IN THE SUPREME COURT OF FLORIDA

WILLIAM REAVES,

Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

CASE NO. 79,575

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

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IN THE SUPREME COURT OF FLORIDA

WILLIAM REAVES, Appellant/Cross-Appellee, vs. STATE OF FLORIDA, Appellee/Cross-Appellant.	)	CASE NO. 79,575

PRELIMINARY STATEMENT

Appellant/Cross-Appellee, William Reaves, was the defendant in the trial court and will be referred to herein as "Appellant" or by his name. Appellee/Cross-Appellant, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." References to the pleadings will be by the symbol "R," references to the trial transcripts will be by the symbol "T" and references to the supplemental transcripts will be by the symbol "ST" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts as reasonably accurate, but would add the following:

1. During the State's case-in-chief, the State read into the record the prior testimony of Erman Eugene Hinton, since Mr. Hinton refused to testify at trial. As read, Mr. Hinton testified that he was awakened by Appellant early in the morning. When Mr. Hinton opened the door, Appellant said, "Let me -- I done fucked up. I done fucked up. I just shot a cop, I just shot a police, I just shot a cracker." (T 1166-67). Appellant was wearing red shorts, a blue and white pajama top, and black Reebok tennis shoes. He was sweaty and had scratches on his arms and legs. He also had a pistol wrapped in a white T-shirt in his hands. Appellant took a shower and changed clothes. Mr. Hinton later disposed of Appellant's clothes. (T 1167-73).

After his shower, Appellant and Hinton smoked some marijuana, and Appellant told Hinton what happened. Appellant had fallen asleep at his girlfriend's house. When he awoke, he walked down to the Zippy Mart to call a cab. He called several times and, by accident, dialed 911, but hung up before anyone answered. As he stood there waiting for the cab, Deputy Raczkoski drove up, asked Appellant what he was doing there, and asked him for some identification. Deputy Raczkoski called Appellant's name into dispatch for a local warrants check, which came back negative. As they stood there talking--Appellant standing on the outside of the driver's door and Deputy Raczkoski standing on the inside of the driver's door--a gun fell from

Appellant's shorts. Deputy Raczkoski put his foot on it, Appellant hit the officer in the throat causing him to fall backwards, Appellant reached down and picked up the gun, and as he leveled it at the officer who was reaching for his own gun, Appellant said, "I wouldn't do that if I were you." Deputy Raczkoski said, "Don't shoot me, don't kill me, man. You can leave. Please don't kill me. Don't shoot." Deputy Raczkoski raised both hands and said, "Don't kill me" as he backed away toward the rear of the car. At some point, Appellant said to Deputy Raczkoski, "One of us got to go, me or you." Deputy Raczkoski turned and ran while trying to draw his weapon. Appellant shot him four times, ran behind the Zippy Mart, hid in the bushes, then eventually ran to Hinton's. As Appellant confessed, Hinton had no trouble understanding him, his speech was not slurred, and he appeared to be in full control of his faculties. (T 1174-88, 1208-09).

2. During the penalty phase, the State presented the testimony of Edward Haver, who, in 1973, was a motel clerk at a Holiday Inn in Stuart. Mr. Haver testified that Appellant and another man checked into the hotel one evening. Some time later, Appellant came to the front desk, stuck a gun to his head and said, "Hit the floor or I will blow your head off." The two men robbed the cash register, then tied Mr. Haver up with a lamp cord and left. The State introduced a certified copy of conviction into evidence. (T 1838-50, 1860-62).

3. The State also presented the testimony of James Attkison, the commander of the uniformed patrol division in Indian River County in 1973. Mr. Attkison testified that he was

[illegible] 3:00 [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] box at the Holiday

Inn [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] had informed Dr. Weitz. Both witnesses also testified

that [illegible]

[illegible] during the penalty phase that on September

30, 1991, [illegible]

[illegible] What [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] by a

drug [illegible]

[illegible]

[illegible] the [illegible]

[illegible]

[illegible]

Appellant was allowed to elicit the fact that Dr. Cheshire had never met or interviewed Appellant, even though the State had sought to have Appellant interviewed by Dr. Cheshire prior to trial, but was prohibited by the court. (T 2236-37).

SUMMARY OF ARGUMENT

Issue I - A witness who is unavailable for trial and whose former testimony is read into evidence may not be impeached by inconsistent statements made before the former testimony.

Issue II - Once the trial court corrected Appellant's misleading question during voir dire, jurors Dudley and Hambelton both stated that they would follow the court's instructions and not recommend death automatically. Juror Kaplan, the lone Jewish juror, was not excused peremptorily by the State based on her ethnicity. Rather, despite repeated efforts by the State to instill the burden of proof, juror Kaplan intimated that she might hold the State to higher burden. Finally, based on juror Mill's equivocal answers regarding her ability to recommend death if appropriate, the trial court properly excused her for cause.

Issue III - This Court has previously held that evidence of a diminished capacity less than legal insanity is inadmissible to rebut the intent element of first-degree murder. Thus, expert testimony that Appellant suffered from "Vietnam Syndrome" was properly excluded.

Issue IV - After reversing Appellant's conviction from the previous trial, this Court specifically rejected Appellant's contention that the entire state attorney's office was disqualified from prosecuting him. Thus, on remand, after hearing testimony regarding the former prosecution team's efforts to screen themselves from the new prosecution team, the trial court properly determined that disqualification of the entire office was not warranted.

Issue V - None of the complained-of comments by the State during its closing arguments amounted, either individually or collectively, to harmful error. Thus, to the extent Appellant sought such relief, the trial court properly denied his motions for mistrial.

Issue VI - The evidence of Appellant's attempted narcotics transaction which culminated in his arrest for this murder was so inextricably intertwined that it would not have been reasonably possible to excise it from the evidence presented without confusing or misleading the jury.

Issue VII - This Court issued an order appointing Judge Balsiger, a county court judge from the Nineteenth Judicial Circuit, to act as a circuit court judge and to hear this case in the Fifth Judicial Circuit pursuant to a change of venue requested by Appellant.

Issue VIII - Appellant's requested instructions regarding premeditated murder, reasonable doubt, and the burden of proof when an affirmative defense is alleged were adequately encompassed within the standard instructions.

Issue IX - The autopsy photograph of the victim was relevant to identify the deceased. The victim's clothing was relevant to show the nature of the victim's wounds and as proof of the underlying felony of escape urged by the State but ultimately rejected by the trial court. At no time did the uniformed officers in the courtroom prejudice the jury; thus, the trial court did not abuse its discretion in allowing them to view the trial in uniform.

Issue X - The venire was properly selected from the county's registered electors.

Issue XI - Based on its assessment of the complexity of the case and the fact that it was a retrial, the trial court properly denied defense counsel's request for appointment of co-counsel.

Issue XII - Letters sent by the prosecutor to its hired expert witness contained the prosecutor's opinions, theories, and conclusions regarding this case; therefore, those letters were privileged "work product" not subject to discovery by Appellant.

Issue XIII - There were sufficient additional facts in this case which set this case apart from the norm of capital felonies. Thus, the trial court did not abuse its discretion in finding the existence of the heinous, atrocious, or cruel aggravating factor. Even if it were error, there remain two weighty aggravating factors and minimal nonstatutory mitigating factors. Thus, there is no reasonable possibility that the trial court would have imposed a lesser sentence had it not found HAC.

Issue XIV - The record supports the trial court's rejection of (1) Appellant's expert's testimony that Appellant suffered from "Vietnam Syndrome" and (2) Appellant's testimony that he was so "high" on cocaine at the time of the shooting that his ability to conform his conduct to the requirements of the law was substantially impaired.

Issue XV - Contrary to Appellant's assertion, the trial court found the existence of all of Appellant's asserted nonstatutory mitigating circumstances, but gave it minimal weight.

Issue XVI - This Court has previously rejected all of the challenges posed by Appellant to Florida's death penalty statute. It should continue to do so.

Issue on cross-appeal - Appellant was appointed a confidential expert to assist in his defense, namely, for asserting mental mitigation. Unless rebutted, any mitigation proposed by Appellant must be accepted by the trial court. In order to adequately rebut the testimony of an expert witness whose opinions are based on personal interviews with the defendant and the defendant's description of the events of the crime, the State must be allowed an opportunity for its expert witness to interview the defendant.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PREVENTING APPELLANT FROM IMPEACHING A WITNESS WITH PRIOR INCONSISTENT STATEMENTS (Restated).

During the State's case-in-chief, the prosecutor informed the trial court that it wanted to call Erman Eugene Hinton as a witness, but that Mr. Hinton refused to testify. (T 1120-22). In the jury's absence, the trial court questioned Mr. Hinton about his refusal to testify and ultimately determined that Mr. Hinton was "unavailable" as a witness. As a result, the State was allowed to read Mr. Hinton's testimony from the first trial into the record. (T 1122-29). Prior to doing so, however, Appellant indicated that he wanted to introduce several statements made under oath by Mr. Hinton that were inconsistent with his prior trial testimony. After Appellant proffered the alleged prior inconsistent statements, the trial court asked for legal authority that would allow their admission, and the following colloquy occurred:

> [DEFENSE COUNSEL]: I can give you due process of law.
>
> THE COURT: No. Can you give me some authority, some precedent cases?
>
> [DEFENSE COUNSEL]: Your Honor, I don't know that it's come up. I don't have authority at hand. But I can tell you this. I can tell you that it's going to be a deprivation of due process to not let the jury hear the whole story, and just to give them the sanitized version that occurred at the last trial where -- for whatever reasons -- the cross-examination did not go into a great number of areas that needed to be gotten into, in order to show that the witness's credibility was extremely low.

(T 1130-44). The trial court ruled that such impeachment was not proper when the witness is unavailable and his prior testimony is being read to the jury. (T 1146-47).

In this appeal, Appellant again claims that his preclusion from impeaching Mr. Hinton's testimony with prior inconsistent statements denied him a fair trial. However, Appellant now asserts that his proffered impeachment evidence was admissible under section 90.806(1) of the Florida Evidence Code, since Mr. Hinton was a "hearsay declarant" rather than a "witness," thereby rendering the usual predicate for impeachment by prior inconsistent statements inapplicable. **Brief of Appellant** at 30-34. As revealed by the foregoing excerpts, this argument was not made below. Consequently, Appellant may not make it for the first time on appeal. See Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Even if he had preserved it, it is wholly without merit. As Appellant readily concedes, Mr. Hinton was "unavailable" within the meaning of § 90.804(1)(b) of the Florida Evidence Code; thus, his prior testimony was properly admitted under § 90.804(2)(a). See **Brief of Appellant** at 32. Although Mr. Hinton's prior testimony was an out-of-court statement offered to

prove the truth of the matter asserted, and thus fell within the definition of "hearsay," see **Fla. Stat.** § 90.801(1)(c) (1991), it was admissible, nonetheless, under the former testimony exception to the hearsay rule, see id. § 90.804(1)(b). The fact that Mr. Hinton becomes a "hearsay declarant" by virtue of his absence at trial and the consequent use of his former testimony, however, does not allow the type of impeachment contemplated by Appellant under § 90.806(1), which provides:

> When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with his hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it.[1]

In the Sponsor's Note to § 90.806, the following comments are made:[2]

> The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His creditability should in fairness be subject to impeachment and support as though he had in fact testified. See §§

---

[1] Normally, with live testimony, an alleged prior inconsistent statement must be shown or disclosed to the witness, pursuant to section 90.614(1). In addition, § 90.614(2) provides that extrinsic evidence of this prior inconsistent statement is inadmissible unless "the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate him on it."

[2] The Advisory Committee's Note to Federal Rule of Evidence 806 is strikingly similar, as is the rule itself. See Moore's Federal Practice, 1993 Rules Pamphlet, Federal Rules of Evidence, Part 2, at 437-41. However, Federal Rule of Evidence 613(a) no longer requires the impeaching party to show the alleged inconsistent statement or disclose its contents to the witness before questioning him or her about it.

90.609 and 90.610. However, the difference between hearsay testimony and that of an actual witness makes it difficult to follow the same rule as when impeaching a witness who testifies.

* * * *

The difference in the particular type of hearsay seems unimportant when the inconsistent statement is a *subsequent* one. When the hearsay is former testimony or a deposition, the opponent is not totally deprived of cross-examination, but he is deprived of cross-examining on the inconsistent statement or along lines suggested by it. The few cases in this area from other jurisdictions generally hold that a party may not dispense with the requirement of asking the witness whether he made the contradictory statement. See 3 Wigmore, *Evidence* §1032 (3rd ed. 1940).

* * * *

When the hearsay consists of former testimony, it is possible to call the prior statement to the attention of the witness or deponent since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Wigmore describes the cases as divided, 3 Wigmore, *Evidence* § 1030 (3rd ed. 1940). However, deposition procedures are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. There is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately be used as evidence. The possibility also exists that knowledge of the statement might not be acquired until after the time of cross-examination. Therefore, this section dispenses with the requirement that the witness be first offered the opportunity to explain or deny an inconsistent statement in all hearsay situations, which is easily administered and best calculated to lead to fair results.

(Emphasis added).

At the first trial, Mr. Hinton was cross-examined extensively by defense counsel (though not the same counsel as in the present trial), and was impeached by some prior inconsistent statements, as evidenced by the transcripts read at the retrial. Defense counsel in the present case, however, disliked the quality of cross-examination by prior counsel and wanted to impeach Mr. Hinton with other inconsistent statements that were made prior to his testimony in the first trial. In other words, defense counsel wanted to use statements which had been made prior to, and which were available to defense counsel at the time of, the first trial. These alleged inconsistent statements related to (1) "what other witnesses were there when William Reaves arrived at Eugene Hinton's house and told his story" (T 1138-39), (2) "the last time that Eugene Hinton claims to have seen William Reaves prior to the shooting" (T 1139-40), (3) Hinton's failure to mention during any of the prior statements that he and Appellant smoked marijuana (T 1140), and (4) Hinton's inconsistent descriptions of the gun he claims he saw in Appellant's possession before and after the shooting (T 1140-42). None of Mr. Hinton's allegedly inconsistent statements relate to what Appellant told him about the shooting. Rather, they all relate to Hinton's ability to relate extraneous details surrounding Appellant's confession to him.

As the Sponsor's Note to § 90.806 discusses, when, as here, former trial testimony which was the subject of extensive cross-examination is used, and the inconsistent statements sought to be used to impeach are made prior to the testimony, are known by, and available to, defense counsel prior to the witness'

testimony, and do not relate to the substance of the witness' testimony, the inconsistent statements should not be admitted. The rationale for such a rule was expressed in a case under similar facts in 1895:

> While the enforcement of the rule, in case of the death of the witness subsequent to his examination, may work an occasional hardship by depriving the party of the opportunity of proving the contradictory statements, a relaxation of the rule in such cases would offer a temptation to perjury, and the fabrication of testimony, which, in criminal cases especially, would be almost irresistible. If it were generally understood that the death of a witness opened the door to the opposite party to prove that he had made statements conflicting with his testimony, the history of criminal trials leads one to believe that witnesses would be forthcoming with painful frequency to make the desired proof. The fact that one party has lost the power of contradicting his adversary's witness is really no greater hardship to him than the fact that his adversary has lost the opportunity of recalling his witness and explaining his testimony would be to him. There is quite as much danger of doing injustice to one party by admitting such testimony as to the other by excluding it. The respective advantages and disadvantages of a relaxation of the rule are so problematical that courts have, with great uniformity, refused to recognize the exception.

Mattox v. United States, 156 U.S. 237, 260-61 (1895).

Defense counsel in this case had the opportunity to use those statements to impeach the witness during the first trial, but chose not to do so. Moreover, had the statements been admitted at the retrial, the witness would not have been available to explain or deny making the allegedly inconsistent statements, and the State would have had no opportunity to rehabilitate the witness. As this Court has often stated, "The trial court has wide discretion in areas concerning the admission

of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed." Welty v. State, 402 So.2d 1159 (Fla. 1981). Here, Appellant has failed to show an abuse of discretion. Therefore, the trial court's ruling should be affirmed.

