SUPREME COURT OF FLORIDA

WILLIAM REAVES,

Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

CASE NO. 79,575

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR INDIAN RIVER COUNTY, FLORIDA. (Criminal Division)

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PRELIMINARY STATEMENT

Appellant was the defendant in the trial court. He will be referred to as appellant or by name in this brief.

The Record on Appeal is consecutively numbered. All references to the Record will be by the letter "R" followed by the appropriate page number in parentheses. All references to the previous record in this case will be by the symbol "PR" followed by the appropriate page number in parentheses.

Additionally, two (2) motions to supplement the record have been filed by appellant, and upon receipt of that supplemented record, references to it will be referred to as "SR" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE

William Reaves was indicted for first degree murder in the death of Deputy Sheriff Richard Raczkoski by an Indian River County Grand Jury on October 8, 1986. (PR 2051-2055) Count I of the indictment alleged that the crime was committed from "a premeditated design to effect the death of Deputy Raczkoski". Count II alleged possession of a firearm by a convicted felon, and Count III alleged trafficking in cocaine. The State subsequently dismissed Counts II and III of the indictment, and those charges never were re-filed. (PR 2429, 2532)

The case proceeded to trial in August, 1987. Appellant was convicted and sentenced to death, and subsequently appealed that conviction and sentence. On January 15, 1991, this Court rendered its opinion reversing appellant's conviction and sentence, and a mandate reflecting same was issued on April 1, 1991. (R 2349)

The case proceeded to jury trial again in February of 1992, where a verdict of guilty to first degree murder and recommendation of death by a 10 to 2 margin were returned. (R 1811, 2320) Judgment was entered, and the trial judge subsequently imposed a sentence of death. (R 2328-2334) Findings of fact in support of the trial judge's ruling were entered in writing. (R 3009-3026)

Appellant filed a Motion for New Trial which was denied, and this appeal follows. (R 2982-2996)

STATEMENT OF THE FACTS

THE PRE-TRIAL PROCEEDINGS AND ISSUES.

On April 17, 1991, Acting Circuit Judge Walsh entered an order specially appointing the undersigned counsel as a special public defender pursuant to Chapter 27.53, Fla.Stat., and Chapter 925.036, Fla.Stat., to represent William Reaves through trial and any penalty phase proceedings. (R 2366) Appellant subsequently filed a Notice of Defendant's Intent to Participate in Discovery, as well as a Motion for Disclosure of Evidence. (R 2369-2378)

On July 26, 1991, hearings were held on appellant's Motion to Appoint Co-Counsel and to disqualify the Office of the State Attorney. (R 29-148).

At the Motion to Disqualify, the State first called Bruce Colton as a witness, who testified that he had been the State Attorney for the Nineteenth Judicial Circuit since November of 1985, and previously had been an Assistant Public Defender from October of 1972 through December of 1973. Colton further stated that he had no present recollection of ever meeting or communicating with the defendant. Colton testified that he had attempted to shield himself from any involvement in the current prosecution of Reaves and that he had not spoken with the current prosecutor, Mr. Barlow, in "any way whatsoever" concerning the current prosecution. (R 42)

On cross-examination, Mr. Colton stated that he had interviewed and subsequently hired Barlow to work at the State Attorney's Office, he had evaluated Barlow's progress as a

prosecutor, he infrequently socialized with Barlow, he had "many" conversations with Mr. Barlow during his five (5) years of employment at the prosecutor's office, and although Colton could not recall any specific instances where he had had conversations with Prosecutor Barlow concerning communications with William Reaves, that it was "possible" that such communications did occur. (R 47-48)

Colton further testified that at the previous trial of Reaves, Colton's involvement was "substantial". (R 49) That involvement included, but was not limited to, "death qualifying" the prospective jurors, general voir dire of the jurors, presenting state witnesses, making the closing argument in the guilt and penalty phase, and ultimately urging the jury to recommend execution of his former client. (R 49-53)

David Morgan testified that he had assisted in the prosecution of Reaves at the first trial and further that he had been instructed by Mr. Colton to shield any information that he acquired during the first prosecution from the current prosecution led by Mr. Barlow. (R 53-56)

Assistant State Attorney Barlow then was called and examined by Katherine Nelson, who assisted Barlow in the prosecution of Reaves. Barlow testified that after being informed by Colton that the re-trial would be assigned to Barlow, that Barlow had no further discussions concerning the case. (R 59) Barlow further testified that the State Attorney investigator currently assigned to assist in the prosecution of William Reaves was Steve Kirby,

and that Kirby had had no conversation with Mr. Renew, who assisted in the investigation and prosecution of Reaves during the first trial. (R 60) On cross examination, Barlow stated that Steve Kirby and Tom Renew both worked in the State Attorney's investigative unit, and further that both investigators worked in the Fort Pierce office, in the same building, and on the same floor. Barlow further testified that Renew and Kirby knew each other for approximately five (5) years.

On September 19, 1991, William Reaves filed a Motion to Disqualify then acting Circuit Judge Thomas J. Walsh, Jr. based upon certain disclosures made by Judge Walsh on the July 26, 1991 hearing. On September 24, 1991, the trial court entered an order granting the motion. (R 2469-2484) On October 2, 1991, the Chief Judge of the Nineteenth Judicial Circuit issued an order appointing County Court Judge James B. Balsiger, of Indian River County, to act as a Circuit Court Judge for the Reaves trial. (R 2493)

Reaves subsequently filed a Motion to Appoint a Mental Health Expert, Dr. William Weitz, of Boca Raton, Florida to confidentially examine Mr. Reaves and to assist the defense in preparing for trial. (R 2413-2415). On July 26, 1991, the trial court entered an order appointing Dr. Weitz to confidentially examine William Reaves and consult with the defense pursuant to the defendant's motion. (R 2431-2434). On November 4, 1991, appellant filed his supplemental witness list, listing the name of Dr. Weitz. (R 2507)

