelevant. If, as Castro himself admitted, he knew that the supervising officers had chosen to seek a warrant first rather than issue a BOLO immediately, then he also should have known that some uncertainty in probable cause or other valid reason existed which required him to wait for the warrant and the BOLO, irrespective of what Redden told him. His superiors had implicitly concluded that

more certainty was needed to authorize Johnson's arrest and had chosen to seek a judge's formal order rather than rely on their own view of the evidence. Moreover, his superiors had expressly directed, as Castro well knew, that line officers like Castro should not be told to arrest Johnson. He should have known that detective Redden had no authority to counteract their superiors' orders. Consequently, for purposes of the fellow officer rule, the requisite nexus of information and communication did not exist, because Castro knew or should have known that he was unauthorized to arrest Johnson at that time. Since he did not himself have probable cause, he illegally arrested Johnson and the fruits of the arrest should have been suppressed.

If this Court concludes that the conflict between Redden's and Castro's testimony was significant, it should rely on Redden's testimony because it was more credible, and Judge Owens specifically ruled in her favor. Every officer agreed that line officers like Castro were not supposed to be told at that time about the investigation. Detective Sutton was surprised to learn about the arrest. Castro himself admitted that Redden told him to keep the matter quiet and not tell anyone else because they were waiting for arrest warrants and would later issue a BOLO. Castro's testimony that Redden told him to arrest Johnson thus made no sense because Redden would not have told him to arrest Johnson without a warrant if she simultaneously told him not to tell other officers because the police were waiting for warrants. Castro's testimony sounded like he was justifying his actions after the fact rather than telling the truth.

If this Court decides that a factual conflict in Castro's and Redden's testimony still exists and that this conflict is significant, then it must remand for a new suppression hearing so that the trial judge may make another factual finding on which officer was lying. A new trial would then also be necessary. See Greene v. State, 351 So. 2d 941 (Fla. 1977) (both a new suppression hearing and a new trial were necessary when trial judge did not make factual finding that confession was voluntary, because the temptation for the trial judge on remand to avoid the need for a new trial by finding the confession voluntary would be too great).

ISSUE II

THE CONFESSIONS SHOULD BE SUPPRESSED.

A. Non-compliance with sections 901.16 and 901.17 and obtaining a confession through custodial interrogation without probable cause

When Johnson asked Castro why he was being arrested, Castro would not tell him and said the detectives at the police station would tell him. (W36) At the station, the officers told him that he was arrested on a warrant for homicide but purposely did not tell him which homicide, hoping to trick him into confessing about all of the cases rather than solely about White. Later, when they said that his fingerprints were found at the crime scene, they again did not specify which crime scene was the site of the prints.

Castro's refusal to state the cause of arrest violated section 901.16, Florida Statutes (1987) (arrest without warrant), or section 901.17, Florida Statutes (1987) (arrest with warrant), which required the arresting officer to tell the defendant the "cause of arrest" and whether "a warrant has been issued." The later trick-

ery about which homicide was involved also violated these statutes. In enacting these statutes, the legislature wanted defendants to know the seriousness and nature of the charges against them, so that they would know exactly what they were facing and could adjust their actions accordingly. The intent of these statutes was ill-served when the officers below deliberately and falsely misled the defendant into thinking he was charged with or arrested for something he was not.

The officers' deception and deceit below were precisely what sections 901.16 and 901.17 were enacted to prevent. The officers exploited their noncompliance with the statutes by suggesting to Johnson that they had evidence in the other cases which they in fact did not have. The noncompliance with the statutes thus directly played a role in obtaining the confessions and cannot be deemed a mere technical violation.

Moreover, the officers did not have probable cause to arrest Johnson for the other crimes and yet were able to use trickery and the coercive effect of custodial interrogation to obtain confessions to these crimes. This was inconsistent with the general principle that a confession to a crime is inadmissible if it is obtained through the exploitation of a custodial arrest for that crime without probable cause, even if Miranda warnings were given. Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975).

Although Conti v. State, 540 So. 2d 934 (Fla. 1st DCA 1989), applied a loose "substantial compliance" test for violations of sections 901.16 and 901.17, this Court should decline to follow

Conti. Contrary to Conti, statutes involving search and seizure (arrest) should be strictly construed. Bonilla v. State, 579 So. 2d 802, 805 (Fla. 5th DCA 1991). The trickery in these cases did not strictly comply with the mandate of section 901.16 to tell the defendant the "cause of arrest." Accordingly, the deliberate noncompliance with sections 901.16 and 901.17 and the exploitation of the arrest in order to interrogate Johnson about other crimes for which probable cause was lacking was error, and the confessions should have been suppressed.

B. Noncompliance with section 907.04

Johnson did not have a right to bail, not only because Judge Silvertooth wrote, "No bail," on the warrant, but also because persons charged with capital offenses have no right to bail. Art. I, § 14, Fla. Const; Fla. R. Crim. P. 3.131(a); Taylor v. State, 388 So. 2d 577 (Fla. 5th DCA 1980). Because Johnson had no right to bail, section 907.04, Florida Statutes (1987), applied to the arrest procedures in this case. According to section 907.04 (emphasis added),

> If a person who is arrested does not have a right to bail for the offense charged, he shall be delivered immediately into the custody of the sheriff of the county in which the indictment, information, or affidavit is filed. If the person who is arrested has a right to bail, he shall be released after giving bond on the amount specified in the warrant.

At the suppression hearing, officer Sutton of the Sarasota city police, who (1) prepared the affidavit in support of the arrest warrant, (2) obtained the arrest warrant from Judge Silvertooth after the judge wrote on it, "No bail," (3) interrogated Johnson at the city police station, and (4) obtained Johnson's

confession, admitted that he had never heard of this statute. He also admitted that the sheriff's department was located across the street from the city police station. He did not bring Johnson "immediately" across the street to the sheriff's department, until seven hours had elapsed and the confession had occurred. (W548-51)

According to Black's Law Dictionary, 6th ed., at 750 (1990), "immediately" means

> without interval of time, without delay, straightway, or without any delay or lapse of time. . . . The words "immediately" and "forthwith" have generally the same meaning. They are stronger than the expression "within a reasonable time" and imply prompt, vigorous action without any delay.

The police officers in this case clearly did not "promptly" and "vigorously" deliver Johnson "without any delay or lapse of time" to the jail. No interpretative gymnastics are needed to understand that a seven-hour delay is not immediately. The statutory requirement that the police deliver the prisoner immediately to the jail is "clear and unambiguous. . . . Under these circumstances, this Court has no authority to change the plain meaning of a statute where the legislature has unambiguously expressed its intent." Barnes v. State, 595 So. 2d 22, 24 (Fla. 1992).

In Fowler v. State, 255 So. 2d 513 (Fla. 1971), this Court considered a competency rule that the court "shall immediately" set a competency hearing when necessary. In construing this rule, this Court attached

> prime significance to the words "shall" and "immediately." The mandatory verb "shall" makes it obligatory on the court to fix a time for a hearing. . . . Moreover, the mandatory "shall" is followed by the word "immediately" which lends urgency and significance to the duty of the judge to conduct the required hearing.

Id. at 514-15. As in Fowler, the words "shall" and "immediately" in section 907.04 likewise lent "urgency" and "significance" to the necessity to transport the defendant in this case to the sheriff's custody immediately.

"Immediately" means immediately and does not and cannot mean several hours later. Consequently, the city police violated section 907.04 by interrogating Johnson for several hours before bringing him to the jail. The judge should have suppressed the resulting confession.

C. The ambiguous desire to get a shot

After the taped statement at the police station ended at 4:35 a.m., Johnson, Sutton, and Sullivan immediately walked across the street less than a block to the jail for booking and arrived within a few minutes. As they walked to the jail, Johnson asked if he could get a shot. Sullivan thought he might be talking about a shot of liquor and asked him what he was talking about. He said he wanted a shot to end his life rather than face the electric chair. (W500-01, 546, 612, 766-67) The judge should have suppressed this exchange for three reasons.

First, under the totality of the circumstances, this statement was simply part of the previous interrogation and flowed from it. Johnson obviously would never have said he feared the electric chair if he had not just confessed to two murders and two other crimes. Consequently, all of the reasons for suppressing the taped statement discussed in case number 78,336 apply equally to this later exchange, occurring on the road to the jail only a few minutes later.

Although Johnson made the initial remark, he should not be deemed for that reason to have initiated this conversation, which occurred only moments after the taped statement ended. This Court in Phillips v. State, 612 So. 2d 557, 559 n.3 (Fla. 1992), agreed with the district court that

> [a]s to the State's assertion that the second interview on May 13 was not police-initiated, the district court found:
>
> > We reject the assertion that appellant initiated the final statement. There is no clear indication that he voluntarily initiated the statement and, even if he had done so, the first statement he made on the evening of May 13, which led to his final statement was undisputedly initiated by the officers.
>
> The record supports the district court's ruling on this point. Officer Mann testified that he initiated the first interview and that the second took place "[j]ust within probably a few minutes" of the first.

A sustained interrogation is a give-and-take, and suspects can pose questions or address various subjects without "initiating" an interrogation. See Owen v. State, 560 So. 2d 207, 211 (Fla. 1990) ("He was soon responding with inculpatory answers and asking questions of his own"); Christopher v. State of Florida, 824 F.2d 836, 845 (11th Cir. 1987) ("'Initiation' means to 'begin' or 'set-going'; in the interrogation context, it means that the suspect 'started,' not simply 'continued,' the interrogation"). In this case, just as in Phillips, the police initiated the first interrogation; the second brief exchange occurred only a few minutes after the first and effectively functioned as part of it.

Second, if this Court views this exchange as separable from the first interrogation, detective Sullivan was required to give renewed Miranda warnings and did not. Miranda warnings are

necessary when custodial interrogation occurs. Johnson was plainly in custody. Further, when Johnson asked for a shot, Sullivan should have known that, under the circumstances, this ambiguous comment might relate or lead to incriminating information. A suspect's reference to shots, killing, or death, necessarily gives rise to police suspicions. Consequently, Sullivan's question about the meaning of Johnson's comment was custodial interrogation for Miranda purposes and required a fresh set of Miranda warnings.

> [T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily on the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (emphasis added).

Viewing Sullivan's question from Johnson's perspective as Innis requires, it was reasonably likely to and did elicit an arguably incriminating response. Moreover, Sullivan's supposedly innocent motive was irrelevant because "the deputy's perceptions and intentions are not determinative of the issue." Lornitis v. State, 394 So. 2d 455, 458 (Fla. 1st DCA 1981). Sullivan, "regardless of his underlying intent, should have known that his remarks to appellant were reasonably likely to elicit an incriminating response." Tierney v. State, 404 So. 2d 206, 208 (Fla. 2d DCA 1981). See also Jones v. State, 497 So. 2d 1268, 1271 (Fla. 3d

DCA 1986) ("Innis focused on the perception of the accused rather than the subjective intent of the officer").

Because Sullivan's question constituted custodial interrogation (and assuming arguendo that this exchange was separable from the original interrogation), new Miranda warnings were required. The circumstances were almost identical to those in Kight v. State, 512 So. 2d 922 (Fla. 1987). When Kight told the detective that he was "not afraid of the chair," the detective's response, "What chair?" constituted interrogation "which was reasonably likely to and, in fact, did elicit an incriminating response" under Innis. 512 So. 2d at 926. The statement and response in Kight were substantially similar to those in the present case. Consequently, Johnson, like Kight, "was entitled to a fresh set of warnings." Id. Because he did not get these warnings, this exchange was inadmissible at trial. See also Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) ("where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present"); Christopher, 824 F.2d at 844 ("where the 'initiated' conversation is not 'wholly one-sided,' but instead involves interrogation by the police, the suspect's statements are admissible only if the suspect both initiated the dialogue and waived his previously asserted right to silence").

Third, the statements and questions on the way to the jail were the fruit of the poisonous tree and tainted because the cat was already out of the bag (again assuming arguendo that this exchange was separable from the original interrogation). No clear

break in the "chain of illegality" occurred. State v. Eubanks, 588 So. 2d 322, 323 (Fla. 4th DCA 1991).

The doctrine of Oregon v. Elstad, 470 U.S. 298 (1985), was inapplicable. Although "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings," id. at 318 (emphasis added), the requisite renewed Miranda warnings were not given in this case.[2] Moreover, the questioning was highly coercive, and the police ignored Johnson's requests to cut off the questioning.

As then-Judge Grimes pointed out in Anderson v. State, 487 So. 2d 85 (Fla. 2d DCA 1986), Elstad itself said that its holding did not apply when, as in this case, the suspects' "invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation." Id. at 86, quoting Elstad, 470 U.S. at 312 n.3. Elstad likewise made clear that statements resulting after coercive police tactics (like those in the present case) would continue to be judged under the traditional doctrines of taint and the fruit of the poisonous tree. 470 U.S. at 310-12 & 312 n.3. Elstad applies only to technical Miranda violations, not to the substantive violations occurring in the present case.

It is important to note . . . that Elstad involved only

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[2] For this reason, as well as the facts that (1) the police did not wait to reinterrogate Johnson and (2) the right to counsel had attached, Michigan v. Mosley, 423 U.S. 96 (1975), which allows the police in the fifth amendment context to wait a sufficient period of time before reinterrogating a suspect after a request to remain silent, is likewise inapplicable.

> a technical violation of Miranda and the court was careful to so limit the decision by stating that "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that the suspect has made an unwarned admission does not warrant a presumption of compulsion." (emphasis added) Elstad, 105 S. Ct. at 1296. We can only conclude from a reading of Elstad that when the police use deliberately coercive and improper tactics a presumption of compulsion is warranted. In that case, any subsequent statements must be suppressed unless the taint of the improper activity is sufficiently attenuated.

State v. Madruga-Jimenez, 485 So. 2d 462, 465 (Fla. 3d DCA 1986).

Because the taint of the improper activity which had ended only moments earlier was patently not attenuated at the time the police walked Johnson to the jail, because new Miranda warnings were not given, and because this episode was in any event simply a continuous part of the whole interrogation, the judge should have suppressed this exchange between suspect and police on the road to the jail.