Even assuming, however, that Appellant has preserved this issue and that he has shown an abuse of discretion in the preclusion of this impeaching evidence, there is no reasonable possibility that the trial court's ruling affected the jury's verdict in this case. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). All of the physical evidence, along with Appellant's confession and his immediate flight from the area, support his conviction for first-degree premeditated murder. Even if Appellant's impeaching evidence had been admitted and Mr. Hinton's testimony was partially or completely discredited by the jury because of it, there was a sufficient quantity and quality of other evidence upon which the jury could have legitimately relied to reach its verdict in this case. Therefore, this Court should affirm Appellant's conviction.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN RESTRICTING APPELLANT'S QUESTIONS DURING VOIR DIRE, IN DENYING TWO OF APPELLANT'S CHALLENGES FOR CAUSE, IN PERMITTING THE STATE TO EXERCISE A PEREMPTORY CHALLENGE AGAINST A JEWISH JUROR, AND IN GRANTING A CAUSE CHALLENGE BY THE STATE (Restated).

A. Appellant's cause challenges to jurors Dudley and Hambelton

In questioning the first panel of venire members, Appellant asked, "How many of you think that if a person kills another person, takes their life, goes to trial, is found guilty beyond and to the exclusion of every reasonable doubt, that that person ought to get the death penalty?" (T 432). Several members raised their hand. After questioning juror Dudley and juror Hambelton in more detail on this issue, the State interposed an objection, arguing at side-bar that the question was misleading in that it did not include the weighing process that is instructed on by the court. (T 434-35). Initially, the trial court overruled the State's objection. (T 435).

While defense counsel was questioning juror Hambelton further on this issue, the trial court interrupted:

> I think the problem is I told you earlier there was going to be two phases to this and you will be asked to weigh aggravating and mitigating circumstances.
>
> Will you follow the law as I instruct you the law to be or do you just feel that just automatically because somebody -- if somebody were to be convicted of first degree murder that automatically they would just receive the death penalty; or would you weigh and consider aggravating and mitigating circumstances as the Court instructs you?

PROSPECTIVE JUROR HAMBELTON: As instructed, yes.

(T 436-37).

Appellant then moved on to another juror who had raised their hand to his original question and asked, "If you knew nothing more other than the fact that they were convicted, didn't know anything about aggravating circumstances, didn't know anything about the mitigating circumstances, do you think they ought to get the death penalty for killing someone else?" (T 438). Again, the State objected, and the trial court sustained the objection, stating, "That is not the law and that is not what they're going to be instructed on. There's more to it." (T 438).

Notwithstanding the trial court's admonition not to ask that question, defense counsel persisted with another juror, and the state objected. Once again, the trial court sustained the objection and told defense counsel, "You're allowed to explore it, but you must ask the total question and that's not [it.]" (T 439-40). Thereafter, the trial court inquired of the jury:

> Let me ask the jurors, do you understand that you will be asked to weigh certain aggravating and mitigating circumstances before you're asked to come back with a recommendation on death or life? Do you understand that?
>
> PROSPECTIVE JURORS: Yes.
>
> THE COURT: Will you consider those aggravating and mitigating circumstances before you would come back with any such recommendation?
>
> PROSPECTIVE JURORS: Yes.
>
> THE COURT: Are there any of you who would just totally ignore listening to the

> aggravating and mitigating circumstances, automatically just go back and vote for the death penalty because somebody is convicted of first degree murder?
>
> PROSPECTIVE JURORS: No.
>
> THE COURT: Thank you. Let's proceed.

(T 440-41).

At the end of defense counsel's questioning, he moved to have the panel stricken and to have a mistrial declared because of the trial court's restriction on his questioning. The motions were denied, and the State was allowed to question the panel again. (T 505-06). Specifically, the State sought to rehabilitate juror Dudley, and others, regarding their previous answers:

> Specifically, Mr. Dudley, in reference to the question which [defense counsel] asked you as to how you would rule as to the death penalty.
>
> Do you understand that under the law of the United States and specifically here in Florida that no one can receive the death penalty automatically simply because they are convicted?
>
> PROSPECTIVE JUROR DUDLEY: Yeah, I understand that. You can't say the man -- go in there and you're going to give him the death penalty just by walking in the jury room. You have to look at the evidence and everything what's against him.
>
> [THE STATE]: And everyone agrees as to that? The issue is not -- because a person is found guilty of first degree murder, they don't automatically in your minds or under the law automatically receive the death penalty?
>
> PROSPECTIVE JURORS: (Nodding heads.)
>
> [THE STATE]: Mr. Dudley, you would also agree that you would follow the Judge's instructions, the written instructions and the oral instructions that he would give you in the second phase as to considering the proper punishment?

PROSPECTIVE JUROR DUDLEY: Yes.

[THE STATE]: And you would follow those instructions?

PROSPECTIVE JUROR DUDLEY: Yes.

[THE STATE]: And part of those instructions would be that you are to weigh, as all of the members of the jury are, the aggravating versus mitigating to determine what the appropriate and proper punishment for this Defendant in this circumstance of this case is?

PROSPECTIVE JUROR DUDLEY: Yes.

[THE STATE]: Everybody would follow the same procedure of the Judge's instructions?

PROSPECTIVE JURORS: Yes.

(T 506-07).

At the end of the questioning, Appellant moved to challenge jurors Dudley and Hambelton for cause. The trial court denied the challenges: "The problem was, back again, in the juror trying to answer your question when the question was wrong. And I think once the question and the proposition was put to the jurors properly, I mean the whole thing, then there would be no reason to grant a cause challenge on either one of these." (T 512-13). As a result, Appellant struck the two jurors peremptorily, claiming that he was forced to do so because of the trial court's ruling. (T 513-14). After later exercising all of his peremptory challenges, Appellant requested more, although he did not say how many more, and indicated that, were he given more, he would excuse four jurors presently on the panel and "any additional members" that may be forthcoming, but the trial court denied his request. (T 640-42).

In this appeal, Appellant claims that the trial court abused its discretion in restricting the form of Appellant's question and in denying Appellant's challenges for cause. **Brief of Appellant** at 34-41. Not surprisingly, Appellant does not challenge the trial court's denial of his request for additional peremptories. As noted, after Appellant exercised all of his peremptory challenges, including the two for jurors Dudley and Hambelton, Appellant sought additional peremptories from the trial court, claiming that he would strike four more jurors on the panel if permitted, and perhaps others not yet seated. His effort to preserve this issue for appeal, however, appears quite disingenuous. Having jurors Dudley and Hambelton struck for cause would not have satisfied him. He had at least two more people that he wanted to strike but could not. What he wanted was more peremptories. It mattered not whether jurors Dudley and Hambelton were excused for cause or peremptorily. In other words, his claim for more peremptories was not in response to the trial court's refusal to strike jurors Dudley and Hambelton for cause, but rather as a ploy to obtain more peremptories. Such a tactic should not be condoned, however, under the guise of preserving the issue for review.

Regardless, Appellant's claim has no merit. While the State would agree that jurors who are predisposed to vote automatically for death are proper candidates for a challenge for cause, neither of the two jurors challenged professed that predisposition. After being informed initially of the two-phase system by the court and the State, the jurors' were misled by Appellant's later question to them. As the trial court realized,

the proper question was whether the juror would automatically vote for the death penalty regardless of any mitigating or aggravating evidence presented. Once the question was asked properly, no one equivocated; they would follow the instructions, weigh the aggravating and mitigating circumstances, and recommend an appropriate sentence. Thus, where there was no basis for any reasonable doubt as to these jurors' ability to render an impartial verdict and recommendation based solely on the evidence and the law, the trial court did not abuse its discretion in denying Appellant's challenges for cause. See Brown v. State, 565 So.2d 304 (Fla. 1990), cert. denied, 112 L.Ed.2d 547 (1991).

B. The State's excusal of a Jewish juror

Near the beginning of the State's voir dire of the first panel, the prosecutor explained the State's burden of proof in the guilt phase. Everyone indicated that they understood the standard and would not apply a higher standard because this was a death case. (T 354-59). Defense counsel also explained the State's burden of proof as it contrasted with the burden of proof in a civil case, and as it related to Appellant's right not to testify and his freedom from having to prove his innocence. (T 492-99).

After the first round of challenges, juror Kaplan, and three others, were seated in the jury box. They all indicated that they had heard the questions asked of the first panel. (T 516). During the State's questioning of these four jurors, one of the jurors stated that, "if the evidence is put to the jury, that it's found more towards the prosecution's side, the preponderance

of the evidence is towards [the State]," he could vote for the death penalty. (T 532). At that point, the State reiterated that the standard of beyond a reasonable doubt was the standard during the guilt phase and that a weighing process would have to be performed during the penalty phase. (T 532-34). Despite the attorneys' efforts to instill the correct standard of proof, juror Kaplan stated shortly thereafter: "I believe [the death penalty is] appropriate if the evidence has proven that the defendant is guilty without any doubt, without any reasonable doubt, and that I could, I could vote for it if that were proven to me." (T 534). Again, the State reiterated that the standard was not beyond all doubt, but beyond all reasonable doubt. (T 534-35).

During Appellant's questioning, defense counsel elicited the fact that juror Kaplan was Jewish, as he asked all of the venire members their religious affiliation, if any. (T 546). Thereafter, Appellant excused two members of this second panel, and a third round began. Again, the burden of proof was discussed by both the State and defense counsel. (T 562-66, 572). After the third round, Appellant excused two jurors, and the State excused juror Kaplan. At that point, Appellant made a challenge pursuant to Neil v. State, 457 So.2d 481 (Fla. 1984), and claimed that the State was striking juror Kaplan solely because she was Jewish. (T 573-74). When asked by the trial court to respond, the State argued that Neil did not apply to ethnic/religious groups such as this and that, even if it did, he excused her because:

> Ms. Kaplan yesterday in questioning in my voir dire -- it may have been prior to my -- it was during my voir dire where she made the statement to "any doubt;" not "beyond a reasonable doubt," but to "any doubt."
>
> And then she later corrected that. However, it's the State's position that she believed at least inside that that's the standard of proof that she would require.
>
> And even though she indicated that she would follow the law, I have a tendency to believe that people in that position who stated that actual fact, that they would require that standard which is higher than the law, are going to have a tendency to push the State to a higher standard of law than that which is going to be instructed to the jurors.
>
> Based on that, I want jurors that have -- not only will follow the law, but will have the instinctiveness to follow the law as it already exists and not require the State to be pushed to a higher standard.
>
> She made that statement. She did correct it[;] however it's my feelings that she would not be an appropriate juror for the State.

(T 575-76). Appellant disagreed with the State's statement and claimed that other jurors had expressed similar confusion over the standard of proof, but the State had not excused them. (T 576-77). The trial court overruled the objection, finding that "there does not exist any substantial likelihood that the peremptory challenge was made in violation of Neal [sic]." (T 577-78).

In this appeal, Appellant initially claims that "Jews certainly are a cognizable ethnic group" who qualify for constitutional protection. The State disagrees. Just as persons who practice Catholicism are ethnically diverse, so are persons who practice the Jewish religion. The label "Jew" does not necessarily denote ethnicity. While persons of Jewish descent

tend to have certain identifiable physical traits, not all persons who practice the Jewish faith necessarily have those characteristics. In other words, not all persons who practice the Jewish faith have the type of identifiable characteristics as persons belonging to an ethnic group such as Hispanics, or to a racial group such as Negroes.

In questioning the jurors, Appellant sought their religious affiliation, if any, not their ethnicity. To charge the State with ethnic bias where Appellant elicited the information, and where the State professed no interest in the jurors' ethnicity or religious affiliation, borders on bad faith. Neither the law of this State nor of the United States supports Appellant's assertion. Thus, Appellant's Neil challenge should have been overruled without seeking a response from the State. Since the trial court was obviously unsure about whether Ms. Kaplan's Jewish affiliation afforded her heightened constitutional protection, however, the trial court sought a response from the State. Its response was an ethnically neutral reason for her excusal.

Contrary to Appellant's assertion, no other juror expressed a similar misunderstanding of the burden of proof. Perhaps her initial expression of the State's burden of proof--beyond any doubt--was merely a misstatement that did not truly reflect her understanding of the law. However, the prosecutor, who saw her demeanor and heard her tone of voice, believed that she would impose a higher burden on the State. Thus, out of an abundance of caution, he excused her. As the trial court found, his reason for doing so was an ethnically neutral, nonpretextual one.

As this Court recently reaffirmed in Files v. State, case #78,552 (Fla. Dec. 10, 1992), the trial court, by virtue of its superior vantage point, must be given broad discretion in determining whether peremptory challenges are racially motivated. Not only is it better-suited to assess the demeanor of both the juror and the prosecutor, but it has the advantage of personally witnessing the jury selection process from beginning to end. From this vantage point, the trial court in this case determined that the State's peremptory challenge of Ms. Kaplan was not ethnically motivated. Consequently, Appellant's Neil challenge was properly overruled. As such, this Court should affirm the trial court's ruling and Appellant's conviction.

C. Juror Mills' excusal for cause

During the State's questioning of the fifth panel, the prosecutor asked the panel if anyone had any religious or moral beliefs that would prevent them from passing judgment and recommending a sentence on another person. Juror Mills responded as follows:

> I have a personal feeling towards that. I believe in capital punishment. But if it affects so many people's lives that whether he's innocent or guilty, if he was proven guilty, I don't know that I would want to have any say-so on sending somebody to death.
>
> [THE STATE]: And that's important. I believe you're being very candid as to that. Because as a member of a jury you wouldn't sentence the Defendant to death but you would make an advisory recommendation.
>
> Do you understand the importance of that?
>
> PROSPECTIVE JUROR MILLS: Yes, sir.

[THE STATE]: Do you feel you have such strong feelings that --

PROSPECTIVE JUROR MILLS: I feel that if I was selected for jury duty I would do everything by the law and my personal feelings wouldn't -- I would do what I had to do and I'm sure I would do the right thing. But personally, inside, I wouldn't feel comfortable with myself doing it.

[THE STATE]: Okay. And then I guess I need to ask this. Do you feel that you would feel so uncomfortable inside personally that you might not be able to follow the instructions that the Judge gives you?

And there are people that will say, "I know what the law is and I know it's my duty to follow it, but I also have some personal moral beliefs and those are even stronger and I cannot follow the law."

PROSPECTIVE JUROR MILLS: I believe I could follow the law. I would just have to deal with it.

THE COURT: Let me step in here for a second, Mr. Barlow. Now, let me just understand now. Are you opposed to the death penalty?

PROSPECTIVE JUROR MILLS: No, I'm not opposed to it.

THE COURT: Okay. But would your views prevent you from finding the Defendant guilty if the evidence so warranted it because you might be concerned that the death penalty would be imposed?

PROSPECTIVE JUROR MILLS: No.

THE COURT: Would your views on the death penalty interfere or substantially impair your ability to judge the guilt or innocence of the Defendant in this case?

PROSPECTIVE JUROR MILLS: If I was selected -- excuse me. I'm not good with words under pressure, but if I was selected and if I had to do this, if he was guilty, if they decided he was guilty, I would do what I would have to do by the law if I was selected.

But my personal feelings is -- I mean whether I have personal feelings or not, I would do what I would have to do and I would deal with my feelings. I don't know any other way to answer that.

THE COURT: I understand that and we're not trying to argue with you; just trying to get exactly, you know, where your standing is on this thing.

Do these feelings -- would these feelings that you have, do you feel would they interfere with or even substantially impair your ability to judge guilt or innocence?

PROSPECTIVE JUROR MILLS: I don't know.

[THE STATE]: Ms. Mills, do you think that you would be able to sign a verdict form --

PROSPECTIVE JUROR MILLS: No.