On January 6, 1992, the State filed its Motion to Prohibit Testimony of Abnormal Condition Not Constituting Legal Insanity. (R 2577-2605). On January 16, 1992, a non-evidentiary hearing was held on the motion. The State relied on this Court's decision in Chestnut v. State, 538 So.2d 820 (Fla. 1989), to support the contention that Dr. Weitz ought not be permitted to testify in the guilt phase of the proceeding. Appellant did not contest the fact that under Chestnut, Id., evidence of an abnormal mental condition not rising to insanity would be inadmissable to show that a defendant did not have the requisite specific intent to commit first degree murder. Appellant did object however, to excluding psychological testimony if admissable for some other purpose.(R 210-211). At the hearing, the trial court granted the State's Motion to Preclude such testimony limited solely to the "Chestnut" issue,[1] and on January

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[1]The trial court did not however, rule out that psychological testimony might be admissable for other purposes. The Court specifically ruled:

> Okay, I'm going to grant the state's motion, but it is, again, only inadmissable to negate the specific intent required to convict a (sic) first degree premeditated murder. ...they're right, they could come in and testify to something else, I don't know what they may try to testify to. Certainly, under Chestnut, they cannot negate the specific intent. ...but, you know, I just---I'm being very cautious, **but I am not about to enter an order that says for all reasons no psychologist can testify in guilt phase. I think that's just---I'm not going to say that**. I will say so far as if he tried to do it to show that he did not have the specific intent required to convict somebody of first degree premeditated murder, I will exclude that, that's excludable, **but just having a blanket saying that under no circumstances can a psychologist testify, I'm not going to sign something like that, but**

17, 1992, a written order reflecting same was entered. (R 2618)

On February 11, 1992, appellant filed his Motion to Disqualify Trial Judge/Motion to Dismiss for Lack of Jurisdiction. (R 2846-2850) The motion was summarily denied at a hearing on February 14, 1992. (R 265-266)

THE TESTIMONY AT THE GUILT PHASE OF THE TRIAL

The first witness called by the State was Jerry Fitzgerald. Fitzgerald testified that he processed the crime scene with the assistance of crime scene technician Michaela Scheihing. The crime scene was located at the Zippy Mart located on Route 60 between I-95 to the west and Vero Beach to the east. (R 769) The Zippy Mart is bordered by Route 60 on the north and 82nd Avenue on the west. (R 773) Upon arriving on the scene, Mr. Fitzgerald observed a Sheriff's Department's car parked in front of the telephones facing the phones. (R 771) An ice machine was located in front of the Zippy Mart on the sidewalk, and a "Dempsey dumpster" was located on the east side of the store. (R 771) There was bullet damage both to the Dempsey dumpster and the ice machine. (R 782) The bullet striking the ice machine hit the lower, left hand part of that machine, and two (2) bullets struck the dumpster. (R 783) Fitzgerald identified State's exhibit #11, consisting of the officer's belt and holster, and the exhibit was admitted over objection by appellant. (R 812)

<u>certainly as to what Chestnut is direct to, I will grant the motion</u>. (R 212-213)[Emphasis supplied]

Fitzgerald further testified that when he initially recovered Officer Raczkoski's pistol, the pistol contained three (3) live cartridges and three (3) empty shell casings. (R 815) Three (3) rounds had been fired from the deputy's gun. (R 816)

Mr. Fitzgerald then identified the shoes worn by the deputy at the time of the shooting. The shoes were admitted into evidence as Exhibit 9 over objection by appellant. (R 818-821) Also admitted was State's Exhibit 19, containing approximately four and a half (4 1/2) ounces of cocaine. Micheala Scheihing testified that she was a crime scene technician with the Indian River County Sheriff's Department in 1986. (R 861) She assisted Fitzgerald in processing the crime scene. (R 863) She located and recovered a bullet found inside a trailer located northwest of the Zippy Mart. (R 864)

Clinton Edward Fredell, Jr., was a mechanic/welder working on farm and citrus machinery in September of 1986 in Indian River County. (R 881) On the afternoon of September 22, 1986, Fredell noticed the appellant attempting to push a car near Fredell's driveway. Fredell offered to assist appellant and ended up agreeing to attempt to fix appellant's car. Fredell drove appellant to a friend's residence, dropped him off, and Reaves subsequently returned to Fredell's residence at approximately 3:00 to retrieve his automobile. At that time, appellant was wearing red shorts, a white t-shirt and black tennis shoes. Fredell charged Reaves $15.00 for the repairs to the automobile, which the appellant paid. (R 885) Appellant did not appear to

Mr. Fredell to be under the influence of alcohol or drugs. (R 887)

Susan Erhardt was employed with the Indian River County Sheriff's Department as a dispatcher in September of 1986. (R 894) On the night of the shooting, Ms. Erhardt was on duty with Cathleen Cooney. Two (2) persons worked at the 911 dispatching station, one to monitor the radio calls, and one to monitor telephone calls. (R 895). The console monitoring incoming 911 telephone calls displayed the telephone number from which the call was made, as well as the location/address of the telephone from which that call was made. (R 896) All of the 911 communications, both telephonic and radio, are recorded on magnetic, reel to reel tape. (R 899) The machine that contains that magnetic tape is approximately seven (7) feet tall, and has a red display located near the top, which displays the time of day in hours, minutes and seconds. (R 909-910) Additionally, as the magnetic tape is recording 911 radio and telephone transmissions, the recording machine imprints the precise time onto the magnetic tape itself, so that when the tape is replayed, the precise timing of events can be determined. (R 910-911)

Ms. Erhardt received a 911 telephone call at approximately 3:06 A.M. in the early morning hours of September 23, 1986. Erhardt answered the phone, and whoever made the call hung up. (R 902) Erhardt informed the radio dispatcher to send a patrol car to investigate the source of the call at the Zippy Mart located at 8195 State Road 60. (R 902) Ms. Erhardt then heard Deputy