D. The statement and knife obtained after the police snatched Johnson from the jail.

1. Factual background

Johnson was booked at the jail on two counts of murder at 4:48 a.m. (W547, 949-51) Sullivan told the guards to watch him closely, because, after his comment about the shot, Sullivan thought he might commit suicide. (W767) By 5:16 a.m., he was lying down and he was sleeping at 6:20 a.m. (W685)

Usually, inmates were seen by a Public Defender's Office representative about sixty to ninety minutes before first appearances, scheduled that day for 8:30 a.m. (W690-91, 955, 968-69) A public defender investigator arrived at 6:30 a.m. and by 6:45 a.m. began talking in groups of five or six to the people arrested

during the previous twenty-four hours. If he had seen Johnson, the investigator would have told him not to talk to the police unless his attorney was present. The investigator learned later during the first appearance hearing before the judge that Johnson was absent because he was talking to the police. Afterward, the investigator informed his supervisors, and a standard "gag" letter was sent to the police that day. It directed the police not to talk to Johnson unless a public defender was present. (W978-79, 982-90)

The classifications officer had already prepared several jail documents for Johnson to sign after first appearances. The officer, however, crossed out the dates on the forms and changed them to the next day, because Johnson did not go to first appearances and was not in his holding cell after first appearances when the officer looked for him. (W846, 865-67, 956) Eight of the eighteen defendants who did attend first appearances that morning were arrested after 9:48 p.m. (when Johnson was arrested the previous night), including Amos Taylor at 5:12 a.m. and Charles Moody at 2:54 a.m. (W961-62)

Johnson did not attend first appearances because by 7:15 a.m. Sullivan had taken Johnson from the jail to execute a search warrant for body and hair samples. The police also wanted to clear up a few points that were unclear from the first interview. Sullivan knew that the Public Defender's Office sent "gag" letters after first appearances in homicide cases. As they walked across the street, Sullivan asked Johnson if he was tired. He said he was not tired; he was a night person. Sullivan advised him of the Miranda warnings, and told him that, as soon as the search was

done, he had ten or fifteen minutes of questions to ask him. He agreed to speak to them. (W687, 768-69, 978, 1249)

Body samples were taken, beginning at 7:20 a.m. (W929, 1208) At 8:15 a.m. when this process was over, Sullivan asked about the broken knife by McCahon's body outside. The knife suggested that a second attack had occurred outside, but Johnson had said only that he stabbed her inside the house and later saw her walk outside and collapse. Sullivan wanted to clear up this discrepancy. Johnson said that, when he saw McCahon outside, he grabbed one of his knives, ran outside, and "stabbed her a lot." The knife broke, and he threw the handle into the same lot that he had thrown the first knife that he had used. (W770-72)

At 8:30 or 8:45 a.m., Johnson returned to the jail. (W501, 844) The arrest warrant in White was executed at 8:43 a.m. at the jail. (W63-65, 1251) By 9 a.m., he was sleeping again and attended first appearances the next day. (W844, 965)

2. The statement

The admission of this statement as evidence at trial was error for five reasons. First, Johnson argued in case number 78,336 that Article I, section 9, of the Florida Constitution affords defendants the due process right to know that an "identified attorney [is] actually available to provide at least initial assistance and advice" within three hours. Haliburton v. State, 514 So. 2d 1088 (Fla. 1987), quoting State v. Haynes, 602 P.2d 272, 278 (Ore. 1979). Johnson will not repeat this argument here except to emphasize the obvious -- it applies with even more force when, as in this case, the public defender's representative was in the jail at

6:30 a.m. and, by 6:45 a.m., was interviewing clients in groups, thirty minutes **before** the police snatched Johnson from the jail at 7:15 a.m. Evidently, the police arrived for Johnson just in time, before his group was next in line to talk to the investigator. The investigator represented an "identified attorney actually available," and Johnson had a right to know about him before waiving his rights to remain silent and consult a lawyer.

Second, after the taped confession, the booking officer booked Johnson for McCahon and White at the jail at 4:48 a.m. and prepared the requisite formal documents. For the reasons expressed in case number 78,336, his rights to counsel under the sixth amendment, Florida Rule of Criminal Procedure 3.111, and Article I, section 16, of the Florida Constitution attached in McCahon at that time. Consequently, for the reasons expressed in case number 78,336, the Miranda waiver was insufficient under section 16, Rule 3.111, and the sixth amendment, because knowledge of the investigator's presence was meaningful information which the Miranda waiver did not address and which could have affected Johnson's decision to talk to the police.

A suspect "must be informed when his counsel actually seeks to advise him and must knowingly and intelligently reject such opportunity before subsequent statements may be taken and used against him." Haliburton v. State, 476 So. 2d 192, 194 (Fla. 1985), quoting State v. Burbine, 451 A.2d 22, 35 (R.I. 1982) (Bevilacqua, C.J., dissenting). "[W]e have permitted a Miranda waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver

would not be valid." Patterson v. Illinois, 487 U.S. 285, 296 n.9 (1988). Johnson's lawyer or representative was "actually" available in the same building to advise him at that time, and Johnson's waiver of his sixth amendment, section 16, and Rule 3.111 rights to counsel was not knowing and intelligent without knowledge of this fact.

Third, this second statement about the knife resulted directly from the previous illegal interrogation only a few hours earlier that morning, as discussed in case number 78,336, and therefore was the fruit of the poisonous tree and tainted because the cat was already out of the bag. Johnson never would have answered the questions about the knife if the police had not previously violated his constitutional rights and obtained his confession. The mere administering of the Miranda warnings was insufficient to remove the taint. Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975). For the reasons expressed previously in this brief, the principles of Oregon v. Elstad, 470 U.S. 298 (1985), do not change this result.

Fourth, because this second statement occurred after Johnson's section 16, Rule 3.111, and sixth amendment rights to counsel had attached, the fifth amendment principles of Michigan v. Mosley, 423 U.S. 96 (1975), were inapplicable. Even if this was a fifth amendment case and no prior coercion had occurred, however, the procedure below violated Mosley.

Mosley allows the police to initiate a second interrogation at

some point after suspects invoke their right to remain silent.[3] In Mosley, after immediately ceasing interrogation concerning two robberies which the suspect declined to discuss, the police waited more than two hours and then initiated questioning about a different crime. By contrast (as discussed in case number 78,336), the police below ignored and did not scrupulously honor Johnson's repeated statements of fatigue and requests to remain silent. Moreover, rather than give him time to sleep as he had requested, they interrogated him again less than three hours after the previous interrogation had ended. A scrupulous respect for the request to sleep would have mandated at least an eight hour delay before reinterrogation. Finally, they interrogated him about the same crime. Consequently, Mosley is inapplicable to this case.

Fifth, the police exploited the delayed first appearance to induce the second statement. Clearly, the police and the jail officials did not follow Florida Rule of Criminal Procedure 3.130, which requires an appearance before a judicial officer within twenty-four hours. When this rule is violated, the issue is not merely whether the resulting statement was voluntary. This Court always suppresses involuntary statements. As the Michigan Supreme Court has said,

> [T]his Court now treats the question of pre-arraignment delay apart from the issue of voluntariness. If voluntariness were the only relevant inquiry, there would be no reason to analyze whether a pre-arraignment delay occurred and was used as a tool, since involuntary state-

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[3] The police, however, cannot initiate questioning when suspects invoke their fifth or sixth amendment rights to counsel. Edwards v. Arizona, 451 U.S. 477 (1981); Michigan v. Jackson, 475 U.S. 625 (1986).

> ments have always been held inadmissible regardless of when they are obtained. Prompt arraignment serves several important functions apart from preventing improper custodial interrogations.

People v. Bladel, 365 N.W.2d 56, 72 n.27 (Mich. 1984).

Under Florida law, a delayed first appearance means not only that the resulting confession must be voluntary but also that the delay must not have induced the confession. "[E]ach case must be examined upon its own facts to determine whether a violation of the rule has induced an otherwise voluntary confession." Keen v. State, 504 So. 2d 396, 400 (Fla. 1987).

For several reasons, the delay in this case did induce the second statement about the knife. In the first place, the police had no particular necessity at that exact moment to take the body samples talk to Johnson and could easily have waited until the afternoon when he had had some sleep. Despite their denials, the strong suspicion is that they chose this moment to talk to Johnson because they were familiar with first appearances and the presence of a public defender at these hearings, knew that the public defender would advise Johnson not to talk to them, and knew about the "gag" letter they would get.

Furthermore, in the present case as in Anderson v. State, 420 So. 2d 574 (Fla. 1982), the sixth amendment and section 16 rights had attached and the judicial process had started. Jail officials had already put Johnson's name on several first appearance documents. The police, however, interrupted this normal process in order to obtain Johnson's further confession. This case is not like Keen, in which the delay was more understandable because the

police arrested the defendant in one county and had to transport him to another county. No deliberate and unnecessary interruption of judicial process occurred in Keen.

Finally and most importantly, Anderson found it "significant that the elicited statements came far after the time [the defendant] normally would have appeared before a judicial officer with the attendant advice of rights and appointment of counsel." 420 So. 2d at 576. In this case, the converse was equally significant. The police elicited the statement at the same time that Johnson was supposed to be talking to his lawyer's representative as part of the first appearance procedure. Consequently, the delay in first appearance induced the confession because the exact statement actually taken would not have been made had the police allowed the first appearance procedure to take its normal course. Perhaps, Johnson might have made a similar statement in different words at some other time, but this is only speculation. He would not have made this statement. The police induced the statement by taking Johnson from the jail and causing a delay in first appearance. This Court cannot speculate that he would have made the same statement at some other time.

This case is markedly similar to State v. Mitter, 289 S.E.2d 457 (W. Va. 1982). Just as in the present case, the police obtained a second statement to "clear up a few discrepancies."

> [T]he "discrepancies" involved were not minor inconsistencies. Indeed, the discrepancies between the defendant's version of the murder contained in his first statement and the facts shown by the physical evidence in the case, as well as other evidence, were such as to render the first confession of limited value. By seeking a second confession to "clear up a few discrepancies" the

> police were actually holding the defendant for the explicit purpose of rendering a usable confession from him. A magistrate was available at that time and had been alerted that his services would be required. Under these facts the delay in taking the defendant before a magistrate after the first confession was so **unjustifiable and unreasonable** as to render the second written statement inadmissible.

Id. at 462 (emphasis added). "The delay in taking the defendant to a magistrate may be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant." Id. at 461, quoting State v. Persinger, 286 S.E.2d 261 (W. Va. 1982). Mitter is exactly applicable to the case at hand.

For these reasons, this Court should suppress the statement which the police obtained after interrupting the first appearance procedure.

3. The knife

About 9:30 a.m., based on Johnson's statements in the second questioning about the broken knife, the police went to a lot near his apartment. (W1211, 1231, 1251-52) They did not find a knife immediately, but, after a road gang cleared out the weeds, they found a broken knife handle later determined at trial to match the broken knife blade next to McCahon's body. (W1212) This knife was at least the fruit of the poisonous tree because the police found it as the direct result of the two unlawful questioning sessions at the police station. Absent one, the other, or both of these unconstitutional interrogations, Johnson would not have told the police about the knife, and the police would not have found it.

Indeed, to use a better metaphor, the knife was not the fruit of the tree -- it was the tree. Finding the knife was a prime

purpose of the renewed interrogation. Suppressing the statement but admitting the knife -- when the knife was the direct focus of the police questioning -- would be absurd under these circumstances and would directly reward the illegal police action. Consequently, this case was like State v. LeCroy, 461 So. 2d 88 (Fla. 1984), in which the police illegally ignored a defendant's request for counsel and obtained the defendant's directions on how to find a gun. This Court assumed that this gun should be suppressed as the fruit of the poisonous tree, unless it was admissible under the independent source or inevitable discovery doctrines.

Furthermore, as Appellant has already argued in this brief and in case number 78,336, the police did not obtain the knife through a mere technical Miranda violation to which Oregon v. Elstad, 470 U.S. 298 (1985), might arguably apply. See also Michigan v. Tucker, 417 U.S. 433 (1974) (in case arising before Miranda but tried after Miranda, erroneous partial Miranda warnings did not require exclusion of witness named in confession, if confession was otherwise clearly voluntary). As Appellant has argued at length in this brief and in case number 78,336, the tree was extremely poisonous and rotten to the core. Consequently, the exclusionary principles of Wong Sun v. United States, 371 U.S. 471 (1963), were fully applicable.

For these reasons, this Court should suppress (1) the second statement at the police station after the police snatched the defendant from the jail before first appearances, and (2) the knife which was the focus and purpose of the interrogation.

ISSUE III

A CLERK IMPROPERLY SWORE, QUALIFIED, AND EXCUSED JURORS IN THE ABSENCE OF THE JUDGE.