[THE STATE]: -- recommending -- in the first phase you wouldn't be able to sign that verdict form?

PROSPECTIVE JUROR MILLS: No.

[THE STATE]: Do you think in the second phase you would be able to sign a verdict form recommending to the Court to impose the death penalty if that was the decision of the jurors and yourself?

PROSPECTIVE JUROR MILLS: I would not want to sign a death penalty form.

[THE STATE]: Okay. Do you think you might be suited for another case other than this sort of case?

PROSPECTIVE JUROR MILLS: Yes, sir.

[THE STATE]: Do you think that this case, because it involves first degree murder, death penalty, that it might be very traumatic to you and that you wouldn't be able to fulfill you duties?

PROSPECTIVE JUROR MILLS: Yes, sir.

(T 622-25) (emphasis added). Then, during Appellant's questioning of the panel, the following colloquy occurred with juror Mills:

> [DEFENSE COUNSEL]: Is it fair to say that you consider the death penalty a serious, a serious question and a question that requires a lot of thought and lot of introspection?
>
> PROSPECTIVE JUROR MILLS: Yes, sir.
>
> [DEFENSE COUNSEL]: Would you also agree with me that probably every person on this jury is going to be indulging in that same kind of process of thoughtful and careful introspection?
>
> PROSPECTIVE JUROR MILLS: Yes, sir.
>
> [DEFENSE COUNSEL]: With that in mind, do you believe that you can -- knowing that that is a possibility and that it's out there in the universe of possibilities -- let's look at the Phase One of the trial.
>
> During the Phase One of the trial do you think that your concerns about it possibly being a death penalty case would stop you from being able to consider the evidence and decide whether or not the State has proved its burden?
>
> PROSPECTIVE JUROR MILLS: No, sir.
>
> [DEFENSE COUNSEL]: What's that?
>
> PROSPECTIVE JUROR MILLS: No, sir.
>
> [DEFENSE COUNSEL]: With that you realize that we all here -- his Honor, the prosecutor and myself and the rest of the jurors -- have a certain civic responsibility and that I think you would agree that these are many times difficult questions.
>
> But do you think that if William Reaves was found guilty in the first, in the first part of this trial, that that thoughtfulness and that care that you're alluding to would prevent or substantially impair you from evaluating aggravating factors and evaluating mitigating factors per his Honor's discussion and his instructions?

Would it prevent you form listening to those instructions and making your decision according to law?

PROSPECTIVE JUROR MILLS: No, sir.

[DEFENSE COUNSEL]: Are you sure about that?

PROSPECTIVE JUROR MILLS: Yes, sir.

[DEFENSE COUNSEL]: Are you unequivocal about that?

PROSPECTIVE JUROR MILLS: Yes, sir.

[DEFENSE COUNSEL]: Thank you for your honesty and I know these are difficult questions.

* * * *

[DEFENSE COUNSEL]: Do you want to serve on this jury?

PROSPECTIVE JUROR MILLS: No, sir.

[DEFENSE COUNSEL]: But you will?

PROSPECTIVE JUROR MILLS: I will.

[DEFENSE COUNSEL]: And is that because you believe it's part of your civic duty?

PROSPECTIVE JUROR MILLS: Yes, sir. And I will do the right thing. I will -- I mean, my personal feelings, none of that will come in here. That has nothing to do with Mr. Reaves that is seating [sic] over there.

And I will do what I have to do and I feel I could do that if I have to. But if I had a choice, would I like to, no.

[DEFENSE COUNSEL]: I think many of the people on the panel would be similarly inclined. If at the conclusion of a second phase you had to put your name on a piece of paper recommending to the Judge a sentence of life or death, could you do that?

PROSPECTIVE JUROR MILLS: If I had to, I would.

[DEFENSE COUNSEL]: If the Judge instructed you that you had to, would you?

PROSPECTIVE JUROR MILLS: Yes, sir.

[DEFENSE COUNSEL]: Thank you.

(T 628-29, 630-31).

Finally, during the State's reexamination of the panel, Juror Mills made the following remarks:

[THE STATE]: Ms. Mills, we're not picking on you, but we're asking questions because obviously the issue of the death penalty is the central focus and concern to both parties in this case.

And you're the first juror that has indicated any hesitancy, I guess, along those lines. And that's why I'm here to ask you, you know, would you be the appropriate juror in this sort of case?

PROSPECTIVE JUROR MILLS: I feel I would be more qualified for a different kind of case.

[THE STATE]: Different kind of case. And is that because of your personal feelings you feel might prohibit you -- might come into, subconsciously or otherwise, into your feelings of whether you could render a decision in favor of the death penalty?

PROSPECTIVE JUROR MILLS: I just know it makes me feel --

THE COURT: The question is whether or not it would interfere with her, substantially impair her ability to judge guilt or innocence in the first place is the test.

Do your feelings -- let me ask you again. Are your feelings or your views on the death penalty, are they such that they would interfere with --

PROSPECTIVE JUROR MILLS: No. My feelings are my feelings. I would go on what the attorneys were showing.

THE COURT: Well, but you need to listen to my question, okay. Now, the question is

whether or not your feelings about the death penalty either interfere with or even substantially impair your ability to judge the guilt or innocence of the Defendant.

PROSPECTIVE JUROR MILLS: I guess not.

(T 635-37) (emphasis added).

Immediately thereafter, the following colloquy was had at side-bar:

THE COURT: Do you want to argue or discuss the cause challenge?

[THE STATE]: Judge, the State is moving for cause to strike Ms. Mills. Judge, clearly by the questions that you even asked here, she didn't even have the ability to answer those questions.

She was almost -- and I would ask the Court to establish this for a finding in the record. She was almost sobbing in her voice, crying. It was a sort of manner that that is a particular person --

She indicated she would not prefer to sit on this case, would not like to sit on this case, would rather sit on another case. Even though she answered some questions correctly, they were certainly equivocal when compared to other questions.

Yet the main thing is she was not able to answer the Court's questions of would it substantially impair her ability. And that's -- obviously when you can't answer --

THE COURT: I think the first time I asked her she said it would and then she said it wouldn't and then the third time -- I asked her three times.

[THE STATE]: I know.

THE COURT: Mr. Kirschner, do you want to --

[DEFENSE COUNSEL]: Your Honor, she certainly wasn't crying. I would say that she responded in response to leading questions by the prosecutor, which were certainly designed in a way in order to try and get her to commit

> to being equivocal and not being able to follow the standard and she held her ground very well.
>
> When I had a chance to redirect her, she specifically said and unequivocally, that she would not let her feelings about the death penalty impact upon her in the first phase of the trial; that, indeed, she would be willing to sign any verdict form in the penalty phase of the trial recommending either life or death.
>
> THE COURT: Of course, the first time she was asked that question she said she would not do it and then you said she would. And I asked her myself three times following the guidelines and the last one was, "I guess not," which is certainly, at best, equivocal.
>
> And I'm going to -- so I'm going to -- for those reasons, I'm going to allow the challenge for cause.
>
> I will state for the record though that I won't go so far as to say that she was sobbing. She was quite emotional and appeared that tears were welling up and very difficult for her. I wouldn't go so far as to say she was sobbing.
>
> So I will grant the challenge for cause. At best, her answer was equivocal.

(T 637-39).

In this appeal, Appellant claims that the trial court abused its discretion in excusing juror Mills for cause. **Brief of Appellant** at 43-45. As the above excerpts reveal, however, Ms. Mills was extremely disturbed about the prospect of potentially having to recommend a sentence of death. As the trial court noted, she was "quite emotional" and her answers to the court's questions were "at best, equivocal." (T 638-39). Under similar circumstances, this Court held:

> It is the duty of a party seeking exclusion to demonstrate, through questioning, that a

> potential juror lacks impartiality. The trial judge must then determine whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. On appeal the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record. We believe that the trial court's finding that Burse's views would have substantially impaired his performance as a juror is adequately supported by the record. While being examined relative to his fitness to serve as a juror, Burse answered, "I don't know" or otherwise equivocated ten times in response to questions concerning his views of the case and the death penalty. The fact that he ultimately responded affirmatively to a question regarding his ability to follow the law as instructed does not eliminate the necessity to consider the record as a whole. When the entire Burse colloquy is considered, we conclude that the trial judge did not abuse his discretion in removing Burse for cause.

Trotter v. State, 576 So.2d 691, 694 (Fla. 1990). As in Trotter, juror Mills' answers and her demeanor created a reasonable doubt as to her ability to render an impartial verdict based solely on the evidence and the law. Therefore, the trial court properly exercised its discretion in excusing Ms. Mills for cause. See also Randolph v. State, 562 So.2d 331 (Fla. 1990), cert. denied, 112 L.Ed.2d 548 (1991).

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING THE TESTIMONY OF APPELLANT'S EXPERT WITNESS REGARDING A DIMINISHED CAPACITY DEFENSE (Restated).

Prior to trial, the State filed a motion to prohibit testimony of abnormal mental condition not constituting legal insanity. (R 2577-2605). At the hearing on the motion,

Appellant conceded that evidence of diminished capacity that did not rise to the level of insanity was inadmissible, and the trial court granted the State's motion as the evidence applied to rebut the specific intent element of first-degree murder, but left open the possibility that it may be admissible for some other purpose. (T 209-212; R 2618).

At the close of the State's case-in-chief, the State raised the issue again. (T 1469). Appellant offered a memorandum of law to the Court and argued that the testimony was not offered to rebut the specific intent element of the crime, but to establish the elements of his excusable homicide affirmative defense. (T 1469-74; R 2906-10). Again, the trial court granted the State's motion, finding the evidence inadmissible where the defense of insanity had not been raised. (T 1473-74). Thereafter, Appellant proffered Dr. Weitz's testimony. (T 1475-1533).

In this appeal, Appellant again claims that Dr. Weitz's testimony was not being offered as evidence of diminished capacity, but, rather, was being offered to support the elements of his excusable homicide defense. According to Appellant, the manifestations of his "Vietnam Syndrome" produced in his mind a heat of passion brought on by the victim's sudden provocation which was sufficient to overcome the use of ordinary judgment, thereby incapacitating his ability for reflection. As authority for his position, Appellant cites to cases in which "Battered Spouse Syndrome" has been admitted to support the elements of self-defense, namely, that the accused reasonably believed that

it was necessary to use deadly force to prevent imminent death or great bodily harm to herself.[3] **Brief of Appellant** at 46-51.

Appellant's analogy to cases involving "Battered Spouse Syndrome" is unavailing. First, the defendants in these cases were not charged with first-degree premeditated murder, which requires a period of reflection. Second, the defendants' acts were perpetrated against the person who had precipitated the syndrome. In no case has a defendant claimed "Battered Spouse Syndrome" to justify the death of a person not responsible for her traumatization. Here, however, Appellant made no claim that he believed himself to be in a jungle in southeast Asia confronted by an enemy soldier. To the contrary, Appellant knew that he was at a convenience store in 1986 confronting a sheriff's deputy who was trying to retreat and draw his weapon after Appellant gained possession of his own weapon and was threatening the deputy's life. The victim did nothing to provoke Appellant; rather, Appellant created the situation by fighting for and gaining control over the weapon that fell from his shorts. Third, the testimony sought to be admitted did not prove that the victim's actions were sufficient to produce in the mind of an ordinary person the highest degree of anger, rage, or resentment that was so intense as to overcome the use of ordinary judgment, as the defense requires.[4] See **Fla. Stand. Jury Instr.**

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[3] Appellant also cites to cases in which evidence of child sexual abuse accomodation syndrome, rape trauma syndrome, and post-traumatic stress disorder has been admitted. However, in these cases, the evidence was admitted as it related to the victim, not the defendant. Thus, these cases are wholly inapplicable.

[4] The State would note that the long-form instruction on excusable homicide which contains this "ordinary person" standard was not read to the jury. See infra Issue VIII at 59 & n.7.

in Crim. Cases 76 (1981). Rather, it was sought to be admitted to prove that Appellant was so overcome by a heat of passion that he could not reflect on his actions. Finally, although Appellant claimed that he was not offering the evidence to rebut the specific intent element of the offense, the excusable homicide defense, by its nature, seeks to prove that Appellant could not reflect on his actions, i.e., premeditate, because of his heat of passion.

In Chestnut v. State, 538 So.2d 820, 821 (Fla. 1989) (emphasis added), this Court rejected a claim similar to Appellant's, approving the trial court's finding that "absent an insanity plea, expert testimony as to mental status, especially when offered to bolster an affirmative defense would be improper in and of itself since it would only tend to confuse the jury." Here, no plea of insanity was tendered, and the evidence was sought to be admitted to bolster an affirmative defense whose object was to rebut the specific intent element of first-degree murder. Based on Chestnut, the trial court properly excluded in the guilt phase Dr. Weitz's testimony that Appellant suffered from "Vietnam Syndrome." See Bunney v. State, 579 So.2d 880 (Fla. 2d DCA 1991) (evidence of an alleged epileptic condition properly excluded in first-degree murder trial in absence of plea of insanity).

Even if, however, the trial court should have allowed Dr. Weitz to testify during the guilt phase, his failure to do so was harmless beyond a reasonable doubt. Based on the sufficient quality and quantity of evidence upon which the jury relied to find Appellant guilty, there is no reasonable possibility that

this evidence, if admitted, would have affected the jury's verdict. See State v. DiGuilio, 429 So.2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's conviction.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE STATE ATTORNEY'S OFFICE (Restated).

At Appellant's first trial, he filed a motion to disqualify the State Attorney's Office from prosecuting the case because the prosecutor, State Attorney Bruce Colton, had previously represented Appellant as an Assistant Public Defender in another case. On appeal, this Court reversed the trial court's denial of his motion. In so doing, it cautioned that "any prosecutor must be properly screened from other state-attorney personnel. Failure to do so may require the trial court, upon a proper motion and factual predicate, to disqualify the entire state attorney's office." Reaves v. State, 574 So.2d 105, 107 (Fla. 1991) (citing to State v. Fitzpatrick, 464 So.2d 1185 (Fla. 1985)).

At Appellant's retrial, he again filed a motion to disqualify the State Attorney's Office. As grounds, Appellant alleged that

> State Attorney Colton, having access to privileged, confidential communications of a client, directly participated, as lead counsel, in the prosecution of that former client for first degree premeditated murder, ultimately securing a conviction and death sentence. Colton's involvement and participation to date, violates the bipartite requirements as stated in Fitzpatrick, Supra., and under the tenets of that decision, mandate disqualification of the entire State Attorney Office.

(R 2422) (emphasis in original).

At the hearing on the motion, the State initially called Bruce Colton as a witness. Mr. Colton testified that, after this case was reversed on appeal, he believed that this case could be retried by his office if he, co-counsel, and the original investigator were properly screened from the new prosecutors and investigator. As a result, Mr. Colton appointed Richard Barlow to prosecute the retrial because Mr. Barlow had had nothing to do with the original prosecution. In addition, Mr. Colton appointed an investigator who also had had nothing to do with the case. Mr. Colton specifically instructed his former co-counsel and the original investigator not to discuss the case in any way with the new prosecution team, and he instructed the new prosecution team not to seek assistance from the former team. To the best of his knowledge, no information, in any form, had been shared between the current and the former attorneys and investigators. (T 41-45).

Next, the State called Assistant State Attorney David Morgan, Mr. Colton's former co-counsel, as a witness. Mr. Morgan testified that he and Mr. Barlow had never communicated, in any way, either during the initial prosecution or the retrial, about this case. (T 53-56). Mr. Barlow, the current prosecutor, also testified that he had never had any communication with any member of the original prosecution team about this case. In fact, until being appointed to prosecute this case, Mr. Barlow had worked in another county, and thus had very little contact with the office in which Mr. Colton and Mr. Morgan worked. In addition, he has made certain that his new investigator did not have any contact

about this case with the former investigator, despite the fact that they work in the same branch office. (T 57-63).