Raczkoski indicate on his radio that he was enroute to that location. (R 903) Some time later, Deputy Raczkoski called the 911 dispatcher to check the name of William Reaves for any outstanding warrants. When the warrant check came back clear, the 911 telephone console again rang, and this time Deputy Raczkoski requested Susan Erhardt to call the cab company and find out when the cab William Reaves had requested would arrive at the Zippy Mart. (R 905) Ms. Erhardt called the City Cab Co., and asked if they had dispatched a cab to the Zippy Mart. The cab company representative responded affirmatively, and Susan Erhardt told Cathleen Cooney that the cab was on its way to the Zippy Mart. Subsequently, Ms. Erhardt heard a radio transmission to the effect that a deputy was "down" and to get an ambulance. (R 906)

Cathleen Cooney was the dispatcher on duty with Susan Erhardt. (R 914) Ms. Cooney testified that a dictaphone master tape system records all radio transmissions and telephone calls to and from the 911 emergency center. (R 918) Her testimony essentially corroborated the sequence of events outlined by Susan Erhardt. Cooney overheard the conversation between Raczkoski and Earhardt about getting a cab. Cooney testified Deputy Raczkoski did not sound excited, did not sound upset and gave no indication whatever that he was in any kind of trouble. (R 933)

Sandra Fox was employed as a communications supervisor in September of 1986 and testified that the 911 consoles viewed by the dispatchers displayed dates and times of incoming

communications. (R 936) She stated that the 911 system was working accurately on September 22, 1986, but could not state that the clocks viewed by the dispatchers were synchronized with the time imprinted upon the magnetic tape recording all communications in the dictaphone system. (R 937) On cross-examination, Ms. Fox testified that the singular most accurate measure of time between communications would be that time that was electronically imprinted on the 911 tape. (R 939)

Howard Whitaker was a supervisor for the Miami Herald in September of 1986, supervising newspaper carriers and on occasion delivering newspapers. (R 942) Whitaker was training a new newspaper carrier on that morning. (R 946) While driving behind the Zippy Mart, Whitaker heard loud "reports", that he believed sounded like someone shooting off fireworks. (R 948-949) As Whitaker approached the parking lot of the Zippy Mart, he noticed a police vehicle with its door open. Whitaker pulled slightly off the road, and yelled to the deputy to see if he could provide assistance. Whitaker then noticed a black male wearing red shorts, a white shirt, white socks and white footwear running from the scene. The man fled the scene into a wooded area. (R 950) Whitaker observed and approached Deputy Raczkoski, who lay supine on the parking lot. The deputy had his pistol in his hand. (R 951) Whitaker could not see any indications of wounds, so he reached under Deputy Raczkoski and found blood in the area of the deputy's back. (R 951) Whitaker then went to the deputy's car, staying down low, for Whitaker was unaware of whether the

shooter was still in the area. (R 951) Whitaker opened the passenger door of the vehicle, partially closed the passenger door in order to ascertain the number of the vehicle, reopened the door and leaned inside. Whitaker accomplished this while staying as low as he could. (R 964) Whitaker then leaned across the front seat, reached up by the steering wheel and pulled the microphone, which was draped over the handle of the spotlight located on the outside of the driver's door, and retrieved the microphone into the car. At that point, Whitaker keyed the microphone and attempted to make an emergency call. Subsequent to that, Whitaker proceeded to the telephones located in front of the Zippy Mart and called 911. (R 941-965) Upon completing the telephone call to 911, as Whitaker returned to render aid to the deputy, Deputy Raczkoski discharged his weapon one (1) time. (R 956-957)

Whitaker stated that there was something unusual about the way the person he observed fleeing the scene was running, and that he had only seen that kind of running at one other time in his life; in Vietnam under fire. (R 966-967)

Detective Perry Pisani was a general assignment detective in September of 1986. (R 971) Pisani was the on-call investigator on the morning of the shooting. (R 972) Pisani collected and preserved certain items of evidence, including the master 911 tape recording the telephone conversations and radio transmissions between Deputy Raczkoski and the 911 dispatchers. Pisani also collected a piece of paper found in Deputy

Raczkoski's car, on which was written the following information: William Reaves, black male, 4336 38th Avenue, date of birth 12/30/48. (R 975-976) Pisani stated that he constructed and edited a version of the events taken from the 911 master tape onto an additional tape, which the State of Florida attempted to introduce into evidence as Exhibit 78. Detective Pisani then explained the meanings of the various "ten" codes commonly in use by law enforcement in September of 1986. Detective Pisani testified that his reconstruction of the 911 master tape was an attempt to try to put it in "sequence", so that people would more readily understand the series of events. (R 1011) Mr. Pisani admitted that his taped version would not be accurate to the second, and further, that the single best measurement of time between any two (2) transmissions would be that time which was reflected and imprinted on the 911 master tape. (R 1012)

Detective Pisani testified that a "10-39" call was a 10 code wherein the party transmitting is requesting a confirmation of a given event. Deputy Raczkoski's telephoned request to the 911 dispatchers to confirm that a cab had been sent to the Zippy Mart became known in the course of the trial as the "10-39" call. Detective Pisani testified that the amount of time between Deputy Raczkoski's "10-39" call and Mr. Whitaker's telephone call to 911 reporting the downed deputy, was two (2) minutes and forty-seven (47) seconds. (R 1014)

Whitaker testified that prior to making the telephone call to 911, he attempted to utilize Deputy Raczkoski's car radio to

telephone for assistance but was unsure whether or not the message had gotten through. (R 954, 955) Dispatcher Erhardt testified that prior to receiving the telephone call from Mr. Whitaker, a broken radio transmission was received, the substance of which being that a deputy was "down" and requesting an ambulance. (R 906)