Shortly after voir dire in Cornell began, a deputy clerk testified that she had previously sworn the prospective jurors in the holding room. She had also asked the group of jurors seven questions and excused eighteen prospective jurors who did not answer the questions correctly. She used a list of acceptable excuses, such as work, family coming in, etc. (M2097-99) The defense objected that swearing, qualifying, and excusing prospective jurors were judicial duties which a clerk was unauthorized to perform. (M2093-94, 2100) Judge Owens overruled this objection and did not himself swear the jury, notwithstanding a prosecutor's suggestion to do so. (M2094, 2100)

Before voir dire in Giddens, a clerk testified that she had sworn and qualified the prospective jurors in the holding room for several cases including Giddens. She had asked the jurors seven questions, including whether they (1) were older than 18, (2) were summoned by their proper name, (3) were residents and (4) electors of Sarasota County, (5) were not certain specified government officials, and (6) did not have criminal convictions or (7) pending charges. She had excused one juror who was pregnant. (M2959-63) Judge Owens overruled a defense objection that the clerk was unauthorized to swear and qualify the jurors. (M2963-65)

Before voir dire in White, a clerk said that a clerk rather than a judge had administered the oath to the prospective jurors and qualified them. Judge Owens stated for the appellate record that the same procedure employed in Cornell and Giddens was also

employed in White. The judge overruled the defense objection to this procedure. (W3405-07)

Before voir dire in McCahon, a clerk said that a clerk rather than a judge had administered the oath to the jurors and qualified them by asking eight questions. No judge was present during this qualification procedure. (M3412-13) Judge Owens overruled the defense objection. (M3404-05, 3575)

At that time, the alternate jurors for White still had to be picked, and the defense asked if the prospective alternate jurors in White had been in the same room as the new prospective jurors for McCahon. The defense was concerned that the jurors for each case might have been told about the other case. The judge said that both sets of jurors had been in the same pool that morning, but the clerks did not talk to the jurors about individual cases. Defense counsel objected that, because no judge had been present, counsel had no idea what the clerk had done, and the clerk might very well have told the jurors about both cases. (M3417-18)

Later during the McCahon voir dire, the defense pointed out that one juror who was taking care of her children should have been excused under section 40.013, Florida Statutes (1987). The clerk also had not asked about those jurors who wished to be excused because of their age. The court was surprised that the clerks had not asked these questions. The defense objected that the clerks were not asking the proper statutory questions. (M3968-70)

Later during the McCahon voir dire, a prospective juror said he had pleaded guilty to petit theft and thought he had been adjudicated guilty. He had listed his arrest on the juror question-

naire, but the clerk that swore him never asked about it. The defense pointed out that any conviction for larceny was grounds for automatic excusal under section 40.013 and that the clerks were evidently not doing their job correctly during the initial qualification process. (M4110-15)

When the McCahon voir dire was concluded, the defense said that two of the jurors had served on a jury within the past two years, which was also a ground for exclusion under section 40.013. This fact bolstered the arguments previously made. (M4288-89)

This procedure was error and violated Johnson's rights under the state and federal constitutions to a fair trial by jury. This Court has squarely held that a judge must be present whenever questioning of prospective jurors occurs.

> [N]o questioning of prospective jurors in a criminal case may take place outside the presence of a trial judge. This requirement cannot be waived by anyone, including a defendant. The expediency of juror selection outside the presence of a judge must yield to judicial supervision of all questioning and the exercise of peremptory challenges.

State v. Singletary, 549 So. 2d 996, 999 (Fla. 1989).

Although the present case involved the general qualification of all jurors summoned to the courthouse for trials while Singletary involved the specific qualification of jurors picked from this larger group for the individual trial, Singletary's holding by its terms applied to all questioning of jurors, and nothing in its language or logic suggested any reason to distinguish these two situations. Singletary reasoned that the

> selection of a jury to try a case is the beginning of trial. Moreover, article I, section 16 of the Florida Constitution and the sixth amendment to the United States

> Constitution assure a criminal defendant of a trial by an impartial jury. A crucial function of a trial judge is to insure that a competent jury is selected. Although both parties participate in voir dire, it is ultimately the judge's responsibility to see that the constitutional mandate is followed. As previously stated by this Court, "[t]he selection of a jury to try a case is a work which devolves upon the court. His purpose is to secure such jurors as are qualified for jury service and who are without bias or prejudice for or against the parties in the case."
>
> There is a possibility of prejudice where the judge is absent from jury selection. Jury selection is an active process involving considerable discourse between counsel and veniremen. If a party exceeds the bounds of proper examination or misstates the law, a judge can immediately alleviate the prejudice by means of a curative instruction. A judge cannot fulfill this responsibility if he or she is absent. . . .
>
> Because of our decisions [on peremptory challenges against minority jurors], it is more important than ever for the trial judge to be present during all parts of voir dire to assure that selection of jurors is free from racial prejudice.

549 So. 2d at 998-99 (citations omitted) (emphasis added). These rationales -- (1) the need for a judge to insure the selection of competent jurors, (2) the possibility of prejudice which cannot be corrected by instruction if a judge is not present, and (3) the necessity to prevent discrimination against minority jurors -- are equally applicable to both the general and the specific juror qualification processes.

This Court in other contexts has assumed that a judge would oversee the general qualification of jurors. For example, in the course of rejecting a claim that the defendant did not expressly waive his presence during the general qualification process, this Court observed that

> [i]t is important to understand the distinction between the general qualification of the jury by the court and the qualification of a jury to try a specific case. In the former, the court determines whether prospective

> jurors meet the statutory qualification standard or whether they will not qualify because of physical disabilities, positions they hold, or other personal reasons. The general qualification process is often conducted by one judge, who will qualify a panel for use by two, three, or more judges in multiple trials.

Remeta v. State, 522 So. 2d 825, 828 (Fla. 1988) (emphasis added). Remeta plainly assumed that a judge would preside over the general qualification process. See also State ex rel. Maines v. Baker, 254 So. 2d 297 (Fla. 1971) (clerk propounded questions, and the court excused certain jurors for cause during general qualification).

The procedural rules adopted by this Court also contemplate that a judge will conduct all qualification proceedings. Before general qualification begins, the "prospective jurors shall be sworn collectively or individually, as the court may decide." Fla. R. Crim P. 3.300(a) (emphasis added). Judges may have some reason -- after seeing the conduct of the jurors as they assemble in the room -- to swear the jurors collectively or individually; judges cannot make this discretionary decision if they are not present.

According to Rule 3.300(b), "[t]he court may then examine each prospective juror individually or . . . collectively" (emphasis added). The parties also have the "right to examine jurors orally on their voir dire." Id. The rule, however, has no provision for clerks to examine jurors, especially in the absence of the judge. According to a familiar principle of legal interpretation, because clerks (unlike judges and the parties) are not expressly mentioned in Rule 3.300(b) as having this authority to examine jurors, they must be deemed not to have it. Expressio unius est exclusio alterius. Locke v. Hawke, 595 So. 2d 32, 36-37 (Fla. 1992).

Rule 3.300(c) then provides that, after examination, if "the court is of the opinion that the juror is not qualified to serve as a trial juror, the court shall excuse the juror from the trial of the cause. . ." (emphasis added). This rule does not say that clerks may excuse jurors if the clerks are "of the opinion" that these jurors are unqualified. As the attorney general has correctly stated, "[w]hether a person drawn as a juror comes within an exemption is for the determination of the court." 1989 Op. Att'y Gen Fla. 89-54 (September 6, 1989) (emphasis added). See also Russom v. State, 105 So. 2d 380, 382 (Fla. 3d DCA 1958) ("The determination of the qualifications and conduct of jurors is under the sole jurisdiction of the trial judge. . . .") (emphasis added).

The conclusion that clerks lack the authority to swear, qualify, and excuse prospective jurors is buttressed by the principle that the clerks' authority is statutory; their power to act must clearly appear from a particular statute. Overholser v. Overstreet, 383 So. 2d 953 (Fla. 3d DCA 1980); Ferlita v. State, 380 So. 2d 1118 (Fla. 2d DCA 1980). Clerks' duties are ministerial, and they have no discretion to perform judicial functions or determine the legal significance of a person's legal submissions. Collins v. Taylor, 579 So. 2d 332 (Fla. 1st DCA 1991); Corbin v. State, 324 So. 2d 203 (Fla. 1st DCA 1975); Pan American World Airways v. Gregory, 96 So 2d 669 (Fla. 3d DCA 1957). As the attorney general has persuasively argued during the course of rendering well-reasoned opinions that clerks lack the authority to perform particular functions,

the clerk of the circuit court, although a constitutional

> officer, possesses only such powers as have been expressly or by necessary implication granted by statute. The clerk of court's power to act must clearly appear from the particular statute and record to which it applies. Further, because of the statutory nature of the clerk's authority, his official actions, in order to be binding upon others, must be in conformity with such statutes.

1990 Op. Att'y Gen. Fla. 90-69 (August 20, 1990); accord 1986 Op. Att'y Gen. Fla. 86-38 (May 6, 1986).

The relevant statutes in this instance do not authorize clerks to qualify and excuse jurors after they have been summoned to the courthouse. The chief judges in each circuit annually direct the clerks to prepare jury lists of persons qualified to serve under section 40.01, Florida Statutes (1987). § 40.02(1), Fla. Stat. (1987). At the time of trial in this case, section 40.01 required only that jurors be registered electors and citizens older than 18.

Interestingly, section 40.02(1) does not authorize clerks to prepare lists of persons qualified under section 40.013, Florida Statutes (1987). Section 40.013 includes several of the qualification questions asked in this case, such as whether the prospective juror was one of several specified government officials, had been convicted of a crime, or had pending criminal charges. The failure of section 40.02(1) to refer to section 40.013 bolsters the conclusion that clerks have no authority to excuse those jurors who say they satisfy the 40.013 criteria.

"[U]nder supervision of a judge," the clerk then generates a venire from these jury lists, either manually or by mechanical or electric device, to be returnable at the time the judge specifies. § 40.221, Fla. Stat. (1987); § 40.225, Fla. Stat. (1987). The clerk summons to court the persons in the venire list. § 40.23,

Fla. Stat. (1987). Upon arrival, these prospective jurors are placed in a jury pool, from which the court draws persons to serve as jurors in the particular case. § 40.231, Fla. Stat. (1987).

These statutes do not authorize clerks to examine and excuse prospective jurors at the courthouse. Moreover, no other statutes give powers to clerks with respect to prospective jurors. Consequently, because the clerk's powers are limited to those that are expressly assigned, the clerk in this case had no authority to qualify and excuse jurors. Indeed, in an analogous situation and for similar reasons, the attorney general has cogently ruled that an elections supervisor has no authority to remove names of jurors who are exempt or disqualified from jury service pursuant to section 40.013. 1989 Op. Att'y Gen. 89-54 (September 6, 1989).

Not only do clerks lack authority to examine and excuse jurors, but they also lack authority to swear them outside the presence of a judge. The relevant statute provides that "[o]aths . . . required or authorized under the laws of this state (except oaths to jurors and witnesses in court and such other oaths . . . as are required by law to be taken or administered by or before particular officers) may be taken or administered by or before any judge, clerk, or deputy clerk . . . or any notary public within this state." § 92.50(1), Fla. Stat. (1987) (emphasis added). This statute does not authorize clerks to swear jurors. Furthermore, despite a diligent search, Appellant has not found any other relevant statute or rule on this subject. Consequently, because clerks have only those powers expressly assigned to them, they do not have the power to swear jurors outside the presence of a judge.

Section 92.50(1) does not clearly say who should swear jurors, but it implies that judges must do it because the law does not authorize anyone else to do it, and only judges have the inherent power by law to swear jurors and witnesses. This result does not mean that clerks may not swear jurors and witnesses in a judge's presence. Section 92.50(1) requires only that the oath be administered "by or before any judge." Consequently, as is commonly done, clerks may swear jurors and witnesses in a judge's presence.

Because the clerk in this case was not authorized in the absence of a judge to issue to the prospective jurors the preliminary oath that Rule 3.300(a) required, these jurors were effectively not sworn at all. "An attempted oath administered by one who is himself not qualified to administer it is abortive and in effect no oath." Crockett v. Cassels, 116 So. 865, 866 (Fla. 1928). Consequently, the jurors never in fact swore that they would "answer truthfully all questions asked of [them] as prospective jurors." Rule 3.300(a). Because the jurors did not swear to answer the voir dire questions truthfully, the entire voir dire was a nullity, and Johnson's constitutional rights to trial by jury were violated.

The attorney general might argue here that the clerk's seven (or eight) questions to the prospective jurors were non-discretionary, and that excusing jurors on the basis of these questions and ensuing answers was a ministerial duty which a clerk can perform. Designating a duty as "ministerial," however, does not authorize clerks to perform it. Judges have many ministerial duties (such as signing court orders and judgments) which clerks cannot perform.

Furthermore, most of the statutory juror disqualifications re-

quire the use of some discretionary judgment. For example, section 40.013(1) disqualifies those under prosecution for a crime and those who have been convicted of crimes such as felonies or larcenies, but a clerk might have difficulty determining whether a crime was a "larceny" or whether it would be a felony if committed in this state. Another discretionary matter would be the effect of a lack of adjudication and/or the restoration of civil rights, particularly if the juror was not certain what had happened; this exact question arose in McCahon. (M4110-15, 4757)

Similar difficulties could occur with the other statutory criteria in section 40.013. In subsection (2) of section 40.013, a question might arise over the exact definition of a police officer. Similarly, subsection (3) does not clearly define those who are disqualified for having an interest in the cause. Subsections (4) and (8) require a discretionary judgment that a pregnant woman or a person over 70 in fact wants to be excused. Subsection (5) is expressly limited to the presiding judge's discretion to excuse doctors and lawyers. Subsection (6) inherently requires a judge to exercise discretion in excusing persons for hardship. Finally, determining the effect of juror answers necessarily requires the clerk to exercise at least some discretionary judgment about the jurors' credibility and demeanor. For example, to avoid jury service, jurors might try to lie about their age. Consequently, a clerk deciding to excuse prospective jurors will inevitably make discretionary legal decisions which the law reserves for judges.

In any event, whether statutory juror disqualifications are ministerial or discretionary is largely beside the point. The

point of Singletary was that no judge was present to insure that this ministerial/discretionary duty was carried out properly and that prejudice did not occur. The clerk might not have understood what the statutory disqualifications were and might not have applied them properly. She might have excused people for other improper reasons. Indeed, the clerk in Cornell excused eighteen jurors, apparently based on a list of hardship reasons. Excusing jurors for hardship was inherently a discretionary judicial decision. Similarly, the clerk in Giddens excused a pregnant woman, even though pregnancy was not one of the seven questions that the clerk asked. The clerk might not have understood that pregnant women can serve on a jury if they so desire.

A judge who was present might have observed and disapproved of the manner in which some jurors swore their oath, and the presence of a judge certainly would have made the oath more meaningful to the jurors. In addition, the clerk or jurors might have made other comments which the judge was not present to correct or declare a mistrial if necessary. Defense counsel accurately objected that he did not know whether the general qualification of jurors in White had contaminated the jurors in McCahon, because no judge was present to insure that the two groups of jurors remained independent. Moreover, even if a juror's comments had not justified a curative instruction, a cause challenge, or a mistrial, a presiding judge might have decided that the parties should know about some of the comments. A clerk might not have realized the importance of the comments for jury selection purposes.