Thereafter, after argument from counsel, the trial court held:

> The Court finds that there has been no evidence of any confidential communication even remembered, let alone communicated to any parties.
>
> I also find that there is no evidence of any memory of any memory of any prior communication, or any memory of the actual representation of Mr. Reaves by Mr. Colton, let alone any communication of that representation, or that prior communication, or that possible confidential communication to any other person.
>
> There is no evidence that Mr. Colton or Mr. Morgan, or anyone else in the first prosecution team provided any prejudicial information, nor any other information relating to this pending criminal charge, nor is there any evidence that they have personally assisted in any capacity in the prosecution of this pending charge subject to the retrial order by the Florida Supreme Court.
>
> Nor has there been any indication or evidence of any communication with Mr. Barlow, nor Ms. Nelson, or any other portion of the present prosecution team.
>
> I find that the evidence supports the integrity of the shielding required by both Fitzpatrick and Reaves, and that I specifically find that any communication to the new prosecution team has been so shielded, and there is no evidence to the contrary.
>
> I find that the Florida Supreme Court in writing this opinion has not directed this trial court to disqualify the entire office, nor the Florida Supreme Court did not disqualify the entire State Attorney's office, which is the direct issue on appeal in this case, directly related to the context of the appeal, and directly related to the authority that the Florida Supreme Court had before it at that time.

> I do find that the appearance of propriety has been upheld. I find that the Florida Supreme Court directions in Fitzpatrick and Reaves have been complied with by the Nineteenth Circuit's State Attorney's office.
>
> I do deny the defendant's motion to disqualify[.]

(T 69-70).

In this appeal, Appellant again claims that the entire state attorney's office should have been disqualified because the mandates of State v. Fitzpatrick, 464 So.2d 1185 (Fla. 1985) had not been met. Specifically, Appellant claims that, because Mr. Colton participated substantially in the first trial, the appearance of impropriety has been cast on the whole office and no amount of screening could dispel the taint. **Brief of Appellant** at 51-54. The State disagrees.

In Fitzpatrick, this Court adopted a specific test for disqualifying attorneys from a government office: "We find . . . that imputed disqualification of the entire state attorney's office is unnecessary when the record establishes that the disqualified attorney has neither provided prejudicial information relating to the pending criminal charge nor has personally assisted, in any capacity, in the prosecution of the charge." 464 So.2d at 1188. Appellant is obviously taking this language literally without considering the fact that this Court rejected his argument in the first appeal and that this case is now here after retrial.

The principal issue in the first appeal was whether the entire state attorney's office should have been disqualified. This Court rejected that argument and remanded for a new trial by

the same state attorney's office. If disqualification of the entire office would have been appropriate, then this Court would have found it to be so, as that was the issue before it. It did not do so. Rather, this Court cautioned that the disqualified attorney had to be screened from other state-attorney personnel, lest the trial court disqualify the entire office. Here, the State provided uncontroverted testimony that the new prosecution team had had, and would have, no contact regarding this case. As the trial court found, the dictates of Reaves and the appearance of propriety were upheld.

To prove otherwise, Appellant claims that State Attorney Colton was "de minimus involved in the prosecution" in that transcripts from the first trial were read into the second trial, the prior conviction on which Mr. Colton represented Appellant was admitted into the trial as proof of the "prior violent felony conviction" aggravating factor, and every motion tendered by the new prosecutor contained the name of Mr. Colton. **Brief of Appellant** at 53. Such does not constitute participation by the previously disqualified attorney. Although the prior trial transcripts were read, they were not admitted into evidence in their printed form, and the jury was not informed of the derivation of those transcripts or by whom the testimony was elicited.[5] Further, no connection was made between the defense attorney's name on the prior conviction and the state attorney's office trying the case. And, since Mr. Colton was the elected state attorney for that circuit, all pleadings filed by the

[5] In fact, the trial court went to great lengths to shield from the jury the fact that this was a retrial.

assistants had to contain his name. Besides the fact that these instances were not put before the trial court as bases for the motion, they simply do not engender even the appearance of impropriety. To the contrary, the State presented competent and uncontroverted evidence that the new prosecution team had been completely screened from the former disqualified team. Since Appellant has failed to show that the trial court abused its discretion in relying on this evidence and denying his motion to disqualify, this Court should affirm the trial court's ruling and Appellant's conviction.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL DURING THE STATE'S CLOSING ARGUMENTS (Restated).

Appellant complains that the State sought to inflame the passions of the jury by making repeated inappropriate remarks which cumulatively denied him a fair trial. **Brief of Appellant** at 54-57. The State disagrees. When read as a whole and in context, the State's closing arguments properly conveyed the State's view of the evidence as it applied to the law and properly rebutted Appellant's theory of the case. In a few instances where the State misspoke, the trial court sustained Appellant's objections and remedied the error by cautioning the prosecutor and/or instructing the jury to disregard the statement. These few instances, however, did not vitiate the entire proceeding or improperly influence the jury to return a guilty verdict.

Appellant first complains that the prosecutor pointed to Detective Pisani in the gallery when he referred to Appellant's taped confession. Appellant's objection was sustained by the trial court. No relief was requested and the State continued with its argument. (T 1662). This hardly warranted a mistrial.

In discussing the actions of Appellant which proved motive and premeditation, the State mentioned his flight to Georgia and his attempt to finance his escape through the sale of the cocaine with which he was arrested. (T 1668). Appellant made no objection. He did object some time later, however, when the State again mentioned his attempt to sell cocaine and his use of the gun to intimidate the undercover officer. Appellant renewed his objection to the admission of the evidence and moved for a mistrial because the State was allegedly making it a feature of the trial. The trial court denied the motion for mistrial, but cautioned the State not to make it a feature. (T 1671-72). Again, since the evidence of Appellant's attempted drug transaction was properly admitted during the trial and was not a "feature" of the State's case, see Issue VI, infra, a mistrial was not warranted.

Appellant next asserts that "the most egregious abuses" occurred during the State's rebuttal argument. **Brief of Appellant** at 55. First, citing two instances, Appellant complains that the State "repeatedly indulged in personal attacks on appellant's counsel, as well as on appellant." Id. During neither of these "egregious abuses," however, did Appellant even register an objection, much less a motion for mistrial, assumedly because he did not find them objectionable at the time they were

made. See (T 1735, 1738-39). Even now, when read in context, they do not support Appellant's characterization of them, and most assuredly do not constitute fundamental error.

Nor do they support Appellant's assertion that "[t]his not so thinly veiled approach was abandoned in favor of less subtle strategies when the prosecutor told the jurors that appellant's counsel was attempting to 'insult your intelligence.'" **Brief of Appellant** at 55. This latter comment occurred before the others; thus, Appellant's argument makes no sense. Moreover, Appellant's objection to this latter comment was sustained, and his motion to strike was granted. (T 1734). He neither requested a curative instruction, nor moved for a mistrial. He obtained the relief he requested and was due no more.

Appellant's next complaint must be put in context. During his closing argument, Appellant contended that it would not have made sense for him to decide to kill Deputy Raczkoski because the officer had just called his name and birthdate into dispatch for a warrants check. (T 1695). In rebuttal, the State was attempting to show that it made perfect sense, because, by killing the officer, there would be no witness. The fact that Appellant's name had been called in before the officer's death was very little proof of guilt:

> There would have been no crime that could have been proved against that Defendant by the dispatchers or anyone else at that point. The only witness that could have proved a crime was Deputy Raczkoski because he would have been the only witness to prove that the Defendant was carrying that gun that night.
>
> That's why he was killed. He was the witness. He was the one person in this world that could have said in a court of law on a

> witness stand that, 'That Defendant, William Reaves, is the person on the morning hours of September 23rd that I met at the Zippy Mart carrying that weapon and I arrested him for that.'
>
> The Defendant knew that. The Defendant made sure that --
>
> [DEFENSE COUNSEL]: Objection, Your Honor. We need to approach.

(T 1741-42). At side-bar, Appellant moved for a mistrial and objected to "prosecutorial misconduct for arguing through the acting as the slain deputy and pretending to be the deputy as part of argument. It's inflammatory and improper." (T 1742). The trial court overruled the objection and denied the motion for mistrial (T 1742) -- and properly so, since the State's argument was appropriate rebuttal to Appellant's closing argument.

Next, without any citation to the record, Appellant complains that the State was arguing that defense counsel was attempting to confuse the jury about premeditation and was responsible for the instructions on all the lesser-included offenses. **Brief of Appellant** at 55. Presumedly, Appellant is referring to argument on pages 1742-43 of the trial transcripts, wherein the State was noting Appellant's absence of argument on his confession which proves his motive and premeditation. The State was merely beseeching the jury not to be confused by all of the lesser-included offenses which Appellant hopes the jury will consider. The trial court recognized the propriety of the State's argument and denied his motion for mistrial. (T 1744).

Finally, Appellant complains, again without citation to the record, that the trial court only interceded when the State attempted to make a "Golden Rule" argument. **Brief of Appellant**

at 56. The trial court did intercede at one point, without any objection from Appellant, and instructed the jury to disregard the statement and asked the State to rephrase it. (T 1751). Contrary to Appellant's assertion, by doing so promptly the trial court sufficiently cured any error engendered by the State's inartful wording.

As this Court has stated on many previous occasions, "a motion for a declaration of a mistrial is addressed to the sound discretion of the trial judge," and that "the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity." Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). It is also well-settled that "both a motion to strike the allegedly improper [comments] as well as a request for the trial court to instruct the jury to disregard the [comments] are thought to be necessary prerequisites to a motion for mistrial." Palmer v. State, 486 So.2d 22 (Fla. 1st DCA 1986). Here, Appellant failed to satisfy his burden. Several times, Appellant did not even object to the alleged improper comments. Other times, he objected, but requested no relief. Still others, he moved for a mistrial, but neither moved to strike nor requested a curative instruction. Now, on appeal, he claims that all of these "egregious abuses" cumulatively deprived him of a fair trial. They did not.

In State v. Murray, 443 So.2d 955, 956 (Fla. 1984) (citation omitted), this Court enunciated the appropriate test for review of such claims:

> [P]rosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether 'the error committed was so prejudicial as to vitiate the entire trial.' The appropriate test for whether the error is prejudicial is the 'harmless error' rule set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the Court in United States v. Hasting, ___ U.S. ___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

As noted previously, only a few of the State's comments were inappropriate. In each instance, the trial court admonished the State and instructed the jury appropriately. None of these instances, either singularly or cumulative, was so prejudicial as to vitiate the entire trial. Moreover, in light of the physical evidence linking Appellant to the crime, his flight from the state immediately after the shooting, his confession to Eugene Hinton, and his confession to the police upon his arrest, there is no reasonable possibility that the few improper comments by the prosecutor during closing arguments affected the jury's verdict in this case. Consequently, this Court should affirm Appellant's conviction.

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF APPELLANT'S ATTEMPTED NARCOTICS TRANSACTION WHICH RESULTED IN HIS APPREHENSION FOR THE INSTANT MURDER (Restated).

Prior to trial, Appellant filed a motion in limine, seeking to exclude evidence of Appellant's attempt to buy or sell drugs shortly before his arrest in Georgia. In support of his motion, Appellant alleged that the attempted drug transaction did not constitute evidence of flight, and thus was not relevant. Moreover, because it was evidence of another crime, its probative value, if any, was outweighed by its prejudicial effect. (R 2855-58). At the hearing on the motion, the State responded that Appellant's arrest in Georgia, which thereafter produced a detailed confession, was inseparable from the other evidence. Not only was the attempted drug transaction a part of his escape, but Appellant referred to it several times in his taped confession. Because the trial court had not read the confession, it took the motion under advisement. (T 270-73).

During the testimony of the State's first witness, the identification technician charged with collecting and maintaining control over all of the physical evidence, the State indicated that it wanted to introduce the cocaine seized from Appellant upon his arrest. (T 845-47, 849-52). Although acknowledging that he had not moved to suppress the cocaine itself, Appellant argued that evidence of the attempted drug transaction in Georgia was not relevant, or, if relevant, more prejudicial than probative. Ultimately, Appellant had no objection to the cocaine

being admitted, just the evidence of the attempted drug transaction. (T 848-49, 852-56). Finding that the transaction and cocaine were part of Appellant's flight from the crime, the trial court denied Appellant's motion in limine. (T 855, 856; R 2900). Later, when the State sought to introduce testimony relating to the attempted drug transaction, Appellant renewed his objection, which was again overruled. (T 1241).

In this appeal, Appellant maintains that the attempted drug transaction was not relevant to the killing or the flight and was offered merely to show bad character, or that, if relevant, was more prejudicial than probative. **Brief of Appellant** at 58-59. In Smith v. State, 365 So.2d 704, 707 (Fla. 1978), cert. denied, 444 U.S. 885 (1979), this Court stated, "Among other purposes for which a collateral crime may be admitted under Williams is establishment of the entire context out of which the criminal conduct arose." Since then, this Court and others around the state have allowed the admission of evidence of other crimes when the other crimes are "inextricably intertwined" with the charged offense. See, e.g., Jackson v. State, 522 So.2d 802 (Fla. 1988), cert. denied, 488 U.S. 871 (1989); Henry v. State, 574 So.2d 66, 70-71 (Fla. 1991); Austin v. State, 500 So.2d 262 (Fla. 1st DCA 1986), rev. denied, 508 So.2d 13 (Fla. 1987); Garcia v. State, 521 So.2d 191 (Fla. 1st DCA 1988); Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA), rev. denied, 496 So.2d 144 (Fla. 1986); Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990), rev. denied, 576 So.2d 286 (Fla. 1991).

In this case, the State's evidence established that, after Appellant shot Deputy Raczkoski, he ran to a friend's house where

he showered and changed clothes. (T 1163-88). Another friend, Jerry Bryant, picked up Appellant and drove him to the Colonial Motel in Melbourne where they stayed until Appellant took a cab to a shopping mall in Melbourne. (T 1224, 1227-31). Later that morning, Appellant purchased a one-way bus ticket from Melbourne to Albany, Georgia. (T 1233-39). Having discovered Appellant's escape route, the Indian River police called the Albany police and asked them to apprehend Appellant when he got off the bus. (T 1243-44). They described Appellant as a black male, approximately 5'9" tall, weighing around 150 pounds, with short hair and a dark complexion. (T 1247, 1248) In response, an undercover officer, Deputy Hall, and two uniformed officers, Deputies Enfinger and Daniel, went to the bus station. When Appellant's bus drove up, Deputy Hall stood outside, while the other officers stayed in the unmarked police car. Almost immediately a black male (Appellant) got off the bus and approached the officer. First, Appellant asked where he might get a cab and was directed to a pay phone. Then, Appellant asked where he might stay and was directed to a Holiday Inn down the street. Because Deputy Hall did not think that Appellant was the suspect, he tried to get rid of him so that he could concentrate on the other people getting off the bus. When too many people fit the general description of the suspect, and when Appellant approached him about selling some cocaine, Deputy Hall decided to make a drug bust. (T 1244-49).

After approaching Deputy Hall about buying some marijuana and cocaine, Appellant told Deputy Hall that he had some cocaine for sale. They went into the men's restroom at the bus station,

where Appellant put down a J.C. Penney bag, pulled out a handgun (later identified as the murder weapon), put it back in, pulled out a big bag of cocaine, put it back in, pulled out a smaller bag of cocaine, and offered Deputy Hall a $20 rock of crack cocaine to "try." Realizing that this person was the suspect he had come to find, Deputy Hall went into a stall under the guise of "trying" the cocaine, but emerged with a gun he retrieved from his ankle holster. At that point, Appellant grabbed the gun, they struggled, the gun went off, and Deputy Hall regained control over Appellant. Deputy Hall arrested Appellant and took him outside to the other officers. When Deputy Hall returned from talking to the bus station's security officer, Appellant bolted, and the three officers gave chase, ultimately subduing Appellant a few blocks away. (T 1249-54).