Detective Pisani testified that if the "walked on" radio call was, in fact, Mr. Whitaker attempting to call for help on Deputy Raczkoski's car radio, then the elapsed time from the "10-39" call until the "walked on" radio transmission was two (2) minutes and thirty-two (32) seconds. (R 1014, 1016, 1017)

Dr. Richard Peters was qualified as an expert in the field of emergency medicine, and testified to emergency procedures administered to Deputy Raczkoski upon his arrival at the Indian River Memorial Hospital. Dr. Peters testified that there were four (4) entrance wounds, two (2) in the small of the back, one (1) somewhat lower than that and one (1) up near the left shoulder. (R 1021) Dr. Peters first saw the patient at 3:45 A.M. Deputy Raczkoski was able to speak and complained about abdominal pain as well as having no feeling in his legs. (R 1022) At approximately 3:59 A.M., Dr. Peters turned responsibility for Deputy Raczkoski over to Dr. Large for further treatment. (R 1026)

Dr. James W. Large, upon stipulation, was qualified as an expert in internal medicine and surgery. (R 1030) Dr. Large testified that Deputy Raczkoski would frequently lapse in and out

of consciousness and that further, the deputy was "delirious". (R 1033) Dr. Large further stated that the deputy did mention "that he was having pain and was short of breath". (R 1034) Dr. Large attempted emergency surgery, but due to the extensive bleeding caused by the bullet wounds, the deputy expired at approximately 5:20 A.M. (R 1035)

Kenneth Hamilton was a road sergeant for the Indian River County Sheriff's Department in September of 1986. Hamilton heard over his radio that Deputy Raczkoski was checking out the Zippy Mart on Route 60, and proceeded to "back up" the deputy. (R 1049) Deputy Hamilton heard the radio transmission from an unidentified voice that an officer was "down". (R 1050) When Hamilton arrived at the shooting scene he administered first aid to Deputy Raczkoski. (R 1054) Deputy Hamilton identified the trousers that were worn by Deputy Raczkoski on the night of the shooting, and those trousers were admitted into evidence over objection as Exhibit 6. (R 1061)

Dr. Leonard Walker conducted the autopsy of Deputy Raczkoski. Dr. Walker identified an autopsy photograph, which was admitted into evidence over appellant's objection as Exhibit 66. (R 1074) Based on the trajectory of the bullets through the deputy's body, Dr. Walker concluded that the angle common to all four shots was from the back to the front, upward, and left to right. (R 1096) The number of injuries, and the concomitant voluminous loss of blood, would have resulted in the deputy surviving, at most, an hour after being shot. Dr. Walker

believes that his estimate of one hour of survival would be "pushing it". (R 1090) The deputy could have been moving and turning at the time the fatal shots were fired, and the anatomical evidence could be consistent with the deputy turning from right to left as the fatal shots were fired. (R 1097) There were no marks on the deputy's throat. (R 1097)

The State then called Erman Eugene Hinton to testify. Hinton testified that he did not remember anything from back in 1987 and further, that he had been in prison twice since then, and had no memory of anything that had occurred so long ago. (R 1122-1127) The Court then ruled that Hinton was unavailable, and his testimony from the 1987 trial would be read into the record. (R 1128-1129) The undersigned counsel then moved the Court to permit reading prior inconsistent statements made by Hinton that related to Hinton's credibility. (R 1130-1131) The trial court denied appellant's Motion to permit introduction of the additional statements, and the statements appellant was seeking to introduce were then proffered into the record. (R 1132-1133; 1135-1143) Additionally proffered were nine (9) certified copies of Hinton's felony convictions. (R 1145-1147) The thrust of Hinton's testimony was that in the early morning hours of September 23, 1986, Appellant, following the shooting, visited Hinton at Hinton's apartment. Hinton claimed the appellant knocked at his window, waking him, and upon entering the apartment made certain statements, to wit:

1. "I done fucked up. I done fucked up."

2. "I just shot a cop, I just shot a police, I just shot a cracker." (R 1167)

Hinton claimed appellant was wearing red shorts, a blue pajama top and black or blue reebok sneakers. (R 1167-1168) Appellant carried a pistol wrapped in a white t-shirt. (R 1169) Hinton claimed that although his girlfriend was present, she was not awakened by the entry of appellant, and only Hinton heard the statements made by Reaves. (R 1169-1170) Hinton stated he smoked marijuana with Reaves. (R 1175) Hinton stated that Reaves said a gun he was carrying fell out of his shorts, that Deputy Raczkoski put his foot on it, that Reaves hit the deputy under the throat, and that the deputy fell back while Reaves was hitting him. (R 1178-1179)

Hinton stated that while holding the recovered gun on Deputy Raczkoski, Reaves told the deputy "I wouldn't do that if I were you". Hinton claims Reaves said the deputy said, "Don't shoot me. Don't kill me." (R 1181) Hinton then stated that the deputy turned and ran, and that Reaves shot the deputy four (4) times. (R 1182) Hinton claimed that Reaves, following the shooting, ran through the woods until reaching Hinton's residence. (R 1185)

Tim Dobeck, Sheriff of Indian River County, then testified that he and his staff were able to track appellant to the Colonial Motel in Melbourne, Florida and from there to a bus station in Brevard County, and subsequently to a bus bound for Dougherty County, Georgia. (R 1212-1219)