Finally, as Singletary pointed out, no judge was present to

protect the constitutional rights of minority jurors from discrimination by clerks or other court officials. In Cornell, for example, the only black juror in the initial venire was not one of the jurors drawn for voir dire in the courtroom, and, without permission from the judge, the clerk told him to go home afterward before voir dire was even over. (M2099, 2194-99) This sequence of events raised the possibility of racial prejudice which no judge was present to prevent or assess.

Plainly, the State cannot show beyond a reasonable doubt that these errors were harmless. Because neither the defense nor the judge was present, no legally competent entity can now say what happened when the clerk qualified the jury, and the State necessarily cannot sustain its burden of establishing harmlessness. The possibilities for prejudice were literally endless because virtually anything could have happened.

In any event, this procedure in effect infringed on the parties' rights to challenge prospective jurors and therefore was per se reversible error. Gilliam v. State, 514 So. 2d 1098 (Fla. 1987). The error was also per se reversible because a violation of a defendant's constitutional right to an impartial adjudicator can never be harmless.

> Among those basic fair trial rights that "can never be treated as harmless" is a defendant's "right to an impartial adjudicator, be it judge or jury." Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside. Thus harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a . . . judge, an officer exceeds his jurisdiction by selecting a jury.

Gomez v. United States, 490 U.S. 858, 876 (1989) (citations

omitted).

This Court should reverse and remand for a new trial.

ISSUE IV

THE COURT SHOULD HAVE DISMISSED THE INDICTMENT OR AT LEAST REQUIRED AN EVIDENTIARY HEARING WHEN THE DEFENSE DEMONSTRATED THAT THE GRAND JURY WAS IMPROPERLY QUALIFIED.

The defense moved to dismiss the indictments in White and McCahon because inter alia (1) a clerk had improperly qualified and sworn the grand jury outside the presence of a judge, (2) the clerk had asked improper qualification questions to the prospective grand jurors, and (3) the inability to make a proper record about grand jury proceedings was fundamentally unfair and violated the state and federal constitutions. The court denied these motions. (M4758-61, 4806, 8057-64, 8077, W8365-72, 8395-96) The motions were timely because the defense did not know about the grand jury at the time it acted, the judge agreed to consider the motions, and the State did not object on timeliness grounds. Francois v. State, 407 So. 2d 885 (Fla. 1981); Herman v. State, 396 So. 2d 222 (Fla. 4th DCA 1981).

A clerk testified that, since 1989, a clerk would swear the prospective grand jurors and ask them seven qualifying questions without a judge being present. The clerk's office had received these questions from the court administrator, who had previously used them to qualify grand jurors in 1988 when the indictment in this case was signed. The clerk who testified below had been present with the court administrator at times during 1988 and seen which questions he asked, although this clerk was not present for

the qualification of the grand jury in the present case. (M4743-48)

In this appeal, on federal and state due process grounds, Appellant renews argument (3) mentioned above but recognizes that this Court has partially rejected it. Thompson v. State, 565 So. 2d 1311 (Fla. 1990). Appellant also renews argument (1) for the reasons discussed in Issue III.

With respect to argument (2), the defense argued that the seven questions did not properly track the applicable statutory language. (M8058-64) §§ 40.01, 40.013, 905.01(1), Fla. Stat. (1987). For example, one question asked whether the juror was over eighteen years old. This question improperly excluded eligible jurors who were exactly eighteen. § 40.01. Another question asked whether the juror had ever been convicted of a crime without having civil rights restored. The proper question was whether the juror had ever been convicted of bribery, forgery, perjury, larceny, or a felony, because most misdemeanor convictions were not proper grounds for excusal. § 40.013(1). Another question asked whether the juror was a duly qualified elector in Sarasota County. The proper question was whether the juror was a registered elector. § 40.01. Finally, the questions did not ask whether the juror was an elected public official, as required by section 905.01(1).

A grand jury panel may be challenged on the ground that the jurors were not selected according to law. § 905.02, Fla. Stat. (1987). In this instance, the defense showed that the jurors were asked improper qualification questions and therefore were not selected according to law. Some jurors may have been unqualified to serve, and others may have been excused who were qualified to

serve. Because no records are kept of grand jury proceedings (as defense counsel eloquently pointed out in argument (3)), the State has no basis to dispute these claims.

Because the jury was improperly qualified, Johnson's constitutional rights were violated.

> A person charged with the commission of a capital offense is constitutionally entitled to be proceeded against by an indictment by a grand jury. One unauthorized or incompetent person acting with the grand jury vitiates the indictment. . . . "However unimportant the discrepancy may seem to be, we consider that the appellant had a right to demand a strict compliance with the law in the drawing and empaneling of a jury." . . . [I]t is essential to the existence of a legal grand jury that there be a substantial compliance with the mode of selection prescribed by statute.

Hicks v. State, 120 So. 330, 332-33 (Fla. 1929) (citations omitted).

The State will argue that the defense did not put on testimony about the actual grand jury selection in this case and therefore failed to substantiate its claims. The defense, however, did put on testimony from the clerk that these questions were used in 1988 by the court administrator who did qualify the grand jurors in this case in 1988. (M4743-44) Consequently, under the circumstances, the State cannot seriously dispute that these questions were used in this case. Moreover, although the defense must make more than conclusory allegations to challenge a grand jury selection procedure, Antone v. State, 382 So. 2d 1205 (Fla. 1980), the defense does not have to offer conclusive proof that the procedure was invalid. Instead, the defense must make sufficiently well-founded factual assertions that "raise a reasonable suspicion that the grand jury pool might in fact have been improperly constituted."

Dykman v. State, 294 So. 2d 633, 637 (Fla. 1973). Because the defense did make such factual assertions in this case which supported a "reasonable suspicion," the trial court should have permitted "a full-scale investigation of the panel." Id.

It is now too late to remand solely for an investigation of the grand jury panel pursuant to Dykman. See State v. Johans, 18 Fla. L. Weekly S124 (Fla. Feb. 18, 1993); Greene v. State, 351 So. 2d 941 (Fla. 1977). Accordingly, this Court should reverse and remand for a new trial.

ISSUE V

THE TRIAL COURT IMPROPERLY DELAYED TRIAL FOR WEEKS AFTER THE JURY WAS SELECTED, TO ALLOW OTHER JURY SELECTIONS AND TRIALS TO OCCUR.

After the Cornell trial, the judge decided to conduct jury selection in Giddens, White, and McCahon in succession before holding the trials in those cases. Accordingly, the following events occurred in 1991.

Tuesday-Tuesday, April 16-23, motion hearings (M1557-2074)

Tuesday, April 23, Cornell voir dire (M2075-2344)

Wednesday-Thursday, April 24-25, Cornell trial (M2345-2936)

Monday-Tuesday, April 29-30, Giddens voir dire (M3023-3394)

Wednesday-Monday, May 1-6, White voir dire (W3395-4163)

Monday-Thursday, May 6-9, McCahon voir dire (M3422-4288)

Friday, May 10, Giddens suppression hearing (G2339-2395)

Monday-Tuesday, May 13-14, Giddens trial (G2396-2710)

Thursday, May 16, White motion hearing (M4679-4783)

Monday-Friday, May 20-24, White guilt phase (W4661-5688)

Tuesday-Thursday, May 28-30, White penalty phase (W5752-6136)

Friday, May 31, McCahon motion hearing (M4788-4806)

Monday-Friday, June 3-7, McCahon trial (M4813-5760)

Friday, June 14, McCahon motion hearing (M5768-5832)

Monday-Tuesday, June 17-18, McCahon penalty phase (M5838-6061)

This chronology shows that the parties were almost continuously in court between April 16 and June 18, 1991. In addition, the Giddens voir dire began on April 29 while the trial ended on May 14, a span of sixteen days. The White voir dire began on May 1 while the penalty phase ended on May 30, a span of thirty days. The McCahon voir dire began on May 6 while the penalty phase ended on June 18, a span of forty-four days. The trial judge never offered any justification for this scheduling of cases, and Appellant knows of no justification for it. When defense counsel asked the judge why he was doing it, the judge did not articulate a clear answer. (M2839)

The defense continuously objected to this procedure and moved to sequester the jury, for three reasons. (M2452-54, 2834-40, 2950-52, 3403, 3453, 3575, 4287-88, 4815-16, 5445, 6097-100, 6120-22, W3452-53, 3894-96, 3911-12, 4163, 4666) First, the newspapers and television stations heavily publicized these cases, because the alleged multiple assaults naturally attracted media attention. (M1634, 1728, 2043, 2948, 2954, 3175, 4795, 4814, 5046, W4681, 4912) Cornell involved a beautiful actress visiting from New York to perform at the Sarasota theater, and, for this reason, her case was especially well-publicized. Half of the jurors called for her case had some knowledge of it. (M2126) Giddens likewise involved a young woman in her home who was sexually assaulted. White of

course was a death case, and the television stations had hourly coverage when the penalty phase jury delivered its recommendation. (M4795) McCahon also was a death case and well-publicized.

Because these cases were well-known in the community, the potential for contamination of the jury was already great, and the judge's decision to delay the trials for weeks after the juries were picked greatly increased the likelihood that the juries received extraneous information, both about the case being tried and about the other cases. Indeed, telling the jurors not to read the papers for several weeks was tantamount to telling them that other cases involving the defendant were occurring. Evidence that a jury has heard about collateral crimes from other sources is by itself grounds for a mistrial. Marrero v. State, 343 So. 2d 883 (Fla. 2d DCA 1977) (opinion by Judge Grimes); Pender v. State, 530 So. 2d 391 (Fla. 1st DCA 1988); Wilding v. State, 427 So. 2d 1069 (Fla. 2d DCA 1983); Kelly v. State, 371 So. 2d 163 (Fla. 1st DCA 1979). The jurors below might very well have heard about the other cases while they were waiting for trial in their case.

Similarly, evidence that even one juror has heard about the defendant's confession to a collateral crime means that the juror should not serve, even if the juror claims to remain impartial. "[I]t is unrealistic to believe that during the course of deliberations he could have entirely disregarded his knowledge of the confession no matter how hard he tried." Reilly v. State, 557 So. 2d 1365, 1367 (Fla. 1990). In this case, the defendant confessed to all of the crimes, and, during the lengthy wait between jury selection and trial, the members of each jury might have read the

many newspaper articles about his other confessions. (M2684, 2954)

The trial judge did direct the jurors not to read or listen to any media accounts about the defendant and his cases, and the judge regularly questioned them in a group to see if they had heard or read anything. The judge, however, refused to question the jurors individually (M4825) and instead talked to them only in a general and leadingly broad manner that made it difficult for them to admit in public that they had not followed the judge's directions. "If you did follow those directions if you would just respond affirmatively." "So all of you have followed these directions and didn't read anything pertaining to this case." (M4837, W4698, G2400).

As the defense argued below, these questions were inadequate under Derrick v. State, 581 So. 2d 31 (Fla. 1991). It was only human nature for jurors to be curious about the cases on which they would sit in judgment and to read newspaper accounts without admitting to the judge in public that they had done so. This temptation was too great to subject jurors to it unnecessarily for several weeks.

The second defense objection to the scheduling of cases was that it substantially affected the defendant's constitutional rights to voir dire the prospective jurors. For example, an important method of mitigating the effects of pretrial publicity is allowing the parties to ask the jurors questions about it during voir dire. The parties can then determine whether the jurors should be challenged for cause or peremptorily if the publicity did or could affect their judgment. For this reason, Appellant objected to the trial schedule not only because it increased the

likelihood that publicity would affect the jury but also because it prevented him from questioning the jurors during voir dire about these effects. By the time each trial began, the jurors had potentially been subjected to more publicity, and the defense had no opportunity to ask them about it. The potential prejudice was especially great on the McCahon jurors after the defendant received the death recommendation in White, which had hourly television coverage. (M4795) The defense had no chance to determine the effects of this publicity and challenge some of the McCahon jurors who might have been affected; that jury had already been selected.

The court in fact refused to question the jurors individually on this subject once they had been selected. See Kelly, 371 So. 2d at 163 (judge refused "to question certain of the jurors separately to minimize any knowledge of the previous trial against appellant."). Reversible error occurs when a trial court refuses to allow voir dire about the defendant's status as a convicted felon. Moses v. State, 535 So. 2d 350 (Fla. 4th DCA 1988). The court's scheduling of the trials below had precisely this effect.

The delays in the trials also meant that the jurors could change their views on various subjects based on what they had read or watched on television or based on other events in their lives. The defense would have no opportunity to question the jurors on these views and perhaps challenge them peremptorily or for cause. Similarly, if Johnson decided after one trial to adopt an insanity or intoxication defense (which were real possibilities; notices of intent to rely on the insanity defense were filed, and an addictionologist was hired (M1397)), he would not be able to voir dire

the jury on these defenses. He was entitled to question jurors on these defenses if he decided to use them. Lavado v. State, 492 So. 2d 1322 (Fla. 1986). All of these factors combined to inhibit substantially the defense voir dire questions.

The third defense objection to the scheduling of these cases was that it made jury selection more difficult. (W4047-49) As in fact occurred, many jurors might have travel plans or might have unexpected events occur that might preclude their service on the jury weeks later. This third objection was less important than the first two, but it did underscore again the inadvisability of the judge's scheduling decision.