At the police station, Appellant identified himself as "Randy Martin," but the police quickly identified him from his fingerprints. (T 1288-1301). Later, after waiving his Miranda rights, Appellant gave a taped confession to the murder. (T 1328-33; Court's Exhibit #6). During this confession, Appellant claimed that he was "high" on cocaine at the time of the shooting. He also indicated that, after the murder, he asked Jerry Bryant to take him to his mother's house to pick up some cocaine. Bryant drove to Appellant's mother's house, dropped Appellant off before they got there, got the cocaine from Appellant's mother's house himself, and picked up Appellant again. Appellant agreed to give Jerry Bryant one half-ounce of cocaine if Bryant would drive Appellant to Melbourne, which he did. Appellant also stated that he went to Albany to sell the cocaine in order to finance his escape. (Court's Exhibit #6).

As is evident from the foregoing, the attempted drug transaction which culminated in Appellant's apprehension for this murder was necessary to establish the entire context of the crime. Appellant's theory of defense was that he was provoked by Deputy Raczkoski and shot him before he realized what he was doing. In other words, it was an accident, not a premeditated murder. To rebut this contention, the State submitted evidence of Appellant's elaborate flight from the area to show a consciousness of guilt. Part of Appellant's plan to evade capture and prosecution was admittedly to sell cocaine to finance his travel. This attempted drug transaction was in furtherance of that plan and, contrary to Appellant's assertion, was relevant, along with his other acts in furtherance, to show a consciousness of guilt. Thus, the trial court did not err in allowing it into evidence. Even if it were error, however, it would have been harmless beyond a reasonable doubt in light of the quality and quantity of permissible evidence upon which the jury legitimately could have relied to reach the same verdict. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Consequently, this Court should affirm Appellant's conviction.

ISSUE VII

WHETHER THE TRIAL COURT HAD JURISDICTION TO TRY THE CASE (Restated).

Prior to the first trial in this case, Appellant's motion for change of venue was granted, and the case was transferred from the Nineteenth Judicial Circuit in and for Indian River County to the Twelfth Judicial Circuit in and for Sarasota

County. On April 1, 1991, this Court issued its mandate reversing the first conviction and remanding for a new trial. (R 2349). On April 11, 1991, the chief judge of Indian River County appointed Judge Walsh, a county court judge in the Nineteenth Circuit, as acting circuit judge to preside over the retrial. (T 2363). Pursuant to his appointment, Judge Walsh transferred venue from Sarasota County to the Fifth Judicial Circuit in and for Marion County because Sarasota County could not physically accommodate the trial. (R 2467, 2468). Upon motion by Appellant, Judge Walsh recused himself from the case because of his prior tenure with the state attorney's office and his "friendship" with defense counsel (R 2469-78, 2484), and the chief judge appointed Judge Balsiger, also a county court judge in the Nineteenth Circuit, as acting circuit judge to preside over the retrial. (R 2493).

On February 11, 1992, six days before trial, Appellant filed a motion to disqualify the trial court/motion to dismiss for lack of jurisdiction, claiming that the chief judge of the Nineteenth Judicial Circuit did not have authority to appoint a county court judge to try a case in the Fifth Judicial Circuit. (R 2846-50). At the hearing on the motion, the trial court summarily denied the motion, finding that it was not a "well founded motion at all." (T 265-66).

In this appeal, Appellant again claims that the chief judge of the Nineteenth Judicial Circuit did not have the legal authority to appoint a county court judge to try a circuit court case outside of the chief judge's circuit. **Brief of Appellant** at 59-61. As this Court must be aware from its own order issued on

December 30, 1991, by then-Chief-Justice Shaw, Judge Balsiger was authorized by Justice Shaw to try this case in Marion County as an acting circuit court judge pursuant to Article V, § 2(b) of the Florida Constitution and Florida Rule of Judicial Administration 2.030(a)(3)(A).[6] Therefore, Appellant's claim has no merit, and his conviction and sentence should be affirmed.

ISSUE VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S SPECIAL INSTRUCTIONS ON PREMEDITATED MURDER AND BURDEN OF PROOF AND IN OVERRULING APPELLANT'S OBJECTION TO THE STANDARD INSTRUCTION ON REASONABLE DOUBT (Restated).

A. Premeditated murder instruction

Prior to trial, Appellant filed a written objection to the standard jury instruction on first-degree premeditated murder, claiming that the instruction was "unconstitutional and misstate[d] Florida law" in that it "relieve[d] the State of its burdens of proof and persuasion as to the statutory element of 'premeditated design'" and "as to the requirement that the premeditated design be fully formed before the killing." (R 2636) (emphasis in original). As authority for this proposition, Appellant cited to McCutchen v. State, 96 So.2d 152 (Fla. 1957), wherein this Court defined the phrase "premeditated design." (R 2629-39). At the hearing on the motion and at the charge conference, the trial court overruled the objection and rejected

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[6] For the convenience of all parties, Appellee has attached this Court's order as an appendix to this brief, and would note that this Court has the authority to take judicial notice of its own orders. **Fla. Stat.** § 90.202(6) (1991).

Appellant's proposed instruction based on McCutchen. (T 223-25, 249, 614-15; R 2877).

In this appeal, Appellant renews his objection to the standard instruction and claims that the trial court abused its discretion in denying his proposed instruction. **Brief of Appellant** at 61-64. The State disagrees. The pith of Appellant's argument is based on a case from 1957. Since then, this Court has adopted and revised the standard jury instructions in criminal cases numerous times. To a great extent, Appellant's proposed instruction mirrors the standard instruction on first-degree murder as amended in 1976. In 1977, this Court requested the Supreme Court Committee on Standard Jury Instructions in Criminal Cases to revise the instructions. These revisions, which were adopted by this Court in 1981, resulted in an instruction that has remained unchanged to this date. See In re Jury Instr. in Crim. Cases, 431 So.2d 594 (Fla. 1981). As the instruction reads now, the defendant must "consciously decid[e]" to kill, and "[t]he premeditated intent to kill must be formed before the killing." **Fla. Stand. Jury Instr. in Crim. Cases** 63 (Oct. 1981). This is a correct statement of the law. Thus, the trial court did not abuse its discretion in rejecting Appellant's modifications. See Parker v. State, 456 So.2d 436, 444 (Fla. 1984) ("[T]he requested instructions were encompassed within the standard jury instructions which were properly given.").

B. Reasonable doubt instruction

Prior to trial, Appellant also filed a written objection to the standard jury instruction on reasonable doubt, claiming that

the phrase "abiding conviction of guilt" supplanted proof "beyond a reasonable doubt." As authority for this proposition, Appellant relied principally on Cage v. Louisiana, 111 S.Ct. 328 (1990), wherein the United States Supreme Court found Louisiana's "reasonable doubt" instruction unconstitutional. (R 2653-61). At the hearing on the motion and at the charge conference, the trial court overruled Appellant's objection to the instruction. (T 226-30, 1601; R 2880).

Appellant again claims in this appeal that the reasonable doubt instruction misstates the burden of proof. **Brief of Appellant** at 64-66. In Woods v. State, however, the Fourth District recently rejected an identical claim:

> Nothing in the Cage opinion . . . causes us to question a reasonable juror's ability to properly interpret the Florida instruction as requiring that the jury find the defendant not guilty if there is a reasonable doubt as to guilt. Nor does Cage place in doubt the effort in the Florida instruction to assist a juror in evaluating the circumstances in which a doubt may not be reasonable. We also note that just prior to the U.S. Supreme Court opinion in Cage, Florida's reasonable doubt instruction was again examined and upheld by the Florida Supreme Court in Brown v. State, 565 So.2d 304 (Fla.), cert. denied, ___ U.S. ___, 111 S.Ct. 537, 112 L.Ed. 547 (1990).

596 So.2d 156, 158 (Fla. 4th DCA 1992). As noted in Woods, this Court recently rejected a challenge to the "reasonable doubt" instruction in Brown: "According to Brown the standard instruction dilutes the quantum of proof required to meet the reasonable doubt standard. We disagree. This Court has previously approved use of this standard instruction. The standard instruction, when read in its totality, adequately defines 'reasonable doubt,' and we find no merit to this point." 565 So.2d at 307.

C. Burden of proof instruction

At trial, Appellant requested a special instruction regarding the affirmative defense of excusable homicide. Specifically, Appellant wanted the following added to the excusable homicide instruction: "If you find that the State of Florida did not prove beyond and to the exclusion of every reasonable doubt that this killing was not excusable, then you must find the defendant not guilty." (T 1615-17; R 2915-16). The trial court denied the requested instruction (T 1617), and Appellant now claims it abused its discretion in doing so. **Brief of Appellant** at 66-67. The State disagrees.

Appellant specifically waived the affirmative defense of justifiable use of deadly force. (R 2913). In that instruction, the jury is advised that it should find the defendant not guilty if it has a reasonable doubt about whether the defendant was justified in using deadly force. **Fla. Stand. Jury Instr. in Crim. Cases** § 3.04(d), at 43 (Oct. 1985). The instruction on excusable homicide, however, does not have, and has never had, a similar provision.[7] Id. at 76. See also **Fla. Stand. Jury Instr. in Crim. Cases** 67 (1976). While it is true that the State has the ultimate burden of proving guilt beyond a reasonable doubt, i.e., that the homicide was not excusable, the instructions as read adequately and effectively convey this legal principle. Not

[7] Curiously, although the parties discussed the excusable homicide instruction at the initial charge conference and decided that only paragraph two of the long-form applied (T 1578-79, 1595-97, 1624), the long-form excusable homicide instruction was not read to the jury. Only a modified version of the short-form instruction found in the introduction to homicide was read to the jury. (T 1769, 1775).

only was the jury read the "presumption of innocence" and "reasonable doubt" instructions (T 1777-78), but it was also instructed as follows:

> Now, the Constitution requires the state to prove its accusations against the Defendant. It is not necessary for the Defendant to disprove anything, nor is the Defendant required to prove his innocence. It is up to the State to prove the Defendant's guilt by evidence.

(T 1780). These instructions, when read together with all of the other instructions, adequately informed the jury of the State's burden of proof when an affirmative defense is alleged. Thus, the trial court did not abuse its discretion in denying Appellant's requested instruction. See Parker v. State, 456 So.2d 436, 444 (Fla. 1984).

ISSUE IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING AN AUTOPSY PHOTO AND CLOTHING OF THE DECEASED AND IN ALLOWING UNIFORMED DEPUTIES TO REMAIN IN THE COURTROOM DURING THE TRIAL (Restated).

A. Photograph

Prior to trial, Appellant filed a motion in limine seeking to preclude the State from admitting into evidence unspecified photographs of, and articles of clothing belonging to, the victim on the basis that they were irrelevant and prejudicial. (R 2818-20). At the hearing on the motion, the trial court denied the motion, but agreed to reconsider it at the time the evidence was being admitted. (T 253-55; R 2896).

During the testimony of Lieutenant Hamilton, the victim's shift supervisor at the time of the murder, the State showed the witness State's Exhibit #66. Lieutenant Hamilton identified the exhibit as a photograph of the victim, Richard Raczkoski. No objection was registered by Appellant. (T 1063). Later, during the medical examiner's testimony, the State showed Dr. Walker the same exhibit, and the doctor indicated that he took the photograph of the victim "[t]o document the findings later." (T 1073). At that point, the State moved to admit the exhibit into evidence, and Appellant objected, claiming that "the photograph is inflammatory and will excite the passions of the jury." (T 1074). The trial court overruled the objection and admitted the photograph. (T 1074).

In this appeal, Appellant again complains that the photograph was irrelevant, as well as overly prejudicial. **Brief of Appellant** at 67-69. The State disagrees. This photograph was relevant to prove identity and to corroborate the medical examiner's testimony. Jackson v. State, 545 So.2d 260, 265 (Fla. 1989). Moreover, it was not so shocking in nature as to outweigh its probative value. As this Court has so aptly stated:

> Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments. . . . It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused.

Henderson v. State, 463 So.2d 196, 200 (Fla.), cert. denied, 473 U.S. 916 (1985). The trial court did not abuse its discretion in

admitting the photograph in question. Even if it were error, such error was harmless in light of the sufficient quantity and quality of permissible evidence upon the jury could have relied to reach its verdict. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

B. Clothing

As noted above, Appellant's pretrial motion in limine seeking to exclude unspecified articles of clothing belonging to the victim was denied. (T 253-55). At the trial, the State sought to introduce into evidence, through the crime-scene evidence technician, the victim's shirt and undershirt depicting numerous bullet holes. Appellant made no objection. (T 803-06). The witness then identified the victim's pants, which were obtained from an officer at the hospital. Appellant objected to their introduction, claiming that the chain of custody had not been established and that they were irrelevant and prejudicial. The trial court sustained the objection on chain of custody grounds. (T 807-09). The witness then identified the victim's service belt found at the scene. When the State sought to introduce it, Appellant objected to its relevance and prejudicial nature. Appellant's objection was overruled. (T 810-12). Finally, the witness identified the victim's shoes, which were found at the scene. Appellant objected to their introduction on relevancy and prejudice grounds as well. When asked by the court to establish their relevancy, the State indicated that it was trying to show that the victim was fully identifiable as a law enforcement officer by his uniform and that "there was no

mistaking that he was a deputy at the time he was shot." (T 819). At side-bar, the State also indicated that this was important since it related to the State's felony murder theory that the victim was killed while Appellant was resisting arrest.[8] (T 819-20). The trial court overruled Appellant's objection. (T 821). Appellant renewed his objection to the admission of the victim's pants when the State sought to admit them through Lieutenant Hamilton, who collected them at the hospital. This time, Appellant's objection was overruled. (T 1061-62).

In this appeal, Appellant renews his complaint to the admission of this evidence, again asserting that it is irrelevant, or, if relevant, more prejudicial than probative. **Brief of Appellant** at 68-69. Evidence is admissible if it tends to prove a material fact in issue. **Fla. Stat. §** 90.401 (1991). In this murder prosecution, the State was originally proceeding under a theory of both premeditation and felony murder, the underlying felony being escape. To prove this, the State had to show that Appellant was in the custody of a law enforcement officer. While there was a multitude of evidence establishing that Richard Raczkoski was a deputy, his uniform established that Appellant knew without question that he was a deputy authorized to effect an arrest.

Moreover, the State was required to establish the victim's death. As the medical examiner testified, there was a bullet hole in the upper left rear of the victim's pants. (T 1450).

---

[8] The trial court ultimately concluded that the State could not proceed under a felony murder theory because Appellant was not under arrest at the time of the shooting. (T 1458-68, 1570-71).

Thus, like the shirts, to which Appellant raised no objection, the pants also established the victim's wounds which ultimately led to his death. Although Appellant graciously stipulated to the cause of death, the identification of the victim, and the location and number of wounds to the victim's body (R 2818-20; T 253-55), the State is not required to accept such stipulation. Edwards v. State, 414 So.2d 1174, 1175 (Fla. 5th DCA 1982) ("A defendant cannot, by stipulation as to the identity of a victim and the cause of death, relieve the State of its burden of proof beyond a reasonable doubt.").

Even if this evidence was only marginally relevant, its relevance nevertheless outweighed any prejudicial effect it might have engendered. As noted, the blood-soaked, bullet-riddled shirts were admitted without objection. The pants, belt, and shoes did nothing to "inflame the jury's passion" as alleged by Appellant. Thus, the trial court did not abuse its discretion in admitting this evidence. Even if it were error, it was harmless beyond a reasonable doubt in light of the quality and quantity of permissible evidence upon which the jury legitimately relied in reaching its verdict. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

C. Uniformed officers in the courtroom

Prior to trial, Appellant moved to preclude uniformed officers from viewing the trial. (T 2830-32). At the hearing on the motion, the trial court took the motion under advisement. (T 258-59). Later, still prior to trial, the trial court denied the motion, but agreed to reconsider it at the trial if necessary.