Alexander Hall, of the Dougherty County Drug Squad, was then called as a state witness. Appellant below renewed his objection to evidence of the Georgia drug transaction raised in pre-trial motion #28. Mr. Hall testified that he and other members of the Dougherty County Sheriff's Office were alerted that appellant would be present on a bus due to soon arrive in Albany, Georgia. As the bus disgorged passengers, Hall was approached by a black male who asked Hall where to find marijuana or cocaine, and subsequently offered to sell cocaine to Hall. (R 1248-1249) Hall testified that he was unaware that the person attempting to make a drug transaction with him was suspect Reaves from Florida. (R 1248) Hall and Reaves entered the bathroom at the bus station, where Reaves reached into a bag and first lifted out an automatic weapon (R 1249), then replaced the weapon and retrieved a quantity of cocaine. (R 1251) Hall then went into a bathroom stall, ostensibly to sample the cocaine, but in reality to retrieve his weapon from his leg. When Hall walked out of the stall, Reaves grabbed at the gun held by Hall. (R 1251) Hall testified that at the time of the bathroom incident, Hall was not dressed in a police uniform, and was wearing no police insignia, and was "undercover". (R 1271-1272) Hall further stated that Reaves grabbed at Hall's gun prior to the time Hall identified himself as a police officer. (R 22) Hall said the weapon in Reave's bag was unloaded. (R 1272)

While walking from the bus station to the police car, appellant began running away from the officers---appellant ran

approximately a block and a half and was caught and subdued by the deputies. (R 1254)

Jerry Kennedy, employed by the Albany Georgia Police Department Crime Laboratory, testified that when he asked appellant his name, Reaves gave the name Randy Martin.

Detective Pisani was recalled to identify the statement made by appellant on September 25, 1986 after his capture in Georgia, and the statement was played to the jury in its entirety. (R 1360) Appellant's statement in sum was that the shooting was the result of accident and panic and that appellant was "wired on cocaine" at the time of the shooting. [See Exhibit 72] Appellant's stated the 380 automatic accidentally fell from his shorts while the deputy and appellant were conversing near the deputy's car. The deputy stepped on the gun, Reaves panicked and "went down and just picked it up". Raczkoski demanded the gun, and appellant refused. At that point, Appellant claims the deputy began reaching for his own gun as he ran around the side of his car. Appellant says Raczkoski was approximately twelve (12) to fifteen (15) feet away at the time Reaves fired, and that Raczkoski's gun was out of its holster at the time Reaves fired. Reaves admitted to firing first. Reaves reiterated in the statement several times that he was under the influence of cocaine, and that in fact he was a convicted felon. Reaves further stated that Raczkoski's back was to him when Reaves fired, but that the deputy was running and reaching for his gun. Reaves claimed Razckoski never asked or begged Reaves not to

shoot him. [See Exhibit 72] Reaves stated that the 380 automatic holds seven (7) rounds, and that he emptied the clip when he fired. Reaves admitted running to Hinton's house, subsequently securing transportation to the Colonial Hotel in Melbourne, and ultimately taking a bus to Albany, Georgia.

John O'Rourke testified as an expert qualified in firearms operatability. O'Rourke testified that the .380 automatic used by Reaves was in fact "a semi-automatic" weapon which requires that the trigger be pulled each time for a bullet to be expelled. (R 1425) O'Rourke further testified that the .380 pistol had two safety devices, a grip safety and a thumb safety. (R 1426) In order to disengage the grip safety, one merely would grasp the gun by the handle, and once the grip safety is engaged, it does not automatically disengage, i.e., once the gun was picked up for the first time, the grip safety is disengaged and would not prevent the weapon from firing. (R 1437) O'Rourke also testified that he was able to completely fire a fully loaded clip of seven (7) rounds in 2.13 seconds. (R 1439)

Daniel Nippes was qualified as an expert in microscopic and chemical examinations for the presence of gun powder residue, and also in the area of trace evidence and transfer materials. Nippes testified that by examining the deputy's uniform shirt, he was able to conclude that the shots were fired no less than two (2) feet away and more likely at a distance in excess of four (4) feet.

The State rested, and appellant moved for judgment of

acquittal on the issue of felony murder. (R 1457) The court deferred ruling. (R 1468)

DEFENDANT'S CASE

Appellant attempted to introduce evidence relevant to the issue of excusable homicide during its case in chief. (R 1469) The court below ruled that it would not allow any psychological testimony in support of the affirmative defense of excusable homicide. (R 1474) Appellant then proffered the testimony of Dr. William Weitz. William Weitz is a licensed psychologist in the State of Florida with advanced training in clinical psychology. He is a team leader for the veterans administration where he directs and supervises a readjustment counseling center for Vietnam combat veterans. (R 1476)

Dr. Weitz interned at Walter Reed Army Medical Center and was a staff psychologist at Silas B. Hayes Army Hospital in Ft. Ord California. Dr. Weitz was then appointed as Assistant Chief and Director of Clinical Services for three (3) years at the Walter Reed Army Medical Center. Following that service, Dr. Weitz left the military and worked for the veterans administration for three (3) years in Miami as the director of the Miami Veteran's Center. Dr. Weitz then returned to active duty where he was chief of psychological services at Tripler Army Medical Center. (R 1477) Dr. Weitz holds licenses to practice psychology in Florida, California, Maryland and the District of Columbia. He is a member of several professional organizations and has published articles in academic journals. (R 1479)

Dr. Weitz received specialized training in military psychology, and has spent fourteen (14) years in active duty as an army psychologist in the army medical department. (R 1479) Weitz also received specialized training in clinical psychology, Vietnam Syndrome, and post-traumatic stress disorders. (R 1480-1482) He currently holds the rank of Lieutenant-Colonel in the United States Army. (R 1486) Dr. Weitz was qualified as an expert without objection by the State in the areas of general psychology, clinical psychology, military psychology, Vietnam Syndrome and post-traumatic stress disorders. Dr. Weitz testified that in his opinion, to a reasonable degree of psychological certainty, William Reaves suffers from the condition known as Vietnam Syndrome. (R 1495) Weitz further testified that as a result of Reaves' affliction with Vietnam Syndrome, he experienced certain behavioral reactions, including but not limited to, heightened startle responses, hyperalertness and survivor behavior. Dr. Weitz testified that even though Reaves' combat service was twenty-two (22) years ago, that left untreated, the symptoms of the disease would not decrease over time. (R 1495-1498) Weitz testified that appellant's condition of Vietnam Syndrome impacted upon Reaves' perception of provocation during the seconds before the shooting. (R 1498-1499) Weitz further testified the condition of Vietnam Syndrome impacted upon the intensity of anger, rage, resentment and heat of passion experienced by William Reaves during the shooting. (R 1501-1502)