Florida courts have regularly disapproved of lengthy delays between jury selection and trial. In the leading case, McDermott v. State, 383 So. 2d 712 (Fla. 3d DCA 1980) (cited below at W3912), after the jury was sworn, the state obtained several continuances because a material witness was unavailable. Forty-seven days after the initial jury selection, the defendant sought a writ of certiorari which the third district issued because the delay created too great a potential for prejudice. The court reasoned that

> a trial will normally proceed from the impaneling of the jury on through rendition of the verdict without undue interruption. A continuance during the progress of the trial which results in protracted jury separation must be based upon a real and substantial need which is supported by a showing of due diligence and good faith. A short continuance for an overnight recess, a weekend, a holiday or one that is required for some other substantial reason such as illness or death in the family of a juror or counsel, or to take the deposition of an undisclosed witness, resides within the sound discretion of the court.
>
> The rule is premised upon the state's interest in the integrity of the jury system and the assurance that an impaneled jury will remain free of any extraneous influences. A distillation of cases points to no inflexible

> rule but merely indicates that the manner of a continuance must be balanced by the societal interests against the rights of the accused on a case by case basis. Among the factors assessed are the length and reason for the delay, the defendant's assertion of his right to proceed to trial, and possible prejudice. Generally prejudice is not presumed but must be demonstrated by the party allegedly aggrieved. As the seriousness of the crime decreases, so does the tolerable length of delay. . . .
>
> Allowing a continuance during trial is left to the discretion of the court; however, with the passage of considerable time, the party claiming to be aggrieved by the undue delay in presentation of a case to a jury need only show the existence of circumstances capable of prejudicing the deliberative functions of a jury. At that juncture, the party aggrieved need not prove that prejudice actually resulted. . . . Indeed, such a requirement would place an intolerable burden on a party to demonstrate actual prejudice because parties are ethically, and by order of the court, prohibited from having any extrajudicial contact or communication with an impaneled jury.

Id. at 714-15.

Armstrong v. State, 426 So. 2d 1173 (Fla. 5th DCA 1983), followed McDermott in holding that a fifty-two day delay was too long. This delay occurred because the court had scheduled other trials to start the next day, and Armstrong's trial was not yet over. The Armstrong court said that

> [w]hile we are not unappreciative of congested court calendars and the problems of anticipating the length of trials to accomplish orderly scheduling, we think it far preferable to postpone a case whose trial has not commenced rather than to interrupt one in order that another may be started. A trial by jury is a constitutionally protected right and the law should be sensitive to any infringement or impairment of that right.

Id. at 1174. The court did not require the defendant to show actual prejudice. "Recognizing the difficulty of demonstrating that a jury has actually been prejudiced during the trial, we think it is only necessary to show the existence of circumstances capable of prejudicing the jury to warrant a new trial." Id. at 1175.

Other cases have likewise recognized that trials should not be unnecessarily delayed after jury selection. Hernandez v. State, 572 So. 2d 969, 972 n.2 (Fla. 3d DCA 1990) ("A separation between the selection of the jury and the commencement of the actual trial is highly undesirable and should be avoided wherever possible. While we are entirely sympathetic with the trial court's desire to reach civil cases carried over from earlier dates, absent a bona fide emergency or some genuinely exigent circumstance, the court ordinarily should proceed with the criminal trial."). Compo v. State, 525 So. 2d 505, 506 n.2 (Fla. 2d DCA 1988) ("Our decision in no way approves the trial court's action in continuing the case after the selection of the jury panel. The problems inherent in allowing such an interruption during the course of a trial are evidenced by the necessity of granting a mistrial occasioned in this case by the media exposure of the jurors during the break in the trial.").

This Court's decisions on jury separations during deliberations are relevant here, because they show how jurors can be subtly influenced when they are away from the courthouse. For example, this Court in Raines v. State, 65 So. 2d 558, 559-60 (Fla. 1953) (emphasis added), said that trials should not

> be conducted in a way that defendant has good reason for the belief that he was deprived of fundamental rights. The opportunity was open for tampering with the jury and the temptation to do so was such that we are not convinced that the appellant's trial was conducted with that degree of fairness and security that the bill of rights contemplates. A fifteen hour absence under no restraint whatever leaves too much room to question the bona fides of everything that took place during that time. . . . It imposes too great a burden on the defendant to produce evidence of prejudice to his rights under such circum-

stances.

Similarly, this Court said in Livingston v. State, 458 So. 2d 235, 238 (Fla. 1984), that courts must

> safeguard the defendant's [constitutional] right to a trial by an impartial jury. . . . There is no way to insulate jurors who are allowed to go to their homes and other places freely for an entire weekend from the myriad of subtle influences to which they will be subject. Jurors in such a situation are subject to being improperly influenced by conversations, by reading material, and by entertainment even if they obey the court's admonitions against exposure to any news reports and conversations about the case.

See also Taylor v. State, 498 So. 2d 943, 944 (Fla. 1986) ("Jurors in noncapital cases are just as likely to be subjected to a myriad of subtle influences as jurors in capital cases.").

According to McDermott, among the factors to be considered in assessing whether reversible error occurred are "the length and reason for the delay, the defendant's assertion of his right to proceed to trial, and possible prejudice." 383 So. 2d at 714. Applying these factors to the cases below mandates reversal for several reasons. First, unlike all of the other cases cited above, Johnson's trials were delayed in order to allow portions of his other trials to occur. He remained in the public eye during the delay, and the potential for prejudice from publicity was accordingly much greater. He was unable to voir dire the jury on this publicity and his recent convictions. The seriousness of his charges also meant that the trials should not have been delayed, because publicity is greater for serious charges; Appellant disagrees with McDermott that more serious crimes are more tolerably delayed. (This statement in McDermott might be a misprint or

mistake).

Second, Johnson repeatedly objected to the delay and asserted his right to proceed to trial. Third, the trial judge never offered any reason for the delay, and undersigned counsel still does not know what this reason was. Finally, the length of the delays in the capital cases certainly warranted reversal and the two week delay in Giddens was also error. Although the delay in Compo was twelve days, the second district failed to reverse only because the trial judge declared a mistrial after the jurors were exposed to media coverage. When the jurors below were exposed to substantial publicity, the court should have declared a mistrial in all three cases, just as the trial court did in Compo.

In these cases, Johnson should not have to show actual prejudice but instead the "existence of circumstances capable of prejudicing the jury." Armstrong, 426 So. 2d at 1175. He has certainly shown this potential for prejudice. He has also shown actual prejudice because he was unable to voir dire the jury on the preceding events in his cases.

The defense demanded speedy trial in White. Although the trial technically occurred within the speedy trial time period of Florida Rule of Criminal Procedure 3.191, under the circumstances, jeopardy should be deemed to have attached, the speedy trial time period to have run, and the defendant's constitutional speedy trial rights to have been violated. In extreme cases such as the fifty-five day hiatus in McDermott, the proper remedy is discharge. Hernandez, 572 So. 2d at 972 n.2. The present cases were extreme. Accordingly, the trial court should have granted the defense

motions for discharge in White, (W4665-66) and this Court should now reverse and remand for that remedy. It should also remand for that remedy in McCahon even though the defense did not specifically request it, because the proper remedy on appeal is a matter for the appellate court rather than the trial court to decide.

As a lesser alternative, this Court should reverse and remand for a new trial, because Johnson's constitutional rights to effective voir dire and to a fair trial by jury were violated.

ISSUE VI

THE JUDGE SHOULD HAVE EXCUSED FOR CAUSE TWO JURORS WHO HAD A PRECONCEIVED OPINION THAT DEATH WAS THE PROPER PENALTY FOR FIRST DEGREE MURDER.

During voir dire, when the court asked juror Hanaway whether he could follow the court's instructions, weigh the mitigation, and recommend life if necessary, he gave a series of less-than-enthusiastic responses.

> A: Yes, I guess I could. . . .
>
> A: Well, I advocate the death penalty, so, premeditated first degree murder, that is my feeling. . . .
>
> A: Well, it's kind of hard to say without hearing what anything else is. . . .
>
> A: Yes, very tough. It's a decision that I don't know if I could tell you right now. I would have to hear the aggravating factors and everything.
>
> Q: So you think you could keep an open mind then about it?
>
> A: I would try to.

(M3631-32) His answers to the prosecutor's questions likewise indicated that he favored death.

> A: Again, I would like to think I'd be able to do that.

. . .

A: Like I say, I do lean towards the death penalty. . .

Q: But would you automatically vote that way or would you listen?

A: I don't know, without hearing the actual circumstances.

Q: So right now you wouldn't vote for that, simply because of a conviction?

A: I would vote for that based on a conviction, but then, I would have to hear the other circumstances.

Q: If the judge tells you that mitigating circumstances can be taken into consideration, . . . [w]ould you listen to all of those?

A: I would listen, yes. . . .

Q: And would you follow that law and make a recommendation as to life or death depending on what that law is and those aggravating factors are?

A: If so instructed, I would have to, yes, sir. . . .

THE COURT: So, in other words, you would follow the law? Even though you may not like it, you'd follow it?

A: That's what the law is for, I guess.

(M3633-35) The juror continued in this vein for defense counsel, concluding that he would vote for death for premeditated murder.

Q: [W]hat do you think should happen to him [the defendant], if he's found guilty?

A: Well, like I say, I believe in the death penalty. . . Then we go through with the mitigating circumstances again. . . .

Q: [D]o you think that the death penalty is usually the most appropriate sentence for first degree murder?

A: If used more often it would be more of a deterrent.

Q: . . . [I]s that going to make it difficult for you personally to recommend a life sentence in the case, or even impossible to recommend a life sentence, based on what you feel?

A: I don't know if it would make it impossible, like we discussed earlier. It depends on the mitigating circumstances and everything. . . .

Q: Do you think it's really appropriate to look at things about the defendant's background, as opposed to looking at the crime that the defendant committed? . . .

A: Like I tried to explain earlier, I believe in the death penalty, and I would prescribe the death penalty in first degree murder, premeditated murder.

MR. TEBRUGGE: Okay. All right. We won't belabor it any further.

(M3637-39) Later, juror Hanaway explained to the prosecutor that a different standard should be used for the penalty phase than for the guilty phase. "Trying the case, I can see the same type of [reasonable doubt] standard, but the sentencing would have to be different." (M4052) Thus, Hanaway would begin the penalty phase with the presumption that death was the appropriate penalty, rather than keep an open mind and require the prosecutor to prove that death was the proper punishment.

Similarly, juror Pullman told the judge she could follow the law and decide life or death. (M3644) She told the prosecutor that she believed in the death penalty but would have to be absolutely sure of the person's guilt before she could vote for death. (M3645-46) She told defense counsel that the death penalty was appropriate because people did not have the right to take other people's lives. (M3647) She initially said she did not know what she would do if she was convinced that the defendant was guilty. The following question and answer, however, made her position clear.

Q: [T]he bottom line question is, do you think that they should automatically receive the death penalty if they're definitely guilty of first degree murder?

A: If they're -- yes, I do.

(M3647-48) She would have no difficulty listening to mitigating evidence and could recommend life if, for example, more than one person was involved or the witnesses were not too certain of their testimony. She told the judge that she would be willing to listen to all the evidence before deciding whether life or death was appropriate. (M3648-50) The juror's answers thus showed that she might consider life if she was uncertain of actual guilt -- such as when the witnesses were not credible or another person was involved. If she was certain of guilt, however, she would automatically vote for death.

The court twice denied defense challenges for cause on juror Hanaway and twice on juror Pullman. (M33640, 3651, 4165-66) The defense peremptorily excused these jurors, exhausted its peremptories, and identified other jurors it would have challenged had its request for more peremptory challenges been granted. (M4168, 4255-58) Accordingly, the error is preserved under state and federal law. Penn v. State, 574 So. 2d 1079 (Fla. 1991); Ross v. Oklahoma, 487 U.S. 81 (1988).

The court should have granted these cause challenges, because the jurors' statements provided a reasonable basis to believe that they were improperly biased and would not follow the law.

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

Hill v. State, 477 So. 2d 553, 555 (Fla. 1985), quoting Singer v.

State, 109 So. 2d 7 (Fla. 1959); Moore v. State, 525 So. 2d 870 (Fla. 1988).

Although jurors may claim they can follow the law and consider the evidence impartially, such claims are properly viewed with suspicion when their other statements show otherwise. Hill, 477 So. 2d at 555-56; Club West v. Tropigas of Florida, 514 So. 2d 426 (Fla. 3d DCA 1987). The court must insure that the jury's verdict is fair and untainted by bias or unwillingness to follow the law. "'[J]urors should if possible be not only impartial, but beyond even the suspicion of partiality' . . . 'If there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused.'" Hill, 477 So. 2d at 556 (citations omitted).

In this case, juror Hanaway stated that he would consider mitigation, but it would have to overcome the presumption of death. More than once during the above-quoted voir dire, he said he would presumptively vote for death "based on a conviction" and only then "hear . . . other circumstances." Later, when asked if he would consider mitigation, he did not answer the question and said that, as he had explained, he believed in the death penalty and would vote for death in murder cases. Finally, he said he would use a different standard during the penalty phase, which indicated again that his presumptions on penalty would be against the defendant.

Similarly, juror Pullman was willing to listen to mitigation, but she did not say it would make any difference to her. She indicated that she could consider a life recommendation but her primary concern was clearly that she be sure of the defendant's guilt. She forthrightly stated that, if she was definitely certain

of guilt, she would automatically vote for death.

These responses created a reasonable doubt about these jurors' partiality and showed that they had a preconception that death was the appropriate penalty in first degree murder cases. To prevail, the defense would have to overcome this preconceived opinion. Consequently, these jurors should have been excused for cause.

> It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

Hill, 477 So. 2d at 556 (emphasis added). Federal law likewise requires that jurors be excused if they would automatically vote for death. Morgan v. Illinois, 119 L. Ed. 2d 492 (1992).

The language from Hill that a party should not have to "overcome a preconceived opinion" was quoted in Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). As in the present case, the juror in Hamilton claimed she could base her verdict on the law and the evidence, but her other answers suggested that she did not presume that the defendant was innocent. This Court found that, notwithstanding the juror's claims that she could hear the case with an open mind, she should have been excused because her other answers created a reasonable doubt of her partiality.