(T 282-83). On the first day of trial, after the jury had been selected and sworn, Appellant raised the issue again, noting that five or six uniformed officers from Indian River were in the gallery. The trial court responded, "My ruling was that [I would clear the courtroom] if I felt it looked like it would prejudice the defendant, the officers being here. But I don't see anything offensive." Consequently, the trial court overruled Appellant's objection. (T 703-04). Three days later, Appellant renewed his objection, and the following colloquy occurred:

> [DEFENSE COUNSEL]: Your Honor, I would renew my objection, from my pre-trial motion -- the presence of uniformed Indian River County officers.
>
> I would like the record to reflect that there are three uniformed Indian River County officers in the courtroom at this time. I would ask that they be excluded, at least from wearing the uniforms during the remainder of this trial.
>
> It's an interference and a distraction to the jury and to me.
>
> THE COURT: I also want to state for the record that throughout this trial, most of the trial, there have been none sitting out there. Sometimes there have been one and sometimes two. That has not been a great number.
>
> [DEFENSE COUNSEL]: On the first day, there were five. And today there are three.
>
> THE COURT: Yes. And they all left and didn't come back. They weren't here -- the second day, I don't think we had any of them.
>
> [THE STATE]: The reason there were five --
>
> THE COURT: It may become a problem. You know, if it becomes a problem, I will just ask them not to do it. I don't want to try to feel the jury is being intimidated. But, quite frankly, the jury hasn't had any indications that the jury has even noticed

them. They haven't been looking at them or anything else.

I have been watching for that. And the jury has shown no interest at all in anybody at all being out there. All right.

[DEFENSE COUNSEL]: The motion is overruled, Your Honor?

THE COURT: Well, yes.

(T 1322-23).

In this appeal, Appellant claims that the trial court's failure to remove the uniformed deputies from the courtroom, in conjunction with its allegedly erroneous admission of the photograph and clothing, resulted in cumulative error. **Brief of Appellant** at 69-70. The State disagrees. In Woods v. State, this Court rejected a similar claim, wherein the defendant sought to exclude uniformed correctional officers from a trial involving the murder of a correctional officer:

> Courts have the inherent power to preserve order in the courtroom, to protect the rights of the parties, and to further the interests of justice. Excluding spectators, in effect closing a trial, is largely a matter of discretion with the court, but the primary aim in such an exclusion is to preserve the defendant's rights. Here, although the question is close, we find no likelihood of prejudice or intimidation sufficient to demonstrate an abuse of discretion in the trial court's failure to exclude the uniformed spectators.
>
> Uniformed spectators caused no disruption, although they had apparently been present throughout this trial. On voir dire the prospective jurors indicated that they would follow the evidence and the law in their deliberations and would not be swayed by outside influences. In some instances the mere presence of certain persons may be intimidating. Such is not always the case, however. Here, we can find no indication that the jury failed to perform its duty properly.

> We find that the trial court did not err in failing to exclude the complained-about spectators.

490 So.2d 24, 26-27 (Fla. 1986) (citations omitted), cert. denied, 479 U.S. 954 (1987), denial of habeas rev'd on other grounds, 923 F.2d 1454 (11th Cir. 1991). See also Holbrook v. Flynn, 475 U.S. 560 (1986) (finding the presence of four uniformed state troopers in courtroom not violative of constitutional right to fair trial).

As in Woods, there is no indication that the jury was intimidated by the presence of the uniformed officers at the trial. In fact, the trial court specifically stated that he had been looking for such an indication and found none. Thus, since the trial court was in the best position to determine what influence, if any, the officers had on the jury, this Court should defer to the trial court's observations and conclusion. However, even if the trial court should have precluded the officers from appearing in uniform, its failure to do so was harmless beyond a reasonable doubt, since there is no reasonable possibility that it contributed to the jury's verdict in light of the sufficient quantity and quality of evidence establishing Appellant's guilt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO STRIKE THE JURY VENIRE (Restated).

A week before trial, Appellant filed a motion to dismiss the jury venire, claiming that his right to a fair trial was being

violated by the use of a venire chosen from the registered electors, instead of from driver's license lists as prescribed by a newly amended statute. (R 2852-54). At the hearing on the motion, the State argued that the enabling section of the amended statute did not require implementation of the new law until January 1993. Thus, it did not apply to this case. (T 267-69). The trial court denied the motion. (R 2899; T 269-70). Appellant renewed his motion on the first day of trial, which was again denied. (T 292-93).

In this appeal, Appellant once again claims that, since the effective date of the new statute was January 1, 1992, and the trial was beginning in February of 1992, then the amendment applied to the case, and thus the venire should have been stricken. **Brief of Appellant** at 71-72. Appellant's representation of the effective date, however, is erroneous. When Chapter 91-235, Laws of Florida, was enacted, section 7 indicated that the effective date of the amendment would be January 1, 1992. However, on December 20, 1991, the legislature amended section 7 to read: "This act shall take effect January 1, 1992, except that section 3 shall take effect January 1, 1997, and sections 1, 4, and 6 shall take effect January 1, 1998." Chapter 91-424, Laws of Florida. Section 1 is the operative section, which changed the venire pool from registered electors to those with a driver's license. Thus, its effective date was amended prior to the trial in this case to January 1, 1998. As a result, the statutory amendment did not apply to this case. Consequently, this Court should affirm Appellant's conviction.

ISSUE XI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO APPOINT CO-COUNSEL (Restated).

Upon remand of this case for retrial, the public defender's motion to withdraw based on conflict was granted, and opposing counsel was appointed as trial counsel. (R 2366; T 1-9). Shortly thereafter, counsel filed a motion for co-counsel, claiming that his lone representation of Appellant would likely constitute ineffective assistance of counsel because of the complexity of capital litigation. (R 2385-2412). After a lengthy evidentiary hearing on the motion, the trial court denied the motion, finding as follows:

> Although the evidence presented by the defendant does indicate a commonplace practice, and I do acknowledge that commonplace practice, the defense witness also has established that in over nine hundred Florida cases, and over eighty United States Supreme Court cases directly related to the death penalty that has been adopted by the Florida legislature does not indicate one single case that gives me the authority to order that.
>
> * * * *
>
> I specifically find no United States Supreme Court, or Florida Supreme Court case that directs this Court, or gives this Court the authority to levy additional expenses against this county. This Court has no authority, nor is obligated to follow precedence regarding the ABA rules, nor any defense or bar standards that have been adopted.
>
> * * * *
>
> There is no showing of the uniqueness or extraordinary nature of this case, nor the complexity of the issues in this case that necessitate, or even suggest the necessity of

> a second, third, or fourth co-counsel. There is no showing that this defendant, or any other defendant, is entitled to some sort of guarantee of perfect representation.
>
> I see a very genuine concern on the part of [defense counsel] that he may not be able to provide a perfect defense, and may miss an objection at some period of time throughout the trial. This defendant, nor any other defendant, is not guaranteed perfect representation.
>
> Unquestionably, I do find the charge of first degree murder is unique, and we can debate it all we want, but it is the most unique charge, it is a different type of trial, and I specifically recognize the difference of a first degree murder charge seeking the death penalty, and do specifically recognize the differences. However, there is no authority to require me to carte blanche appoint co-counsel at the burden of the taxpayers.
>
> There has also been no showing, either by [defense counsel's] affidavit, or his testimony, that he will be, or intends to be ineffective. I, quite frankly, would run out of lawyers in the four county area if I just only appointed lawyers, who, somehow, were going to direct -- I would be able to direct in advance to say that I'll appoint you for this case, and you will be able to be paid by the taxpayers at about one third you normally make, if, as long as you don't file the motions you believe are appropriate to set up the appellate record.
>
> * * * *
>
> I do deny the defendant's motion for co-counsel.

(T 145-47).

In this appeal, Appellant claims that the trial court abused its discretion in denying his motion for appointment of co-counsel. **Brief of Appellant** at 72-74. While there is some authority for the appointment of more than one attorney for one defendant in a capital case, see **Fla. Stat. §** 925.035(1) (1989);

Schommer v. Bentley, 500 So.2d 118 (Fla. 1986); but see Board of County Comm'rs of Collier County v. Hayes, 460 So.2d 1007, 1009-10 (Fla. 2d DCA 1984), "[t]rial and appellate judges, well aware of the complexity of a given case and the attorney's effectiveness therein, know best those instances in which justice requires departure" from the norm. Makemson v. Martin County, 491 So.2d 1109, 1115 (Fla. 1986). In other words, it is wholly within the trial court's discretion to determine whether additional counsel is warranted, considering both the defendant's right to effective representation and the taxpayer's right to restrict unnecessary fiscal expenditures. While it is this Court's "duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter," id. at 1113, trial courts must be given broad discretion to determine the necessity for multiple counsel.

Here, the trial court considered, but rejected, defense counsel's assertion that his sole representation would constitute prima facie ineffectiveness. Moreover, it did not find anything unique or particularly complex about the instant case to warrant two attorneys. (T 144-48). This case was on retrial. While certainly not confined to it, defense counsel had the benefit of the entire case file and transcripts from the first trial, which was tried by a single attorney. Moreover, it is evident from the quantity and quality of motions filed on Appellant's behalf that defense counsel was well-versed in the issues surrounding capital litigation. The trial court's observation that no defendant is guaranteed perfect representation is well-taken:

> Neither the State of Florida nor any defendant may, within reason, expect to receive a *perfect trial* in any tribunal in which mortals preside. In nearly every adversary proceeding, some technical error may be found. Unless error reaches to and affects in a prejudicial manner the rights of a party to a fair and impartial trial, such error is harmless and does not infect the validity of the proceedings.

State v. Young, 283 So.2d 58, 60 (Fla. 1st DCA 1973) (emphasis in original), cert. denied, 290 So.2d 61 (Fla. 1974). In light of Appellant's failure to show a palpable abuse of discretion in the trial court's denial of his motion to appoint co-counsel, this Court should affirm the trial court's ruling and Appellant's conviction and sentence.

ISSUE XII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO COMPEL DISCOVERY (Restated).

During discovery in this case, the State listed Dr. McKinley Cheshire as a potential witness at trial. (R 2608). At his deposition, Dr. Cheshire indicated that he had reviewed and relied in part on two letters from the assistant state attorney in assessing the case. However, based on the assistant state attorney's claim that the letters constituted privileged "work product," Dr. Cheshire refused to produce the two letters for defense counsel. Thereafter, Appellant filed a motion to compel discovery/motion for sanctions, claiming that the State of Florida had no "work-product privilege." (R 2837-39). At the subsequent hearings on the motion, Appellant reasserted that the State had no "work-product privilege," but in the alternative claimed that it had been waived. The trial court deferred ruling

until it could read the letters and the doctor's deposition. (T 259-61, 283-87, 757-60). Ultimately, the trial court denied the motions, finding that the letters constituted "work product." (T 1100).

In this appeal, Appellant again asserts that the State waived any privilege it may have had regarding the information in the letters when it sent the letters to Dr. Cheshire. In asserting harm, however, Appellant claims that he "does not know the extent to which the trial court's refusal to disclose discoverable materials prejudiced [him]." **Brief of Appellant** at 77. In response, the State submits that "[r]eversible error cannot be predicated on conjecture." Sullivan v. State, 303 So.2d 632 (Fla. 1974). Although Appellant now has the opportunity to review the letters as a part of the record on appeal, he is unable to assert any prejudice to his defense by his inability to review the letters during the trial. Without a claim of prejudice, Appellant has no claim at all. As a purely academic exercise, however, the State will respond to Appellant's frivolous claim.

Florida Rule of Criminal Procedure 3.220(g)(1) specifically provides:

> **(g) Matters Not Subject to Disclosure**
>
> (1) *Work Product*. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda, to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of his legal staff.

(Emphasis added). In reading these letters, it is evident that they contain the opinions, theories, and conclusions of the

prosecutor regarding this case. See, e.g., (SR 139) ("The State's theory of prosecution is simple: . . . ."), (SR 145) ("It is the State's position that the defendant is a dangerous person with a minimum of an anti-social personality."). Thus, they are, in their truest sense, "work product" of the State.

Appellant claims, however, that, since Dr. Cheshire was being developed by the State as an expert witness who would be allowed to give his expert opinions at trial, he had the right to know the bases upon which the witness formed his opinions. Presumedly, Appellant relies on § 90.705 of the Florida Evidence Code, which requires the witness to specify the facts or data upon which he relied to form his opinions. This provision does not require disclosure of any and all information. Rather, it requires disclosure of facts or data "of a type reasonably relied upon by experts in the subject to support the opinion expressed." **Fla. Stat.** § 90.704 (1991). The State's theories, opinions, or conclusions are not facts which experts would reasonably rely upon to form their opinions. Rather, depending on the area of their expertise, they would rely on the evidence provided to them, such as the multitude of reports, transcripts, medical records, etc., provided by the State to Dr. Cheshire, as well as to the defense.

Finally, Appellant asserts that, even if the State did have a "work-product privilege," it was waived when the letters were transmitted to the doctor. **Brief of Appellant** at 76-77. Appellant overlooks, however, § 90.507 of the Evidence Code, which provides:

> A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if he, or his predecessor while holder of the privilege, voluntarily discloses or makes the communication when he does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication. This section is not applicable when the disclosure is itself a privileged communication.

(Emphasis added). Here, the letters were a privileged communication. Thus, by merely sending the letters to Dr. Cheshire, the State did not waive the privilege. Were it otherwise, the protection afforded to "correspondence" by Rule 3.220(g) would be meaningless. Because the trial court's ruling was eminently correct, and because Appellant suffered no identifiable harm from the ruling, this Court should affirm Appellant's conviction.

ISSUE XIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THIS MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL (Restated).

In its written sentencing order, the trial court made the following findings regarding the heinous, atrocious, or cruel aggravating factor:

> The evidence presented in this case established beyond and to the exclusion of any reasonable doubt that the crime for which the defendant is being sentenced was especially heinous, atrocious or cruel. The evidence showed that the victim was made fully aware of his impending death at the hands of the defendant. While the defendant held the victim at gun point, the defendant said to him, "it's either me or you". The evidence further supports the finding that the victim was grabbed by the throat and he literally begged for his life. There was testimony that

> he implored the defendant, "Don't shoot me, don't kill [me], man. You can leave. Please don't kill me, don't shoot." It became apparent to the deputy that his only chance was to turn and flee, and when he did attempt to flee, the defendant shot seven rounds from a .380 semi-automatic handgun at him, four rounds of which struck the deputy in the back. Three of the four rounds that hit the deputy did extensive damage to his liver, his intestines and vertebrae. His death was slow, agonizing and painful as established by witnesses at the scene and by the two physicians who treated him at Indian River Memorial Hospital. The shooting occurred sometime between 3:09 A.M. to 3:17 A.M. on September 23, 1992 [sic], his death occurred over 2 hours later, at 5:30 A.M., during which time the deputy complained of extreme pain and great suffering as he languished and bled to death internally from the fatal injuries he received at the hands of the defendant.

(R 3014-15).

In this appeal, Appellant claims that this aggravating factor does not apply to the facts of this case. Specifically, Appellant claims that "[t]he only evidence presented by the State construable as 'unnecessarily torturous' were [sic] the statements made by hearsay declarant Eugene Hinton," whose statements were "demonstrably unreliable." **Brief of Appellant** at 78. The credibility of Mr. Hinton, however, was a matter for the jury to decide. It obviously found his testimony credible, as evidenced by its unanimous guilty verdict and its death recommendation by a vote of ten to two. His credibility cannot now be reweighed.