Weitz further testified that Reaves' capacity for reflection was minimized as a direct result of his affliction with Vietnam Syndrome. (R 1502)

On cross-examination, Weitz testified that although Vietnam Syndrome was not specifically listed in the DSM IIIR, that battered women's syndrome is similarly not listed as a discreet diagnostic category or clinical diagnosis in that reference source. (R 1533)

Joel Charles then was qualified as an expert in the area of tape recording. (R 1538-1539) Mr. Charles testified that the time maintained on the dictaphone machine recording all 911 transmissions was synchronized with pulsations of electricity at 60 cycles per second, and that such a timing mechanism was absolutely accurate. (R 1542-1543) Charles further testified that the elapsed time between Deputy Raczkoski's last telephone call to the 911 dispatcher, and the radio call by Mr. Whitaker from Deputy Raczkoski's car, was two (2) minutes and twenty-three (23) seconds.

Henry Huerta was qualified as an expert in the area of the operation, functioning and maintenance of firearms. (R 1558) Huerta testified that the .380 automatic utilized by William Reaves in the shooting has no hammer, and is not an external hammer gun. (R 1561)

The defense rested and renewed the motion for judgment of acquittal as to felony murder. Although the trial court refused

to grant the judgment of acquittal, it ruled that the felony murder instructions would not be submitted to the jury, and that counsel would be prohibited from arguing a felony murder theory during the closing arguments.

At the charge conference, appellant renewed his previously denied pretrial motion #3, objecting to the standard instruction on premeditated murder and moved the Court for a corrected instruction on first degree murder from "premeditated design". The trial court denied the renewed motion. (R 1617) Appellant also renewed pretrial motion #6, objecting to the standard jury instruction on reasonable doubt. (R 1601) The trial court also denied appellant's requested special instruction relating to the state's burden of proof when a defendant asserts an affirmative defense. During closing argument, the State repeatedly referred to appellant as a seller of cocaine. Appellant objected and moved for mistrial. The trial court denied the motion for mistrial but cautioned the prosecutor not to make the drugs a "major issue". (R 1668; 1671-1672)

During rebuttal closing, the prosecutor pretended to be the slain deputy, and while pointing at appellant, stated that appellant "is the person on the morning hours of September 23 that I met at the Zippy Mart carrying that weapon and I arrested him for that". (R 1742) Appellant objected on grounds of prosecutorial misconduct due to the prosecutor's portrayal of the slain deputy and the concomitant inflammatory argument. The objection and motion for mistrial were denied. (R 1742) The

prosecutor repeatedly argued that the jury should not be "confused" by defense counsel's argument. (R 1738; 1743) Appellant timely objected and moved for mistrial. The motion and mistrial were denied. (R 1744)

The prosecutor subsequently indulged in a "golden rule" violation, to which the trial court sua sponte interrupted counsel and requested the jury to disregard the prosecutor's statements. (R 1751) The prosecutor told the jury that defense counsel was attempting to 'insult their intelligence' with his argument. Timely objection was tendered. The objection was sustained and the remark stricken. (R 1733-1734)

At the conclusion of the prosecutor's closing rebuttal argument, defense counsel timely objected and renewed his motion for mistrial including the additional ground that the cumulative nature of the prosecutor's argument acted to deprive the defendant of due process of law. (R 1755)

Appellant renewed his objection to the standard jury instructions previously tendered, as well as his request for appellant's special jury instructions previously denied. (R 1786)

The jury retired to deliberate at 2:30 P.M.

Approximately three (3) hours into deliberations, the jury issued a question:

> "Please give a clear explanation of second degree murder, specifically page 9, lines 4 and 5. The defendant carried or possessed a firearm during the commission of the "offense". What offense is being referred to? Is the "offense"...referring to a secondary offense as in a robbery or is it reference to the crime before us?"

Approximately seven and a half (7 1/2) hours into deliberation, at 10:05 P.M., the jury issued the following two (2) questions:

> A. "If a hung jury, will there be a retrial"?, and
>
> B. "Could he be found guilty of first degree murder or explain premeditated first degree murder"?

The trial court reinstructed the jury. (R 1800-1801)

At 11:49 P.M., after over nine (9) hours of deliberations, the jury returned a guilty verdict to the charge of first degree premeditated murder. (R 1811)

THE TESTIMONY AT THE PENALTY PHASE OF THE TRIAL

At the penalty phase, the prosecution presented evidence that appellant previously had been convicted of grand theft and conspiracy to commit robbery. Appellant timely objected that such convictions would not qualify as prior violent felonies under Fla.Stat. 921.141(5)(b). Appellant further requested certain special instructions and modifications to the standard instructions relating to the penalty phase in capital cases, all of which were denied. (R 1836)

Edward Haver was the first witness called by the State in the penalty phase, and testified that appellant had robbed him on May 13, 1973, in Stuart, Florida. This was the defendant's conviction for grand theft. (R 1838-1852) The State then introduced the conviction of the defendant for conspiracy to rob obtained in Indian River County. (R 1854-1862). This was the conviction that appellant received while being represented by

then public defender, Bruce Colton, State Attorney for the Nineteenth Judicial Circuit at the time of this trial. (PR/1960-2002)

The state then presented testimony of Indian River County jailer, Carl Lewis, who stated that appellant had struck him on January 19, 1992. This resulted in a conviction for battery on a law enforcement officer. (R 1872-1881)