A similar conclusion applies in the case at hand. Juror

Hanaway never said clearly that he would follow the law and set aside his personal opinions. He said only, "I guess I could," or "I would try to," or "That's what the law is for, I guess." Merely "guessing" that he would "try" to follow the law was insufficient when his other answers raised a reasonable doubt about his fairness. A similar conclusion applied to juror Pullman, who said she would automatically vote for death. Sikes v. Seaboard Coast Line Railroad Company, 487 So. 2d 1118 (Fla. 1st DCA 1986); Auriemme v. State, 501 So. 2d 41 (Fla. 5th DCA 1986). As this Court characterized the Auriemme decision, the "juror's ability to be fair and impartial must be unequivocally asserted in the record." Moore, 525 So. 2d at 873. Other cases such as Club West and Jefferson v. State, 489 So. 2d 211 (Fla. 3d DCA 1986), have similarly held that jurors who give equivocal answers about their fairness or ability to follow the law should be excused for cause.

In O'Connell v. State, 480 So. 2d 1284 (Fla. 1985), this Court found that two errors involving death qualification of jurors had occurred. One error was the same as that in the present case while the other was an improper restriction of the opportunity to rehabilitate two jurors opposed to the death penalty. Although, arguably, neither of these errors affected the guilt phase, this Court remanded for a new guilt phase, over a dissent that only a new penalty phase was necessary. Thomas also remanded for a new guilt phase after two errors in jury selection occurred. Hill, however, remanded only for a new penalty phase, apparently based on appellate defense counsel's express concession on this point. Hill and O'Connell are not easily reconciled, but Hill is distinguishable

because it is based on a defense concession.[4]

The proper remedy is a new guilt phase rather than merely a new penalty phase. Requiring defense counsel to challenge jurors peremptorily because of their views on the penalty phase meant that He could not challenge other jurors because of their views on the guilt phase. He might have had to accept jurors he did not want on the guilt phase, as the price of rejecting jurors he did not want on the penalty phase.

For example, juror Appleby was the last juror in the box. Counsel never had a chance to challenge her because his peremptories were exhausted, and he identified her as a juror he would have challenged if given the chance. (M4257-58) Her views on the death penalty were unexceptionable; when asked about mitigating circumstances, she said that "everything that pertains to the crime, or to what's happening, should be taken into account." (M3957) Her son, however, was in the military police at West Point, and her business had been burglarized. (M4214) The defense desire to challenge her was thus likely based on her views on the guilt phase, because the defendant also allegedly committed a burglary. A similar conclusion applied to juror Underwood whom the defense would have challenged, who would have had no difficulty recommending life in the appropriate case, but who had been robbed at

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[4] The videotape of oral argument in Hill shows that appellate counsel conceded only that, under the particular facts of that case (where trial counsel had argued to jury that defendant was guilty of felony murder but not premeditated murder), the error in jury selection could only be harmless as to guilt phase if the jury on resentencing was not informed of the previous jury's verdict that the defendant was guilty of premeditated murder.

gunpoint and whose brother-in-law was a police officer. (M3763-65, 4092) Juror Tegge, whom the defense also would have challenged, in fact seemed disposed to recommend life in most cases. (M3615-18)

Instead of using the challenges on these jurors for guilt phase purposes, however, the defense had to use them on Hanaway and Pullman, who were undesirable jurors for penalty purposes. Consequently, the error did affect the guilt phase under both state and federal constitutional law, because the error meant that defense counsel was forced to accept jurors for guilt purposes whom he did not want. This is one reason why a prosecutor who death-qualifies a jury in bad faith when death is not a proper penalty commits reversible error. Lark v. State, 18 Fla. L. Weekly D1113 (Fla. 1st DCA April 28, 1993).

This Court should reverse for a new guilt phase because Johnson's constitutional rights to use voir dire to obtain a fair and impartial jury were violated. As a lesser alternative, this Court should reverse for a new penalty phase.

ISSUE VII

THE DEFENSE PRESENTED A PRIMA FACIE CASE OF RACIAL DISCRIMINATION WHEN, IN CASE AFTER CASE, THE VENIRE DID NOT INCLUDE MORE THAN ONE BLACK.

During the Cornell voir dire, the defense objected that the prospective jurors had included no blacks and that the clerk had sent home the one black juror in the holding room without the judge's permission. The judge responded that the juror was not sent home with the intention of excluding blacks. (M2197-98)

During the Giddens voir dire, the defense filed a written

challenge to the panel, pointing out that the thirty jurors in Cornell did not include any blacks and that the thirty jurors called in Giddens were also all white. The judge overruled this challenge. (M3152) The next day, the defense pointed out that another jury venire called the previous day for a different case had had several blacks. A clerk testified that the computer had randomly picked thirty white jurors for Johnson's trial from the seventy-eight jurors (including five blacks) that were available in the courthouse that day. (M3180-84)

During the White voir dire, the judge overruled a written defense challenge to the panel for including only one black among the fifty jurors called. (W3462, 8340) The defense also challenged the McCahon panel in writing, pointing out that again only one of the fifty jurors called was black. (M3585) The defense renewed this challenge before trial and suggested that the jurors should be picked from those citizens with driver's licenses, pursuant to the recently enacted statute. The judge overruled this challenge. (M4792-94) These challenges were renewed and denied in the motions for new trial. (M8732, 8753-54) In summary, of the 160 jurors called in these four cases, two were black. Johnson is black.

Racial discrimination can have no place in Florida's criminal justice system.

> "[W]e . . . cannot deny that, 114 years after the close of the War Between the States, . . . racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious." . . . [T]he appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being -

> - to insure equality of treatment and evenhanded justice. Moreover, by giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large.

State v. Slappy, 522 So. 2d 18, 20 (Fla. 1988), quoting Rose v. Mitchell, 443 U.S. 545 (1979).

Criminal defendants asserting the shelter of the equal protection doctrine must prove the existence of discriminatory intent. Washington v. Davis, 426 U.S. 229, 239-40 (1976). This intent need not necessarily be consciously formulated and can be the product of unconscious and unfounded racial stereotypes. Slappy, 522 So. 2d at 22-23. Initially, defendants must present a prima facie case of discrimination based on "the totality of the relevant facts." Batson v. Kentucky, 476 U.S. 79, 94 (1986). This prima facie evidence of discriminatory intent can and often will include evidence of discriminatory impact. Washington, 426 U.S. at 242. In many cases, if the evidence of discriminatory impact cannot be alternatively explained, then it is tantamount to proof of discriminatory intent, even absent evidence of conscious selection by race. Batson, 476 U.S. at 93; Alexander v. Louisiana, 405 U.S. 625, 630 (1972). When assessing a prima facie case, courts must make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). In the petit jury context, upon objection, courts must automatically assume that a prima facie case of discrimination has been made. State v. Johans, 18 Fla. L. Weekly S124 (Fla. Feb. 18, 1993).

If defendants establish a prima facie case, the burden shifts

to the State. Mere denials of discriminatory intent do not constitute satisfactory rebuttal, because few if any prosecutors or judges will admit that racial considerations influence their actions. In this context, the Florida and United States Supreme Courts have provided "broad leeway"

> in allowing parties to make a prima facie showing that a 'likelihood' of discrimination exists. . . . [A]ny doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination.

Slappy, 522 So. 2d at 22.

In this instance, "in case after case," a disproportionately low number of blacks were called to serve on the venire. Even in the heyday of Swain v. Alabama, 380 U.S. 202 (1965), defendants could establish a prima facie case of discrimination if the evidence showed a low percentage of blacks "over a number of cases." Batson, 476 U.S. at 84. Moreover, Batson and Washington v. Davis said that proof of discriminatory impact can alone establish unconstitutionality when the impact is difficult to explain on nonracial grounds. The "'total or seriously disproportionate exclusion of Negroes from jury venires . . . is by itself such an unequal application of the law . . . as to show intentional discrimination.'" Batson, 476 U.S. at 93, quoting Davis, 426 U.S. at 241.

In this instance, the defense did show a "total or seriously disproportionate exclusion of Negroes from jury venires" in "case after case." Consequently, this by itself was enough to establish a prima facie case and shift the burden to the State to rebut it. Id. This prima facie case established below by the defense was

substantially stronger than the prima facie case necessary to establish discrimination in petit juries. Johans.

The State provided no evidence to rebut this prima facie case. At best, it showed only that a computer randomly selected some names. Because the principle that guides any computer program is GIGO -- garbage in, garbage out -- showing that a computer randomly selected some names hardly showed that no discrimination occurred during the preparation of the list of names and their entry into the computer.

It is now too late to remand solely for a hearing to allow the State to rebut the defense prima facie case. See Johans; Greene v. State, 351 So. 2d 941 (Fla. 1977). Accordingly, this Court should reverse and remand for a new trial.

ISSUE VIII

THE TRIAL COURT IMPROPERLY CONSOLIDATED CHARGES, MOVED THE TRIAL DATES FORWARD BY ONE MONTH, DENIED MOTIONS FOR CONTINUANCES, AND FORCED THE DEFENSE TO GO TO TRIAL WHEN IT HAD JUST HAD AN EXPERT APPOINTED AND HAD ONLY RECENTLY RECEIVED DISCOVERY, MERELY TO GIVE THE STATE MORE CONVICTIONS TO USE AS AGGRAVATING CIRCUMSTANCES.

Near the end of the last of the four trials in these cases, Judge Owens told the attorneys that "you all have done a great job for going through -- this will be the fourth trial. I could have never done it." Later, he said, "You all have done a great job. I don't know how you all have done it. I'm glad it's you all, not me." (M5632, 5644) These comments were incongruous, when Judge Owens and his predecessor judges were the ones who had forced the defense into so many trials in succession. The judge should have

realized that, if he could not have done it, the attorneys could not either, particularly when the State was still filing discovery the morning of trial. Moving the trial dates up and trying the cases in quick succession was wholly unnecessary; it occurred only to give the State aggravating factors in the death cases.

A. Factual background

These events began on February 4, 1991, when the parties were told that the motion to suppress hearing would conclude on February 25. (W1264) Defense counsel said that trials were then set for March, and he would not be ready so soon after February 25. (M1263) On February 25, the parties presented more testimony and memoranda on the suppression issue. (M1264-1376) Judge Silvertooth denied the motion to suppress on March 1. (M6827) Also on March 1, Judge Dakan set the four cases -- Cornell, Giddens, White, and McCahon -- for trial on May 28 through June 7. (M1579, 6829)

In March, the defense filed a demand for speedy trial in White. At the calendar call on March 28, 1991, Judge Smith decided that trial in White had to be set by May 10, not counting the fifteen day window period. Judge Smith on his own motion set Cornell and Giddens to start on April 22, to be followed by White. When asked why, the judge said, "Aggravating factors, you know why." He admitted he was scheduling these cases a month earlier to give the State convictions to use as aggravating circumstances in the capital cases. (M1417-27)

Defense counsel said he would not be ready for Cornell, because he had much more work to do on that case. He had just recently received a witness list, a lengthy suppression hearing

would be necessary, and he had a pending request for appointment of an eyewitness identification expert. The court, however, denied a motion for continuance. (M1421-28)

On April 1, defense counsel said again that he was not ready for trial in Cornell and that he had just had his expert appointed. (M1441) On April 8, after the State filed amended informations in Giddens and Cornell and arraigned the defendant, the defense pointed out that, under State v. Stell, 407 So. 2d 642 (Fla. 4th DCA 1981), it was entitled to more time to analyze the changed information and possibly file motions to dismiss. (M1518-23) On April 11, the defense moved to disqualify Judge Smith because he had had ex parte communications with the prosecutor and had shown partiality to the State by deliberately setting the trial schedule to establish aggravating circumstances. The judge took this motion under advisement. (M1528-29, 7886-91)

Also on April 11, the State moved to set the McCahon case before White. The State was afraid that, under Pardo v. State, 563 So. 2d 77 (Fla. 1990), White could not be used as an aggravating circumstance in McCahon because White occurred after McCahon. The defense argued that, although McCahon occurred first, the defendant was arrested and charged first for White. The State was orchestrating events and forcing the defense into trials it was not ready for, merely to gain aggravating factors. The defense had moved for continuances in Cornell and Giddens because it was not ready to try them. The defense was awaiting discovery and still obtaining photographs of the lineups to send to its expert, whom the court had appointed only ten days earlier. (M1529-55)

Judge Smith initially scheduled the cases in the order they were charged -- White, McCahon, Giddens, Cornell -- but, after the State strenuously objected, he took the matter under advisement. (M1545, 1553) The next day, he scheduled the cases in the order they occurred -- Cornell, Giddens, McCahon, White. (M7937) He then recused himself. (M7940)

On April 12, the defense moved to dismiss the amended informations. (M1585) The court denied these motions on April 17 and 18. (M1623-33, 1755, 1762) On April 17, the defense moved to continue Cornell. Although Cornell had been pending since October 1988, the defense had worked continuously on Mr. Johnson's cases, as the cart of court files in his cases indicated. The hearings on the motion to suppress confessions had just ended, the information had just been amended, and counsel was still receiving discovery, including voluminous materials on April 2. He had only recently been shown a police report about one photo lineup. He was reconstructing the different lineups that were used and sending them to his eyewitness expert. The expert had sent a letter dated April 16, stating that he would not be ready until May 15, which was before the original time for trial in this case. Counsel wanted to use this expert at the trial and at the identification suppression hearing. Consequently, he was not ready to try Cornell, and scheduling the trial for April 22 would deny his client due process and effective assistance of counsel. (M1576-94)

The prosecutor responded that the new discovery was not relevant and had been sent only in an abundance of caution, and the defense had not alleged any prejudice. The amendments to the

information involved merely technical changes. The case was two-and-one-half years old, the defense had already conducted extensive discovery, and it should have gotten its expert sooner. (M1595-606)

Judge Owens decided that both the defense and the State were trying to structure the order of events to their advantage. He concluded that the cases should be tried in the order in which they occurred. He denied the motion for continuance because the defense should be prepared after two-and-one-half years. (M1614-17)

On April 16-19, the State filed an amended information in White and moved to consolidate in both White and McCahon. (M7949, W8317, 8328) On April 18, the defense said it could not use its expert in Cornell because the judge had denied the continuance motion. (M1688-89, 1827) The judge allowed additional discovery of the pictures shown to Ms. Cornell. (M1740-42) He appointed the identification expert for Giddens but said he was not delaying trial to give the expert time to prepare. (M1751) The defense moved to continue Giddens for the same reasons expressed in Cornell. Counsel added that the motions to suppress confession had lasted over one year because of various delays and had ended only a few months earlier. He had had little reason to incur the expense of an identification expert until the suppression motion was decided. Judge Owens denied the continuance motion. (M1752-60)

On April 19 (Friday) and 22 (Monday), the defense renewed its motion for continuance in Cornell. (M1849, 1880) The expert had written a letter that his testimony might be most useful because he had done a study showing that repeated viewings of lineups cut in half a person's ability to identify a perpetrator correctly.