While it is true that the murder must be committed in a manner that sets it apart from the norm of other capital felonies for the HAC factor to apply, this case meets that heightened requirement. When Appellant's gun fell to the ground, Deputy

Raczkoski put his foot on the gun and bent down to pick it up. Appellant grabbed the victim by the throat, causing the deputy to fall backwards, and said, "I wouldn't do that if I were you." Appellant grabbed the gun off of the pavement and pointed it at Deputy Raczkoski. As the deputy begged for his life with both hands raised, Appellant said something to the effect of, "One of us got to go, me or you." At that point, Deputy Raczkoski turned and ran while trying to draw his weapon. Appellant fired seven shots at the officer. (T 1178-84, Court's Exhibit #6). One shot went through his left shoulder. Three others lodged in the victim's lower back, causing extensive internal injuries. (T 1021-26, 1033-34, 1073-96). According to other officers who arrived on the scene and hospital personnel, the victim remained conscious for the next hour or so, complaining of the pain. (T 1026, 1033-34, 1055-56). More than two hours after the shooting, the victim died. (T 1021, 1035).

As this Court has previously stated, "[t]he mindset or mental anguish of the victim is an important factor in determining whether this aggravating circumstance applies." Phillips v. State, 476 So.2d 194 (Fla. 1985). Here, the facts strongly suggest that the victim knew he was going to die. While pleading for his life and offering Appellant the opportunity to leave, Appellant made it clear, "One of us got to go, me or you." When the deputy made a futile attempt to escape, Appellant emptied his pistol at the officer, striking him four times. While slowing dieing of internal injuries, the deputy lived the last two hours of his life in intense pain.

Appellant cites to several cases in which this Court has found the HAC factor inapplicable under similar, though not identical, facts. The State submits, however, that these cases are distinguishable, and thus not controlling. For example, in Rivera v. State, 545 So.2d 864 (Fla. 1989), the victim was shot while struggling for possession of the gun. There is no indication that the victim pled for his life, was gunned down while trying to flee, or lingered in pain for hours. Similarly, in Brown v. State, 526 So.2d 903 (Fla. 1988), cert. denied, 488 U.S. 944 (1989), although the victim pled for his life after being shot once in the arm, the next two shots caused instantaneous death. These cases simply do not contain the combination of additional factors that are present in this case which set this case apart from the norm of capital felonies: a law enforcement officer as a victim, an awareness of imminent death, pleas for mercy by the victim, an opportunity for the defendant to flee provided by the victim's attempt to flee, multiple gunshot wounds to the back causing extensive internal injuries, and a painful, lingering death. Based on these additional facts, the trial court did not abuse its discretion in finding the heinous, atrocious, or cruel aggravating factor.

Even if these circumstances are not sufficient to sustain the trial court's finding, Appellant's sentence should nevertheless be affirmed. Without this aggravating factor, there remain two valid aggravating circumstances--prior violent felony convictions (two armed robberies and a battery on a law enforcement officer) and avoid arrest/hinder law enforcement/law enforcement victim--and minimal nonstatutory mitigating

circumstances--honorable discharge from service, good reputation in community until age 15 or 16, and good son and brother. The two aggravating factors should be accorded great weight. Not only did Appellant murder a law enforcement officer while the deputy pled for his life, but Appellant had also previously been convicted of (1) holding a gun to the head of a hotel clerk during two separate robberies and (2) punching a correctional officer in the face while in jail. Thus, even without the HAC aggravating factor, there is no reasonably possibility that jury would have recommended, or the trial court would have given, a lesser sentence. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Moreover, not only do the aggravating factors outweigh the minimal mitigating evidence, but the death sentence is proportional to other sentences imposed under similar facts. See Rivera; Jones v. State, 580 So.2d 143 (Fla. 1991), cert. denied, 112 S.Ct. 221 (1992);

ISSUE XIV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING TWO STATUTORY MITIGATING FACTORS PROPOSED BY APPELLANT UNSUPPORTED BY COMPETENT EVIDENCE (Restated).

During the penalty phase, Appellant presented an expert witness in his behalf. Dr. William Weitz, a licensed psychologist in the State of Florida who worked in part for the Department of Veterans Affairs, testified that he originally diagnosed Appellant in 1987 as a drug abuser and as having an

antisocial personality disorder. (T 2041-43). In 1991, he modified his diagnosis to poly-drug abuse and antisocial personality disorder. (T 2043). Although Appellant did not meet the criteria for Posttraumatic Stress Disorder, Dr. Weitz believed that, in addition to being a drug abuser from his service in the Army, Appellant suffered from a sub-clinical disorder called "Vietnam Syndrome." (T 2044, 2085-90). According to the witness, the manifestations of this disorder included alienation from one's environment, depression, generalized rage, an increase in drug use, and the adoption of "survival behavior." (T 2044-45).

Based on his interviews with Appellant, Dr. Weitz believed that, when the handgun fell from Appellant's shorts at the scene, Appellant's mood changed. It became imperative that Appellant maintain possession over the weapon, because losing control over it would have left him vulnerable. In addition, once the deputy turned to run while trying to draw his own weapon, Appellant believed that the officer was losing control over the situation and that Appellant's life was in danger. As a preemptive measure, Appellant shot first. (T 2048-50). According to Dr. Weitz, Appellant was under the influence of extreme emotional disturbance at the time of the shooting, and that his ability to conform his conduct to the requirements of the law was substantially impaired. (T 2052-53).

On cross-examination, Dr. Weitz admitted that, in investigating Appellant's background, he discovered evidence of an antisocial personality disorder and of drug use before Appellant's service in the military. (T 2080-82). In addition,

Dr. Weitz testified that Appellant never blamed the shooting on his experiences from Vietnam; rather, Appellant blamed his drug use. Appellant also blamed the prior armed robberies on the fact that his mother spent the money he sent home during his military service. (T 2083-85, 2093-97). Dr. Weitz also admitted that Appellant's scores on the MMPI test indicated that he was malingering. (T 2128). Finally, Dr. Weitz admitted that Appellant did appreciate the criminality of his conduct, i.e., that he knew right from wrong. (T 2093).

In rebuttal to Appellant's evidence in mitigation, especially that involving Appellant's service in Vietnam, the State offered the testimony of several Army officials, who disputed Appellant's exaggerated claims regarding his accomplishments and accolades, and the extent of his combat experience. (T 2144-2217). In addition, the State offered the testimony of its own expert witness, Dr. McKinley Cheshire, a doctor of psychiatry. Dr. Cheshire testified that, in his opinion, Appellant was experiencing anxiety at the time of the shooting and exhibited signs of Adult Antisocial Behavior, which is different from Antisocial Personality Disorder, but Appellant was not incompetent or suffering from any psychiatric illness, knew right from wrong, and understood the nature and consequences of his actions. (T 2231). In the witness' opinion, the victim "was executed by a drug dealer to cover up the possibility of his going back to jail, and he was motivated to be selfish, to protect himself, and to do away with the witnesses. It was a judgment call and he judged and then carried out the execution based on his judgment." (T 2231). On cross-examination, over

the State's objection, Appellant was allowed to elicit the fact that Dr. Cheshire had never met or interviewed Appellant. (T 2236-37).

In its sentencing order, the trial court made the following findings regarding the two statutory mental mitigators:

> **(II) F.S. 921.141(6)(b).** Whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance?
>
> The jury was instructed on this mitigating circumstance, and there was evidence presented to support defendant's position that the offense was committed while he was under the influence of extreme emotional or mental disturbance. The evidence presented by the defendant was the testimony of a psychologist, Dr. William Wietz [sic], who claimed defendant was suffering from "Vietnam Syndrome". This syndrome which Dr. Weitz theorized was at least in part responsible or defendant's behavior at the time of the commission of the offense. The doctor, however, admitted that the "Vietnam Syndrome" was not a disorder recognized within The Diagnostic and Statistical Manual III R, the authoritative manual used throughout the medical and psychological communities.
>
> The state presented rebuttal testimony by a psychiatrist, Dr. McKinley Cheshire, that the defendant was not suffering from any such emotional or mental disturbance. He testified that he found that the defendant was simply a criminal who committed this crime purposefully to avoid arrest and incarceration.
>
> The court rejects the "Vietnam Syndrome" theory by Dr. Weitz as being without merit. It has been over twenty years since the defendant served in Vietnam and at no time did the defendant himself ever mention his combat in Vietnam as having any bearing on his conduct. Defendant blamed cocaine, and the evidence showed that he used cocaine even before he went into the service.
>
> The court, weighing the testimony of both Dr. Weitz and Dr. Cheshire and the other evidence presented finds as a matter of law

and fact that this was not reasonably established as a mitigating circumstance.

* * * *

(VI) F.S. 921.141(6)(f). Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired?

There was evidence presented that raised a question concerning the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law and was substantially impaired, that evidence being the use of cocaine. The court weighed and considered the defendant's statement that was introduced at trial without objection. Portions of that statement indicated that the defendant may have been under the influence of cocaine at the time of the commission of the offense. However, the evidence presented negate [sic] this mitigating circumstance was reasonably established. The evidence showed:

1. The defendant was clearly aware that when the firearm fell from his shorts he was subject to being arrested, and facing mandatory prison time for being a felon in possession of a firearm.

2. That his stated objective was to kill the deputy sheriff to avoid his arrest and incarceration to a minimum mandatory prison sentence.

3. That he was able to assess his predicament, gain control of the weapon, and take command of the situation, and to tell the victim, "it's you or me".

4. That he then, in a calculated fashion emptied [a] seven round clip from the firearm, at the victim, four rounds of which struck the victim in the back.

5. That following the killing the defendant had the presence of mind to execute a well planned escape, to Georgia. That plan included seeking refuge in a motel about 40 miles from the scene of the crime, purchasing new clothes, obtaining a bus schedule and ticket, to Albany, Georgia, assuming a false

> name and obtaining cocaine for his expressed purpose of selling it to finance his escape.
>
> 6. That when he was arrested in Albany, Georgia, he attempted to escape from the officers there, and the evidence presented by three police officers that the defendant exhibited no signs of cocaine use or any other mind altering substance, and that he was alert and in control of his mental faculties as he tried to escape and hide his true identity. All these events occurred in less than 24 hours after the commission of the crime, and the clarity of his mind and purpose dispells [sic] any showing that his capacities under this section were impaired to any noticeable degree.
>
> Based upon the above findings the court finds as a matter of law and fact that this mitigating circumstance has not been reasonably established.

(R 3017-21).

In this appeal, Appellant now claims that the trial court abused its discretion in rejecting both of these statutory mitigating factors. **Brief of Appellant** at 80-82. It is well-settled, however, that "[a] trial court has broad discretion in determining the applicability of mitigating circumstances urged." Kight v. State, 512 So.2d 922, 922 (Fla. 1987), cert. denied, 485 U.S. 929 (1988), overruled on other grounds, 596 So.2d 985 (Fla. 1992). "In determining whether mitigating circumstances are applicable in a given case, the trial court may accept or reject the testimony of an expert witness just as he may accept or reject testimony of any other witness." Roberts v. State, 510 So.2d 885 (Fla. 1987) (citing to Bates v. State, 506 So.2d 1033 (Fla. 1987) (Expert testimony is not conclusive evidence where contradicted)), cert. denied, 485 U.S. 943 (1988). Here, the trial court specifically rejected the testimony of Appellant's

expert witness, which was adequately contradicted by the State's expert witness and other rebuttal evidence. "'The resolution of factual conflicts is solely the responsibility and duty of the trial judge, and, as the appellate court, we have no authority to reweigh that evidence.'" Jones v. State, 580 So.2d 143, 146 (Fla. 1991) (quoting Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991)), cert. denied, 112 S.Ct. 221 (1992). Consequently, this Court should affirm Appellant's sentence of death. See Johnson v. State, 17 F.L.W. S603, 606 (Fla. Oct. 1, 1992) ("While voluntary intoxication or drug use might be a mitigator, whether it actually is depends upon the particular facts of a case. Here, the evidence showed less and less drug influence on Johnson's actions as the night's events progressed and support the trial court's findings. There was too much purposeful conduct for the court to have given any significant weight to Johnson's alleged drug intoxication, a self-imposed disability that the facts show not to have been a mitigator in this case."); Bruno v. State, 574 So.2d 76, 82-83 (Fla. 1991) (trial court had the discretion to discount most of testimony of defendant's expert witness who opined that defendant's long history of drug use resulted in brain damage), cert. denied, 112 S.Ct. 112 (1992); Johnson v. State, 442 So.2d 185, 189-90 (Fla. 1983) (trial court properly rejected expert's theory that defendant suffered from posttraumatic stress disorder and pulled trigger from "impulsive behavior which had a direct causal relationship to his experience in Vietnam."), cert. denied, 466 U.S. 963 (1984).

ISSUE XV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING NONSTATUTORY MITIGATING FACTORS PROPOSED BY APPELLANT UNSUPPORTED BY COMPETENT EVIDENCE (Restated).

Appellant claims that he proposed fifteen nonstatutory mitigating circumstances to the trial court in his sentencing memorandum below. (R 2972-81). Of these fifteen, Appellant lists nine of them in his brief and claims that all of them should have been found by the trial court. The first four relate to Appellant's service in Vietnam, the fifth one relates to his drug use and penchant for crime after his discharge, and the remaining four relate to his childhood and reputation in the community as an adolescent. **Brief of Appellant** at 83-85.

In its sentencing order, the trial court made the following findings regarding Appellant's nonstatutory mitigating evidence:

> **(VIII) F.S. 921.141(6)(h).** Whether any non-statutory mitigating circumstances exist?
>
> The court further considered the existence of other factors in the defendant's background that would mitigate against imposition of the death penalty.
>
> The defendant presented testimony through several witnesses that established he was raised in Gifford, Florida, an area in Indian River County described by one of defendant's witnesses as a "black town", where he lived in a modest, but well maintained residence with his mother and siblings. He was good and considerate to his mother and a good brother to his siblings. That up until the age of 15 or 16 he regularly attended church and was a good Bible student, but at that age his attendance ceased. There was testimony that he liked sports and played some basketball in high school. A sister testified that he is a gentle and caring person. A friend, now a practicing attorney in Vero Beach, and with whom he was raised testified that as a youth

he was a nice person who encouraged her to complete her education.

This constituted the only testimony concerning his family and community background, and it dealt primarily with his life up until the age of 15 or 16.

The court has weighed and considered these factors and also instructed the jury that it could consider any other aspect of the defendant's character or record. The court finds this view of the defendant's younger years is deserving of some consideration, but on balance it carries little weight, as a mitigating circumstance.

The defense introduced records and testimony regarding his service in the army, including a year of duty in Vietnam during the period of that conflict. There was testimony concerning his combat service and awards he earned during that tour of duty.

In rebuttal the state introduced evidence that while in Vietnam the defendant was tried and convicted by court martial for larceny, a violation of Article 121 of the Uniform Code of Military Justice and for disobeying a direct order in violation of Article 92 of the Uniform Code of Military Justice.

Even though the defendant's military record is less than exemplary, he did receive an honorable discharge, and the court finds the defendant's military service does support a finding that this mitigating circumstance is reasonably established.

No other non-statutory mitigating circumstances were presented.

SUMMARY

* * * *

The court finds that there are no statutorily defined mitigating circumstances that have been reasonably established. The only mitigating circumstances are non-statutory ones and those are:

1. The defendant was honorably discharged after having served in the miliary.

2. The defendant having enjoyed a good reputation in his community until he reached the age of 15 or 16.

3. The defendant was a good and considerate son to his mother and siblings.

The court has carefully weighed all of the aggravating and mitigating circumstances, and it finds beyond and to the exclusion of any reasonable doubt that the aggravating circumstances far outweigh the mitigating circumstances. The mitigating circumstances are of little significance when weighed against the aggravating ones present in this case.

The court, in accordance with Tedder v. State, 322 So. 2d at 908 (Fla. 1975), has also given great weight to the jury recommendation that death be imposed, and follows it as a just and proper sentence in this case.

(R 3021-24) (emphasis added).