Appellant presented the testimony of seven (7) witnesses in the penalty phase. Fran Ross, an attorney licensed in Florida, Will Otis Cobb and Charlie Jones all presented evidence on appellant's growth, development and behavior while growing up in Gifford, Florida, as well as the change in appellant's behavior which occurred subsequent to his return from Vietnam. (R 1895-1947)

Hector Caban and William D. Wade testified as to the appellant's participation in combat in Southeast Asia in 1969 and 1970. Particularly, that appellant spent a year with Charlie Co. in the Central Highlands of South Vietnam, near Pleiku, from 1969 until 1970, and that during that period Charlie Co. experienced significant combat action. (R 1949-2026)

Dr. William Weitz was the last witness called by appellant in the penalty phase, and he in sum reiterated the testimony that he had given during the proffer previously cited in this statement of facts. (R 2027-2135). The State presented rebuttal evidence. (R 2144-2238) At the conclusion of the penalty phase, the jury, by margin of 10 to 2, issued an advisory sentence of

death. (R 2320) The death sentence was imposed at a sentencing proceeding held on March 31, 1992. The trial court filed written findings. (R 2328-2335)

A timely notice of appeal was filed. (R 3056-3057).

SUMMARY OF THE ARGUMENT

This case involved the panic killing of a police officer. The only evidence of premeditation was the hearsay statement of a witness unavailable to testify. In order to prove that the hearsay declarant was lying, appellant sought to admit prior inconsistent statements of the declarant. By excluding the proffered evidence, the trial court prohibited appellant from effectively rebutting the sole evidence of premeditation.

The defense was excusable homicide per Chapter 782.03, Fla.Stat. Appellent relied exclusively on the argument that the killing was accidental, in the heat of passion upon sufficient provocation. Reaves tried to admit expert opoinion evidence of the issue of provocation, as well as the other elements of excusable homicide. By excluding the evidence, appellant was deprived of his ability to put on a defense.

Having precluded appellant from putting on his defense and prohibiting him from effectively rebutting the state's evidence, the state in closing argument chose to indulge in nearly every kind of prosecutorial misconduct known to Florida courts. Personal attacks on counsel; facts not-in-evidence; talking as the victim from the grave; golden rule violations---all were fair game. There were five well-founded mistrial motions.

During voir dire, jurors who thought anyone convicted of a killing automatically should get the death penalty, were allowed to remain on the panel despite challenges for cause. Appellant was precluded from individually questioning the remaining jurors to see if they felt that way too.

The case was prosecuted by the office of State Attorney Bruce Colton, who previously represented Reaves in 1973. Colton actually participated in Reaves' first trial; securing a guilty verdict and the death penalty for his former client. That's why the case was reversed the first time. Reaves moved to disqualify Colton's office from this prosecution, too.

At the penalty phase, the court improperly found heinous, atrocious or cruel as an aggravating factor. It failed to find two (2) statutory mitigating factors that were supported by competent, substantial unrebutted evidence.

It was quite a trial.

GUILT PHASE ISSUES

POINT I

THE TRIAL COURT ERRED BY REFUSING TO ADMIT EVIDENCE OF PRIOR INCONSISTENT STATEMENTS OF A HEARSAY DECLARANT.

The State's evidence of premeditation relied almost exclusively on the testimony of one (1) witness: Erman Eugene "Goose" "Pluto" Hinton.

Hinton claimed that when appellant came to his apartment on the morning of the shooting, appellant told him that prior to

firing the fatal shots, the deputy backed away and pleaded for his life.

The State relied heavily upon Hinton's testimony, arguing repeatedly and persuasively during closing argument that the jury must find the killing premeditated because the deputy, at the time of the shooting, was "begging for his life". (R 1666; 1667; 1674; 1684)

The importance of the Hinton testimony and the State's reliance upon it cannot be overstated. The jury had serious concerns about whether the killing was premeditated. After seven and a half (7 1/2) hours of deliberating, they requested the trial court to further define premeditation. (R 1800)

Hinton refused to testify when called. Upon motion of the State, he was ruled "unavailable" pursuant to Chapter 90.804(1)(b), Fla.Stat. and his former testimony from the previous trial was read to the jury. Appellant requested the trial court to admit evidence of Hinton's prior inconsistent statements, claiming such statements would conclusively show Hinton's testimony to be not credible. (R 1135-1144) Three (3) of the statements were made to sheriff's deputies shortly following the shooting. The fourth was a deposition given shortly before the first trial.

In one of those statements, Hinton claimed appellant stated that while holding the gun prior to the shooting, he "had the hammer back". (R 1142) The uncontroverted evidence at trial was the murder weapon had no external hammer. (R 1561)

Other inconsistencies included, but were not limited to, who else was present when Reaves met with Hinton on the morning of the shooting, whether Hinton smoked marijuana on that morning, profoundly different descriptions of the murder weapon, and when Hinton had last seen appellant prior to the shooting. (R 1135-1144)

Appellant also sought to introduce certified copies of Hinton's nine (9) felony convictions. (R 1145)

The trial court refused to admit evidence of Hinton's prior inconsistent statements based upon Section 90.614(2), Fla.Stat., providing that extrinsic evidence of a prior inconsistent statement is inadmissable unless the witness is first afforded an opportunity to explain or deny the statement. (R 1146)

Hinton however, was not a witness; he was a hearsay declarant.

Hinton's former trial testimony was properly admitted because of his "unavailability" to testify within the meaning of Chapter 90.804(1). Once that testimony was admitted, the provisions of 90.614(2) no longer remained a prerequisite to admitting Hinton's prior inconsistent statements.