(C4941) Both Cornell and Giddens involved several viewings of different lineups.

According to an article the expert had written about his methods, the victim's description of her assailant would be given to several mock witnesses, who would be asked to guess which of the photo lineup members was the suspect. If the lineup was fair, these guesses would be randomly distributed. The expert had found that many lineups were not fair, and people could guess who the suspect was even if they knew nothing about the case or knew only a description. According to the prosecutor, the expert had said he could come on Tuesday to testify about his work, but the defense responded that the expert's studies of the actual lineups could not be completed until mid-May. His findings about identifications in general were covered in his article, which the defense later proffered to the court. (M2002) The court denied the motion to continue. (M1849-54, 1880-83)

As discussed in Issue III, trial in Cornell started on April 23, and defense counsel was in trial almost continuously thereafter until June 18. On April 30, the defense moved for a continuance in McCahon because the State had provided more voluminous discovery on April 11 and April 30. (M3360) The April 11 discovery was one-inch thick, and counsel had not had a chance to look through it because he had been working on Cornell, which ended at 9 p.m. on April 26. The State had only now provided several police reports about other suspects in McCahon. One statement by Arthur Jones discussed Jessie Phillips's criminal activity the night of the murder. Phillips knew McCahon. This information was significant because

Phillips was wearing a red T-shirt, and a red fiber found at the McCahon crime scene was not from Mr. Johnson's clothes. The red fiber had meant nothing to counsel until he saw Jones's statement. Other reports said that Phillips had admitted to "icing Jackie" and that McCahon had been threatened with harm if she testified in an arson trial. The new discovery mentioned several taped witness statements which counsel had not seen. Counsel could not investigate these matters properly when jury selection would start the next day. (M3360-63, 3372-73, 7984-89)

The prosecutor responded that the police reports may have been provided earlier, but he was not certain of this because in the past his office did not mark the file when discovery was sent. The rules on discovery of police reports had changed while these cases were pending for trial. In any event, the defense had known from depositions that other persons had been suspects, and it should have investigated these possibilities then. The prosecutor was willing to open his files to the defense. (M3364-67) Defense counsel, however, said that, in deposition, the police had written off the other leads as inconsequential. If counsel had had the police reports, he would have known what questions to ask and would have learned more. (M3364-68) Judge Owens ruled that they would start picking the White jury the next day rather than McCahon and that he would continue McCahon unless the State could show that the defense was not prejudiced. (M3379)

The next day on May 1, shortly before jury selection in White, the State handed defense counsel a stack of discovery for White. (W3402) Counsel said after consulting his records that he had not

previously received at least half of the newly provided material. Had he had these materials, he might have deposed the witnesses more thoroughly and learned more information. Counsel also objected that he had never been told that prosecutor Nales had been present at the crime scene. (W3430-34)

The prosecutor responded that the witnesses had had their reports with them during depositions, and counsel could have looked at the reports then. The prosecutor admitted, however, that the defense was not entitled to the reports at the time some of the depositions were taken. The prosecutor said he would make the police officers available for depositions at any time. Prosecutor Nales said he had been present at the crime scene but had done and seen nothing. (W3434-49) Judge Owens reserved ruling on the motion for continuance, pending a more specific defense showing of prejudice. (W3451)

The parties then discussed the recent amendment of the information in White and motions to consolidate in McCahon and White. The defense asked for arraignment on the amended information and for reasonable time to prepare motions to dismiss. (W3454-61) The next day, the defendant was arraigned and, over defense objection, the information and indictment were consolidated in White. (W3586-92, 3881) McCahon was consolidated on May 8. (M4163)

On May 3, the State claimed again that the defense had previously had the opportunity to know about the McCahon material in the newly provided reports. The State admitted, however, that the defense could not have known about officer Wildtraut's reports that a large black male had been seen leaving McCahon's residence when

she died and that Daniel Romano had called with information which he would not say over the phone. (M3897, 7993-94) Other reports showed that Jessie Phillips had bragged about icing McCahon, that McCahon was threatened with harm if she testified in an arson case, and that, shortly before she died, McCahon had been with two men and she had screamed. (W7993-97) Defense counsel responded that the officers during deposition had said only that their other leads were insignificant, so he had no reason to pursue them, absent knowledge of the police reports. He certainly did not know that Jessie Phillips had bragged of icing McCahon. (W3901, 3910) Judge Owens denied the motion for continuance. (M3910)

On May 6, defense counsel showed the court letters he had sent to the prosecutor asking for all police reports and inquiring about statements by Arthur Jones and Ernest Ross. Counsel thought perhaps these statements were somebody else's discovery in a different case, because he did not see their relevance. The prosecutor responded then that he had no idea what they were. Only when the defense received the discovery on May 1 about the criminal activity that Ross and Jones had been involved in, did the defense understand the significance of these statements. The court, however, denied the motion for continuance. (M3395-98)

On May 13, the defense renewed the motion for continuance in Giddens, which was denied. (G2397) On May 20, defense counsel renewed the motion for continuance in White, adding to his previous arguments that he had been provided only on May 1 with information that the FDLE reported that one Negroid pubic hair was found on White's body, while the FBI said there were two. He had also

learned for the first time that the police had spoken to several witnesses who had information about the crime scene. Counsel had been in trial continuously and had had no opportunity to investigate these matters. Counsel asked for discharge as the proper penalty for the speedy trial and due process violations. These motions were denied. (W4662-65)

On June 3, counsel renewed the motions for continuance in McCahon. The defense had been in trial continuously for the past several weeks, and had only had a chance to look at the new discovery material during the previous weekend. It had learned about three suspects: McCahon's boyfriend Phillippe Samuel, who often had beat her; Daniel Underwood, who was planning a burglary in the area the same night McCahon was killed and who had tried to extort money from her that day; and Jessie Phillips, who had been with Underwood and been to McCahon's apartment. When the police found Underwood, he ran away. Phillips turned himself in, driving Underwood's car. The police seized knives from Underwood and Samuell and seized Phillips's clothing. One officer had learned that a black male and a white male had done the stabbing of McCahon, which fit the Phillips/Underwood hypothesis. The defense did not know these witness's addresses, and investigating these leads would take much time. (M4818-22) The State claimed in response that the defense had had knowledge of most of these facts from depositions. The court denied the motion for continuance. (M4818-23)

During the McCahon trial, the State violated the discovery rules when it called Sergeant Smith as a witness. Smith's name had

appeared in discovery, but he was not listed as a witness with information. The judge allowed the defense to take Smith's deposition during lunch. Smith said that McCahon had made many complaints to the police regarding tenants, her boyfriends, and threats of violence against her. When Smith went to the station to find these reports, however, they were on microfilm and could not be retrieved immediately. The defense asked for a continuance to obtain records of these complaints or, alternatively, for a mistrial. The State responded that many of the police officers whom the defense had deposed knew about these complaints. The court denied the motions for continuance and for mistrial. (M4875-4917)

Later, when the defense wanted to introduce evidence about Phillips's blood-stained pants, the court ruled that the pants had not been tied to the crime, and the stains might not have been blood. The defense objected that it had not had enough time to investigate this matter properly, because it had not received officer Reddens' police report until April 11. When the State claimed that the defense had heard about the pants in deposition, the defense responded that it had not had the other material, so it had had no idea about the significance of the pants. (M5495-5520)

When the defense wanted to introduce evidence from officer Wildtraut that Daniel Romano had called with information about the homicide which he would not say over the phone, except that Samuel had beaten the victim and threatened her life, the State successfully objected on hearsay grounds. The defense pointed out that it had not received this discovery until April 11. (M5535-43)

The State successfully objected on hearsay grounds again when

the defense wanted to introduce evidence from officer Tatakis that Phillips had bragged that he had killed or "iced" McCahon. The defense also was not allowed to introduce Tatakis's testimony that McCahon's neighbor had told him that McCahon was talking to two men and then screamed on the night she died. An older tenant might have seen these events. The defense, however, did not receive Tatakis's police report until April 11. (M5545-57)

Later, the defense wanted officer Jankens to testify about a Mr. Dougherty's statement that a person named Tim had said a white man and a black man had killed McCahon and a white man had done the stabbing. The State successfully objected on hearsay grounds. The defense said it had received Jankens's report only on May 1 as part of discovery and had been in trial ever since, so it had had no opportunity to find Dougherty or Tim. (M5564-73)

B. Argument

The judge's decision to schedule cases and deny continuances in order to create aggravating circumstances for the State was error. Initially, Appellant does not concede that he demanded speedy trial in White to foreclose aggravating circumstances. White was the first case charged and, at the time of the demand, Appellant was prepared for that case and not prepared for the others. Ceteris paribus, trials are most logically scheduled in the order in which they are charged. This is patently obvious if charging dates are several months apart. Furthermore, counsel would naturally have focused more attention on the capital cases than on the noncapital cases. Finally, the defendant had been in jail for two-and-one-half years; he had a constitutional and procedural

right to demand trial, albeit at a reasonable pace. Consequently, the defense decision to demand speedy trial in White was logical, practical, reasonable, and timely.

Even assuming arguendo that the demand was filed to foreclose the aggravating circumstance, this motive did not justify disrupting the established trial schedule and hurriedly moving up the other cases by more than one month. Judge Owens viewed the issue as a "chess match." The defense had made its offensive thrust by demanding speedy trial, but the State was entitled to make its own offensive thrust in return and seek to have the noncapital cases tried first, to provide aggravating circumstances in the capital cases. (M1615, 1689) In chess, however, when the knight makes an offensive thrust and captures a pawn, the opponent cannot cheat by returning the pawn to the board. Instead, the opponent must accept the new state of affairs before launching return offensive thrusts. In the cases below, rather than accept the loss of the pawn, the State cheated and put the captured pawn back into play by rushing the defense into four trials it was not prepared for. The cheat was the violation of the defendant's constitutional rights to prepare his defense, call witnesses, and be tried fairly with the effective assistance of counsel.

The error in hastening the noncapital cases infected the capital cases because the noncapital cases were used as aggravating circumstances and because the scheduling meant that the defense had no time to prepare for the capital cases. The parties had been engaged in extensive litigation over the admissibility of the confessions, and the defense had little reason to address other issues

until this issue was resolved. The State's constant harping below (and doubtless on appeal) about the two-and-one-half years that the cases had been pending thus overlooked the fact that the confession issue was not resolved for two-and-one-half years; the suppression hearing was not even held until late January 1991.

When this issue was resolved, Judge Dakan in late February set the trials for three months later. Within a few weeks, the defense found an eyewitness expert for Cornell and Giddens, and the court appointed him. The defense had no reason to seek this expert sooner; the county would not have wanted to pay for the expert if the confessions were suppressed and his services were not necessary. The expert would be ready by mid-May, before the scheduled trial dates of May 28. The defense thus consistently acted in a timely manner. The court, however, pushed the Cornell and Giddens trials forward to April so that the defense could not use its expert. At that point, the expert could testify only generally about eyewitness identifications and would not have completed his analysis of the actual lineups for suggestiveness -- the reason he was hired in the first place.

Although Johnson v. State, 428 So. 2d 774 (Fla. 1983), ruled that appointment of identification experts is a discretionary matter, (Appellant does not agree that Johnson applies to him, because he was entitled to the expert under the circumstances of his cases), any question whether the expert was properly appointed is moot. The judge, by appointing him, did in fact conclude that the defense should have his services. Consequently, having decided that the expert should be appointed, the court could not then

foreclose his assistance by moving trials forward to dates that would not allow him to complete his work on time.

These events in Cornell and Giddens were like those in Beachum v. State, 547 So. 2d 288 (Fla. 1st DCA 1989). Four days before trial, the court in Beachum issued a subpoena, finding that the defense needed the witness. When the witness did not appear at trial, however, the judge denied a continuance motion. Beachum reversed because "defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defense." Id. at 289, quoting Smith v. State, 525 So. 2d 477 (Fla. 1st DCA 1988). Because the judge had found that the witness was necessary, Beachum rejected the State's argument that the defense should have sought the witness sooner. These facts in Beachum were less egregious than those in the present cases, in which (1) the witness was sought, not four days, but more than two months before trial, and (2) he later could not be used, not because he did not appear, but solely because the judge moved the trial dates forward. See Mitchell v. State, 580 So. 2d 852 (Fla. 2d DCA 1991) (continuance should have been granted to locate witness); Robinson v. State, 561 So. 2d 419 (Fla. 1st DCA 1990) (same).

Courts must respect experts who say they need more time to render an opinion. In Lane v. State, 388 So. 2d 1022 (Fla. 1980), and in Marshall v. State, 440 So. 2d 638 (Fla. 1st DCA 1983), the experts said they needed more time to determine the defendant's competence. The trial judges denied motions for continuance. On appeal, the courts found that the motions should have been granted. Similarly, in Brown v. State, 426 So. 2d 76 (Fla. 1st DCA 1983),

the appellant needed more time to hire an expert to challenge hynoptically induced testimony. The Brown court found error in the trial court's refusal to grant the continuance. Accord Thomas v. State, 416 So. 2d 890 (Fla. 4th DCA 1982) (continuance needed for expert's services on insanity defense). Similar conclusions apply to the noncapital cases below, when the expert said he needed more time to complete his study of the lineups.