As is evident from the foregoing, the trial court considered all of the evidence in mitigation presented by Appellant. The fact that it paraphrased all nine items into three in its summary does not discount the fact that it considered all of the evidence presented. Therefore, since the trial court accepted all of Appellant's nonstatutory mitigating evidence and properly weighed it against the aggravating circumstances proven, this Court should affirm the trial court's findings and Appellant's sentence.

ISSUE XVI

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL (Restated).

Prior to trial, Appellant filed fourteen motions, claiming that various provisions of Florida's death penalty statute were unconstitutional. (R 2662-2808). All of these motions were

denied by the trial court. (R 2881-95; T 230-49). Appellant renews his challenges in this appeal, none of which have merit.

Appellant raises three challenges to the jury's role in sentencing. First, Appellant claims that the heinous, atrocious, and cruel jury instruction does not provide sufficient guidance to the jury.[9] "Unlike the jury instruction found wanting in Espinosa v. Florida, 120 L.Ed.2d 854 (1992), the full instruction on heinous, atrocious, or cruel now contained in Florida Standard Jury Instructions in Criminal Cases, which is consistent with Proffitt [v. Florida, 428 U.S. 242 (1976)], was given in [Appellant's] case." Preston v. State, 17 F.L.W. S669 (Fla. Oct. 29, 1992). See also Power v. State, 17 F.L.W. S572 (Fla. Aug. 27, 1992). Thus, the instruction given was proper.

Second, Appellant claims that a verdict by a bare majority violates due process. This Court has already decided, however, that a recommendation of death by a simple majority is constitutionally permissible. Fleming v. State, 374 So.2d 954, 957 (Fla. 1979). See also Schad v. Arizona, 501 U.S. ___, 115 L.Ed.2d 555, 564 (1991). Thus, the jury's 10 to 2 vote in this case, which is hardly a bare majority, is constitutionally permissible.

Third, Appellant claims that "[t]he standard instructions do not inform the jury of the great importance of its penalty verdict." **Brief of Appellant** at 87. Rejecting an identical claim, this Court stated that it was "satisfied that these

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[9] Appellant requested that a modified version be read to the jury. (R 2945-50). At the charge conference, the trial court denied Appellant's special requested jury instruction in favor of the standard instruction. (T 2269-70).

instructions fully advise the jury of the importance of its role and correctly state the law." Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). Thus, Appellant's claim must fail.

Appellant also challenges counsel's role in the sentencing process, claiming that "[i]gnorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the present." **Brief of Appellant** at 88. This claim, along with Appellant's attacks on the judge's role and on the judicial election system, are baseless exaggerations which should be rejected subito.

Likewise, Appellant's challenges to this Court's appellate review of capital cases should be summarily rejected as they have been so many times before. See, e.g., Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990); Copeland v. State, 457 So.2d 1012, 1015-16 (Fla. 1984), cert. denied, 471 U.S. 1030 (1985); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); Campbell v. State, 571 So.2d 415 (Fla. 1990); Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990); Remeta v. State, 522 So.2d 825 (Fla.), cert. denied, 488 U.S. 871 (1988).

Finally, Appellant makes three miscellaneous challenges to the sentencing process. First, Appellant claims that the lack of special verdict forms listing the aggravating and mitigating factors that the jury found to exist, and the lack of unanimous verdicts, violate the state and federal constitutions. **Brief of Appellant** at 91. This Court has consistently rejected this

claim. See, e.g., Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990); Patten v. State, 598 So.2d 60, 62 (Fla. 1992).

Second, Appellant claims that a condemned inmate's inability to seek mitigation of sentence under Florida Rule of Criminal Procedure 3.800(b) "violates the constitutional presumption against capital punishment and favors mitigation." **Brief of Appellant** at 91. This argument is patently absurd since the death penalty statute provides for a separate hearing in which a defendant can present anything that might conceivably mitigate his sentence. Were the statute to provide for such a hearing after being sentenced, as Appellant seems to want, there is no doubt that his claims of constitutional deprivation would be extremely more vociferous. Appellant seems to want it both ways, without wanting either.

Third, Appellant complains that "Florida law creates a presumption of death where but a single aggravating factor appears." **Brief of Appellant** at 92. Since this Court's opinion in Dixon, it has maintained that "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." 283 So.2d at 9. See also Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912 (1976); Sims v. State, 444 So.2d 922 (Fla. 1983), cert. denied, 467 U.S. 1246 (1984); White v. State, 446 So.2d 1031 (Fla. 1984), cert. denied, 111 L.Ed.2d 818 (1985). The United States Supreme Court has also rejected this argument:

> The presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth

> Amendment does not require that these aggravating circumstances be further refined or weighed by a jury. See Lowenfield v. Phelps, 484 U.S. 231, 244, 108 S.Ct. 546, 554, 98 L.Ed.2d 568 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion."). The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence.

Blystone v. Pennsylvania, 494 U.S. 299, 306-07 (1990). See also Johnson v. Dugger, 932 F.2d 1360, 1368-70 (11th Cir. 1991) (rejecting an identical claim under Florida's sentencing scheme). As Appellant's constitutional claims are wholly without merit, his sentence of death should be affirmed.

ISSUE ON CROSS-APPEAL

> WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE STATE'S MOTION TO APPOINT AN EXPERT TO EXAMINE APPELLANT IN ORDER TO REBUT APPELLANT'S EXPERT WITNESS DURING PHASE TWO.

On July 17, 1991, Appellant filed a motion to appoint a mental health expert to evaluate him confidentially for purposes of his defense, which the trial court granted on July 26, 1991. (R 2413-15, 2431-34). Thereafter, Appellant was examined, and the doctor was listed by the defense as a potential witness at trial. During the doctor's deposition, the State discovered that Appellant had been diagnosed as portraying "Antisocial Personality Disorder" and "Cocaine Abuse." (R 2539-40).

On December 16, 1991, the State filed a motion for psychiatric examination of Appellant. (R 2538-41). At the hearing on the motion, the State argued that it had hired an

expert witness to rebut Appellant's potential defenses and evidence in mitigation, and that its expert needed to interview Appellant in order to evaluate his mental status. In response, Appellant argued that nothing authorized a mental evaluation by the State when Appellant has not filed a notice of intent to rely on the defense of insanity, and that such an examination would violate his Fifth Amendment right against compelled self-incrimination. The trial court took the motion under advisement and allowed counsel to submit memoranda of law on the issue, which they did. (T 197-206; R 2544-66, 2567-73). Ultimately, the trial court denied the State's motion, "on the basis that the Court finds no authority for granting such motion unless and until Defendant enters a plea of not guilty by reason of insanity, which plea has not been entered." (R 2574). On cross-examination of the State's expert witness, defense counsel was allowed to elicit over the State's objection that the witness had never spoken to, much less performed a psychological evaluation on, Appellant before forming his opinion that Appellant did not suffer from any psychiatric illness either at the time of the offense or at the time of trial. (T 2236-37).

For the following reasons, the trial court abused its discretion in denying the State's motion for psychiatric examination of Appellant. The only rules of criminal procedure that authorize a trial court to appoint a mental health expert to evaluate a defendant are Rules 3.210(b) and 3.216, which relate to the defendant's competency to proceed to trial and the defendant's sanity at the time of the offense, respectively. Under the latter rule, all matters related to the expert are

privileged communications, and the expert's conclusions are confidential until the defendant files a notice of intent to rely on the defense of insanity. If such a notice is filed, the trial court must appoint no more than three, nor fewer than two, experts to evaluate the defendant. At these examinations, both the State and the defense are allowed to be present. **Fla. R. Crim. P.** 3.216(d).

Rule 3.216(h) also states, "The appointment of experts by the court shall not preclude the State or the defendant from calling additional expert witnesses to testify at the trial. . . . " The Committee Notes to the 1980 adoption of subsection (h) indicate that this provision is a restatement of former Rule 3.210(e)(7) and that "[t]he former provision relating to free access to the defendant is eliminated as unnecessary." (Emphasis added). Former Rule 3.210(e)(7) provided, "The appointment of experts by the Court shall not preclude the State or defendant from calling expert witnesses to testify at the trial and in case the defendant is committed to custody of the Court they shall be permitted to have free access to the defendant for purposes of examination or observation. . . ." **Fla. Stat. Annot.** Fla. R. Crim. P. 3.210, at 433 (West 1989) (historical note).

In Estelle v. Smith, 451 U.S. 454 (1981), a death penalty case, the trial court sua sponte ordered a psychiatric evaluation of the defendant to determine his competency to stand trial. On rebuttal during the penalty phase of the trial, the State called the expert who conducted the evaluation to testify that the defendant would remain a threat to the community. Because the defendant had not been given his Miranda warnings during the

evaluation, nor provided access to his attorney, the United States Supreme Court found a Fifth and Sixth Amendment violation. However, in contrasting the facts of this case with cases involving an expressed plea of insanity, the Supreme Court stated,

> When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist.

451 U.S. at 465. See also Henry v. State, 574 So.2d 66 (Fla. 1991) (holding that the insanity defense was properly struck when defendant refused compliance with a pretrial order for examination by the state's expert witness); Bannister v. State, 358 So.2d 1182, 1183-84 (Fla. 2d DCA) (same), cert. denied, 364 So.2d 891 (Fla. 1978).

Similarly, in Buchanan v. Kentucky, 483 U.S. 402, 422-23 (1987), also a first-degree murder case, the defendant was evaluated prior to trial for possible involuntary commitment for psychiatric treatment. At trial, the defendant attempted to establish an affirmative defense of "extreme emotional disturbance." Accordingly, the defendant called a social worker, who read from several reports and letters regarding the defendant's mental condition. On cross-examination, over defense objection, the witness was allowed to read from the original evaluation report, which was edited to exclude any references to statements made by the defendant regarding the commission of the

crime. In affirming the trial court's ruling, the Supreme Court distinguished Estelle v. Smith and held that

> if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Buchanan, 483 U.S. at 422-23 (emphasis added).

In Perri v. State, 441 So.2d 606, 608-09 (Fla. 1983), this Court extended the scope of Rule 3.216 and held that a psychiatric evaluation of a defendant facing the death penalty must be made prior to the imposition of sentence, based on the fact that two of the mental mitigating factors allow for their consideration even though the defendant's mental state did not rise to the level of legal insanity. Thus, since Perri, defendants have had the benefit of confidential evaluations by court-appointed mental health experts to develop evidence in mitigation. Like an insanity defense, however, unless the State offers evidence to contradict the defendant's mitigating evidence, the trial court virtually cannot reject that evidence, and thus must find the existence of that mitigating circumstance. Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1991). By precluding the State from having its own expert witness examine Appellant, the trial court denied the State the right to rebut the defense expert. Much of Dr. Weitz's testimony revolved around his diagnosis of "Vietnam Syndrome." Although the trial court, and implicitly the jury, ultimately rejected Dr. Weitz's testimony based on the testimony of the State's expert witness, the State

was nevertheless prejudiced in its ability to refute Appellant's evidence in mitigation. Appellant's ability, over the State's objection, to elicit from Dr. Cheshire, the State's expert, the fact that he had never spoken to, much less evaluated, Appellant was potentially very damaging. Moreover, had the State's expert not been able to form an opinion without interviewing Appellant, the State would have been totally precluded from rebutting Appellant's evidence, thereby forcing the trial court to find the existence of a mitigating factor that ultimately might not be valid.

The State is aware of Hickson v. State, 589 So.2d 1366 (Fla. 1st DCA 1991), which is currently pending before this Court in case #79,222,[10] wherein the First District reversed the trial court's order for a psychiatric evaluation of the defendant by a state expert. The defendant was seeking to present an affirmative defense of "Battered Spouse Syndrome" in her second-degree murder trial, and the State sought an independent examination of her. In reversing the trial court's order, the First District refused to analogize the case to others involving an insanity defense, since "Battered Spouse Syndrome" did not rise to the level of insanity.

The Fourth District, on the other hand, has recently held to the contrary. In State v. Davis, 17 F.L.W. D2691 (Fla. 4th DCA Dec. 2, 1992), the defendant challenged the voluntariness of his confession in his first-degree murder trial on the ground that he

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[10] This issue is also pending in Jones v. State, case #78,160, and Dillbeck v. State, case #77,752, both capital cases.

suffered from "Battered Child Syndrome" and "Posttraumatic Stress Disorder." The State's expert witness was allowed to evaluate the defendant without counsel present in order to rebut the defendant's claims. The Fourth District found Hickson to be inapposite because "the defendant in this case has placed his mental state at issue, and in doing so he has waived his fifth amendment privilege against self-incrimination." Davis, 17 F.L.W. at D2692.

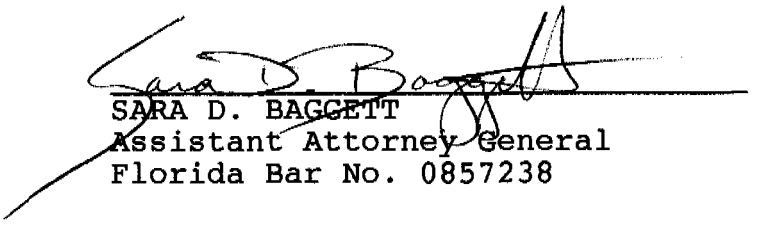
The State submits that the Fourth District's decision is eminently more correct, because, when a defendant agrees to present the testimony of an expert witness whose opinion is based on statements by the defendant regarding the underlying facts of the case, the defendant thereby waives any Fifth Amendment privilege. A contrary result would absolutely thwart the search for truth, since the defendant would be able to present a defense potentially impervious to attack, and the State would potentially be precluded from meeting its burden of disproving the defense beyond a reasonable doubt. In cases wherein the State's proof is wholly circumstantial, an affirmative defense based on uncontrovertible expert testimony would ensure an acquittal or reversal on appeal. Such an intentional subversion of the truth-finding process should not be condoned. Therefore, the State seeks a ruling that will settle the issue.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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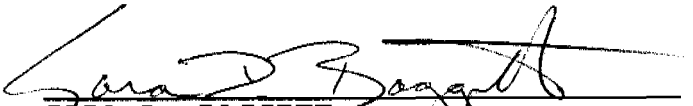
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jonathan Jay Kirschner, Esquire, 100 Avenue A, Suite 1-F, Fort Pierce, Florida 34950, this 23rd day of December, 1992.



SARA D. BAGGETT
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

WILLIAM REAVES, Appellant/Cross-Appellee, vs. STATE OF FLORIDA, Appellee/Cross-Appellant.	)	CASE NO. 79,575

APPENDIX

Supreme Court of Florida

JAN 3 1992

92A-046

WHEREAS, it officially has been made known to me that it is necessary to the dispatch of business of the FIFTH JUDICIAL CIRCUIT COURT OF FLORIDA that a judge be temporarily assigned to duty in that court to hear the case of:

State of Florida v. William Reaves
Indian River County Case # 86-729-CF

NOW, THEREFORE, I, Leander J. Shaw, Jr., under authority vested in me as Chief Justice of the Supreme Court of Florida, under article V, section 2 of the Constitution of Florida, and the rules of this Court promulgated thereunder, do hereby assign and designate THE HONORABLE JAMES B. BALSIGER, a county judge of INDIAN RIVER COUNTY COURT OF FLORIDA, to proceed to the FIFTH JUDICIAL CIRCUIT COURT OF FLORIDA, and on FEBRUARY 17, 1992, to hear, conduct, try, and determine the above cause which shall be presented to him as a temporary judge of said court and thereafter to dispose of all matters considered by him in said case. JUDGE BALSIGER, under and by virtue of the authority hereof, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and laws of the State of Florida upon a judge of the court to which he is hereby assigned.

DONE AND ORDERED at Tallahassee, Florida on DECEMBER 30, 1991.

CHIEF JUSTICE
SUPREME COURT OF FLORIDA

ATTEST:

DEPUTY CLERK