Because the defense was improperly rushed into trying the noncapital cases, it had no time to prepare for the capital cases because it was continuously in trial during those weeks. This unexpected push for trials in which death was the penalty, over repeated objections of lack of preparedness, was a miscarriage of justice. The error was exacerbated when the State at the eleventh hour was still amending informations, consolidating charges, and providing discovery on the eve and morning of jury selection. Under these circumstances, the State's continued refrain about the "two-and-one-half years" that the defense had to prepare for trial sounded exceedingly hollow.

As this Court has long held,

> [j]ustice requires . . . that reasonable time is afforded to all persons accused of crime in which to prepare for their defense. A judicial trial becomes a farce, a mere burlesque, and in serious cases a most gruesome one at that, when a person is hurried into a trial upon an indictment charging him with a high crime without permitting him the privilege of examining the charge and time for preparing his defense. It is unnecessary to dwell upon the seriousness of such an error, it strikes at the root and base of constitutional liberties; it makes for a deprivation of liberty or life without due process of law, it destroys confidence in the institutions of free America and brings our very government into disrepute.

Coker v. State, 89 So. 222, 223 (Fla. 1921). More recently, this

Court has held that "[d]ue process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. . . Haste has no place in a proceeding in which a person may be sentenced to death." Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990) (emphasis added).

Initially, Appellant argues that the consolidations of charges occurred too late. The belated joinder of charges necessarily prejudiced him in preparation for trial. He might have wanted to testify on some of the consolidated charges but not the others. His defenses for the charges might have been different. He might have put on witnesses only in one case and thereby gained or waived his right to first and last closing argument. The consolidations might also have affected his peremptory challenges. In McCahon, the consolidation occurred in the middle of jury selection just before the exercise of peremptory challenges, which was surely too late. (M4163) See Belote v. State, 344 So. 2d 565, 567 (Fla. 1977) ("Petitioner was denied substantial procedural rights by consolidation over her objection on such short notice."); Meade v. State, 85 So. 2d 613 (Fla. 1956); Mullin v. State, 425 So. 2d 219 (Fla. 2d DCA 1983) (trial judge improperly consolidated related indictment and information on the morning of trial); Kilgore v. State, 272 So. 2d 148 (Fla. 2d DCA 1972).

Furthermore, under Florida's discovery rules and Brady v. Maryland, 373 U.S. 83 (1963), as "soon as practicable after the filing of the charging document the prosecutor shall disclose to the defense counsel any material information . . . that tends to

negate the guilt of the accused." Fla. R. Crim. P. 3.220(b(4). Certainly, the reports that Jessie Phillips had bragged of icing McCahon and that a white man had stabbed McCahon tended to negate the guilt of the accused (who was black). Consequently, the State always had an obligation to provide this information but did not.

In any event, effective July 1, 1989, the prosecutor was required to provide "all police and investigative reports of any kind prepared for or in connection with the case." Fla. R. Crim. P. 3.220(b)(1)(B); In re Amendment to Florida Rule of Criminal Procedure 3.220, 550 So. 2d 1097 (Fla. 1989). Although the offenses in this case occurred before July 1, 1989, the procedural rule amendment that required the discovery of police reports was necessarily a procedural change and therefore became applicable below when adopted by this Court. Consequently, quite apart from the prosecutor's Brady obligation, the prosecutor was required to provide the defense with all police reports as soon as possible after July 1, 1989.

Providing these reports on April 11, 1991, and on the day before jury selection was scheduled to begin in McCahon, almost two years after they should have been provided, when counsel had already been in trial for several days on the other cases and would have no real opportunity to investigate them then or later, was not timely discovery. This was a discovery violation, which "occurs where one is deprived of adequate notice and the opportunity for counsel to timely address the subject matter of the discovery." Carter v. State, 485 So. 2d 1292, 1295 (Fla. 4th DCA 1986).

The trial judge's decision to delay McCahon briefly to start

jury selection in White did not cure this discovery violation. Counsel hardly had time to investigate the McCahon material if the court was making him try Giddens and White in the meantime. Furthermore, shortly before White's jury selection began the next day, the prosecution jumped out of the frying pan into the fire by delivering another stack of undiscovered police reports in White which counsel never had an opportunity to consider. These discovery violations and Brady violations, when coupled with the new amendments and consolidations of charges, required the trial court to grant relief in both McCahon and White.

When the State violates the discovery rules, the State has the burden of establishing lack of prejudice. Cumbie v. State, 345 So. 2d 1061 (Fla. 1977); Brey v. State, 382 So. 2d 395 (Fla 4th DCA 1980). The State made no such showing. At best, the State showed that the defense deposed many of the officers, but, without the police reports, the defense did not know what questions to ask. The officers discounted their leads as dead-ends, and, when questioned, the original prosecutor had no idea what significance some of the material had. Consequently, it cannot be disputed that the defense did not in fact know about much of the material contained in the McCahon reports and specifically did not know that Phillips had boasted of killing McCahon, that a white male had stabbed McCahon, and that Phillips wore a red shirt at the time of McCahon's death. Similarly, the police reports in White showed that the police obtained information by canvassing the neighborhood of the crime scene, but the defense had no opportunity or time to follow up on these leads.

Without this information, the defense had no reason to pursue these matters further in McCahon and White and discover whether somebody else committed the crime. The right to present this defense that another person was guilty was constitutionally protected. Chambers v. Mississippi, 410 U.S. 284 (1973). Florida courts have often found error when a trial judge does not allow the accused to present evidence to support this defense. Lindsay v. State, 68 So. 932 (Fla. 1915); Moreno v. State, 418 So. 2d 1223 (Fla. 3d DCA 1982); Pahl v. State, 415 So. 2d 42 (Fla. 2d DCA 1982); see also Barnes v. State, 415 So. 2d 1280 (Fla. 2d DCA 1982) (Grimes, J., dissenting). Because it cannot now be determined what the defense would have discovered had it timely received this information, the State cannot sustain its burden of showing that the defense was not prejudiced by the discovery violation.

When a prejudicial discovery violation occurs, the trial court must then consider the proper remedy. The proper remedy in these cases was to grant the continuance that the defense requested. The trial dates in these cases should never have been moved forward in the first place, and they should have been moved back when the State started amending and consolidating charges and providing new discovery on the morning of jury selection. Several cases show that judges should grant continuances when material discovery is provided late, particularly when it is exculpatory.

> In Smith v. State, 525 So. 2d 477, 480 (Fla. 1st DCA 1988), this court stated that "[a] denial of a motion for continuance will be reversed when the record demonstrates . . . that adequate preparation of a defense was placed at risk by virtue of the denial. . . . Hill v. State, 535 So. 2d 354, 355 (Fla. 5th DCA 1988) ("fairness, state and federal constitutional due process rights and the

> Florida Rules of Criminal Procedure require that witnesses be disclosed and made available to a defendant in a criminal case in sufficient time to permit a reasonable investigation regarding the proposed testimony"); Lightsey v. State, 364 So. 2d 72 (Fla. 2d DCA 1978) (trial court erred in denying continuance where due to state's tardy response to discovery demand, defendant was unable to depose certain witnesses or complete an investigation into the facts prior to trial). Adequate time to prepare a defense is inherent in the right to counsel and is founded on due process principles. . . . The state's late disclosure . . . effectively precluded the defendant from compelling the appearance of this witness at trial and denied appellant time to adequately investigate and prepare a defense, thereby violating appellant's due process rights. . . . See Sumbry v. State, 310 So. 2d 445, 446 (Fla. 2d DCA 1975) (defendant's due process rights were violated by the trial court's denial of a motion for continuance where existence of "two potential defense witnesses who could testify concerning the critical issue of identity" was disclosed to the defense on the morning of the trial. . . .

Griffin v. State, 598 So. 2d 254, 256 (Fla. 1st DCA 1992). See also State v. Davis, 532 So. 2d 1321 (Fla. 2d DCA 1988) (proper remedy for belated discovery was continuance); State ex rel. Gerstein v. Durant, 348 So. 2d 405, 408 (Fla. 3d DCA 1977) (same); Rembert v. State, 284 So. 2d 428 (Fla. 3d DCA 1973) (same).

The defense demanded speedy trial in White. The proper remedy for the late discovery in White was to grant a continuance and charge it to the State.

> Discovery must be furnished within sufficient time to permit the defendant to make use of it without having to forfeit his right to a speedy trial, and when discovery is not promptly furnished, the court may continue a case at the state's expense beyond the speedy trial limits even if such continuance effectively results in the discharge of the defendant. State v. Williams, 497 So. 2d 730 (consolidated) (Fla. 2d DCA 1986); State v. Del Gaudio, 445 So. 2d 605 (Fla. 3d DCA 1984).

George v. Trettis, 500 So. 2d 588 (Fla. 2d DCA 1986). Defendants need not surrender their right to speedy trial as the price of

obtaining discovery. Lasker v. Parker, 513 So. 2d 1374 (Fla. 2d DCA 1987).

For these reasons, the motion for speedy trial discharge in White should have been granted. (W4662-65) This Court should remand for that remedy. It should also remand for that remedy in McCahon even though the defense did not specifically request it, because the right to constitutional speedy trial was violated. As a lesser alternative, this Court should remand for a new trial in both McCahon and White.

ISSUE IX

THIS COURT'S PAGE LIMITS ON BRIEFS HAVE UNCONSTITUTIONALLY DENIED THE APPELLANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Approximately in January 1993, this Court informed the Tenth Judicial Circuit Public Defenders Office by phone that briefs over one hundred pages would henceforth be returned by the clerk immediately and not accepted. Since that time, this Court has routinely sent orders such as the attached order in case number 80,794, stating that the "initial brief and answer brief shall not exceed 100 pages. . . . Motions to file enlarged briefs will not be entertained by the Court." The emphasis is this Court's. In addition, this Court, over undersigned counsel's written and oral objections at the time, also amended Florida Rule of Appellate Procedure 9.210, to impose strict rules on type size and number of lines per page. The net effect of these changes is to restrict severely the number of issues that can be raised in an appellate brief.

The statements of judicial acts to be reviewed in McCahon and

White contain a total of 156 and 125 acts respectively. (W8833-49, M8812-33) In undersigned counsel's judgment, these statements are substantially incomplete. The record also contains a memorandum of law on the confession which, if translated into the current requirements for briefs, would consume approximately 80 pages. The defense sentencing memorandum in the record is 26 pages. These memoranda are also both incomplete.

Undersigned counsel is also aware of 40 or 50 page briefs that have been filed on the issue of the felony murder aggravator, which is currently pending in Tennessee v. Middlebrooks, 53 Crim. L. Rep. (1993). Thirty pages of argument have recently been made in Taylor v State, case number 80,121, on the need for a substantial majority in penalty phase recommendations. Each of these issues are present in the present case. If undersigned counsel did no extra work, merely copied these four arguments (confession, sentencing memorandum, Middlebrooks, and substantial majority) from various sources, he would already have 185 pages in the brief. This total would not include the statement of facts and would not include any of the remaining acts among the total of 281 judicial acts listed by trial counsel in these two cases.

Undersigned counsel has been unable to comply with the Court's 100-page limit for briefs and still argue all of the issues that should be argued. Accordingly, he deleted numerous issues that he had written. These issues are attached in the appendix. He also did not attempt to write numerous other issues which should have been argued. Some of these issues, not including the issues attached in the appendix, are as follows:

Guilt phases:

1. Judge would not permit evidence of the polygraph to establish the involuntariness of the confession.

2. The redacted confessions were confusing and too hard to understand.

3. Judge refused to permit additional material from the taped confessions beyond the state's requests.

4. Fiber expert's opinion that fiber probably came from last person to see White was beyond his expertise.

5. Premeditation was not proved.

6. The date was not proved, since the evidence suggested that the crime occurred in the early morning rather than at night. Statement of particulars was improperly denied, and defense did not get benefit of jury instruction on proof of date.

7. When State asked defense expert why he did not redo procedures, this improperly required the defendant to prove his innocence.

8. State referred to collateral sexual battery during closing argument.

9. State introduced irrelevant knife found in field that was not tied to the offense.

10. Felony murder did not occur, because McCahon's death occurred outside.

11. Judge improperly emphasized the tape by telling the jury how to play it.

Penalty phases:

1. The prior violent felonies were on appeal and therefore could not be used as aggravators. If reversed, the aggravators should be reversed also.

2. White should not have been used as an aggravator in McCahon because White occurred before McCahon.

3. Each prior conviction for the prior violent felony aggravator was listed in a manner that made them seem like individual and separate aggravators.

4. Heinousness was not proved because victims could have become unconscious quickly. Death did not occur in McCahon until victim was outside and unconscious.

5. State introduced unnecessary evidence about White in the McCahon penalty phase.

6. Jury was improperly instructed as a matter of law that burglary was a crime of violence rather than told to determine it as a matter of fact.

7. Jury's recommendation should be at least by a substantial majority.

8. The State introduced and argued collateral evidence of sexual battery during the penalty phase, even though it was not charged.

9. The burglary felony murder was not proved in McCahon since the victim was not killed until she collapsed on the sidewalk outside.

10. State introduced improper victim impact evidence when Cornell said she had open heart surgery.

11. Judge said he had glass of gin for defendant's mother, thereby embarrassing her in front of the jury.

12. Detective Sutton improperly told Wendy Fiati while she was in the witness rom that Johnson was guilty.

13. When defense counsel asked if the defendant had solved the cases by confessing, the officer responded "on those cases yes."

14. Departure reasons were invalid.

15. Pecuniary gain was not proved because the money in White was taken twenty minutes later.

16. Proportionality.

Because this Court's rules did not allow undersigned counsel to argue these and other issues, his client has been denied the right to effective assistance of counsel on his first appeal of right under the Fifth, Sixth, and Fourteenth Amendments, Evitts v. Lucey, 469 U.S. 387 (1985), and his right to the greater certainty required by the Eighth Amendment in death cases.

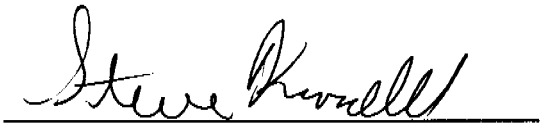
CONCLUSION

This Court should reverse.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this _____ day of September, 1993.

Respectfully submitted,



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