Chapter 90.806, Fla.Stat. directly addresses the issue raised below and 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 admissable, regardless of**

> **whether or not the declarant has been afforded an opportunity to deny it**. [emphasis supplied]

A party may attack the credibility of a witness by any of the following methods:

> 1. Introducing statements of the witness which are inconsistent with his present testimony.
>
> 2. Showing that the witness is biased.
>
> 3. Attacking the character of a witness.
>
> 4. Showing a defect of capacity, ability, or opportunity in the witness to observe, remember or recount the matters about which he testified.

Chapter 90.608, Fla.Stat. Also see, Chapter 90.609-90.610, Fla.Stat. Hinton was no **less** a witness by virtue of his unavailability to testify. He merely was a hearsay declarant witness rather than a testifying witness. And as a hearsay declarant witness, evidence of statements or conduct of the declarant "at any time inconsistent with his hearsay statement is admissable". Chapter 90.806(1), Fla.Stat.

It is well recognized that a violation of due process of law is engendered when a jury either is misled or not fully informed as to facts bearing on the credibility of a key witness. Armstrong v. State, 399 So.2d 953, 960 (Fla. 1981); Napue v. Illinois, 360 U.S. 264 (1959). "If a failure to fully inform the jury of the interest of a witness could in any reasonable likelihood have affected the decision of the jury, a new trial is required. Armstrong v. State, 399 So.2d 953, 960 (Fla. 1981).

The issue of Hinton's credibility went to the very "heart" of appellant's defense. The trial court's exclusion of prior

inconsistent statements affecting his credibility is reversible error, and a denial of due process of law pursuant to Article 1, Sections 9 and 16 of the Constitution of the State of Florida, and Amendments 5, 6, 8 and 14 of the Constitution of the United States. See: O'Reilly v. State, 516 so.2d 106 (Fla. 4th DCA 1987)

POINT II

THE TRIAL COURT ERRED BY DENYING APPELANT'S CAUSE CHALLENGES AND PROHIBITING APPELLANT FROM QUESTIONING JURORS ABOUT THEIR PREDISPOSITION TO IMPOSE THE DEATH PENALTY.

During voir dire, in response to a hypothetical question posed by appellant to the entire panel, several prospective jurors indicated they believed any person found guilty of killing another "ought to get the death penalty". (R 432) Based upon the panel's response to that question, appellant began questioning prospective juror Dudley as to his views on that issue:

> MR. KIRSCHNER:...You had your hand up, sir?
>
> PROSPECTIVE JUROR DUDLEY: Mr. Dudley.
>
> MR. KIRSCHNER: Mr. Dudley, let me get this straight. Your saying that if somebody killed somebody and went to trial and was found guilty by a jury, that as a result of that you feel they **automatically ought to get the death penalty**? [emphasis added]
>
> PROSPECTIVE JUROR DUDLEY: They thought about what they were doing, they took the other person's life. I think they should get the same thing.
>
> MR. KIRSCHNER: And is it fair to say that you feel fairly strongly about that?
>
> PROSPECTIVE JUROR DUDLEY: Yeah, I would say so.

MR. KIRSCHNER: And is it also a fair statement that you feel strongly enough about it...that you would probably carry that into the deliberation room as well?

PROSPECTIVE JUROR DUDLEY: Yeah.

MR. KIRSCHNER: Okay. It would be difficult, would it not, for you to disfranchise yourself from those feelings that you have, that somebody under those circumstances ought to get the death penalty?

PROSPECTIVE JUROR DUDLEY: Yeah.

MR. KIRSCHNER: Okay. Thank you and I appreciate the honesty.

(R 432-433) Appellant then began questioning another juror who initially had responded affirmatively to the hypothetical, prospective juror Hambleton. The following exchange occurred:

PROSPECTIVE JUROR HAMBLETON: Well, under what you've described, depending on the circumstances of the case, if it was premeditated or an act of violence with no justifiable circumstances around it, then the death penalty would be appropriate, I feel.

MR. KIRSCHNER: And you feel strongly about that?

PROSPECTIVE JUROR HAMBLETON: Depending on the circumstances, yes.

MR. KIRSCHNER: Sure. But you think if the jury found him guilty of an unlawful killing, then that person automatically ought to get the death penalty? (R 433)

At this point the State objected and requested a side bar conference. The State contended that the question as posed was "an improper hypothetical". (R 435) The trial court overruled the prosecutor's objection, stating, "I'm going to overrule the objection. If they are so--if they believe that anybody who is convicted automatically gets the death penalty; I think that's what he's asking and I think he can ask that, regardless of any

mitigating or aggravating circumstances." (R 435) Following the side bar conference, the colloquy with prospective juror Hambleton continued:

> MR. KIRSCHNER: You were on the hot seat, Mr. Hambleton. The question was somebody has killed somebody, they've gone to trial, they've been lawfully convicted by a jury of his peers and they've been found beyond a reasonable doubt to be guilty. Do you think that person deserves the death penalty?
>
> PROSPECTIVE JUROR HAMBLETON: Yes, as long as they fit into the same mitigating circumstances that we would be asked to evaluate this case on.
>
> MR. KIRSCHNER: Okay. Well, let me ask you closer than. Is it your feeling---knowing nothing more, than knowing nothing more about mitigating circumstances, just that the person had been convicted; they had killed another human being, they had been convicted. Do you think that, by itself, that person deserves the death penalty?
>
> PROSPECTIVE JUROR HAMBLETON: Yes.
>
> MR. KIRSCHNER: Okay. And is that a strongly held belief?
>
> PROSPECTIVE JUROR HAMBLETON: Yes.
>
> MR. KIRSCHNER: And is that a theory that you would bring with you as you have brought it before us here to the jury room to deliberate?
>
> PROSPECTIVE JUROR HAMBLETON: That's an impression, yes that I would bring with me--
> MR. KIRSCHNER: I understand.
>
> PROSPECTIVE JUROR HAMBLETON: --based on the rules and instructions that we have of our system.

(R 436) At that point in the voir dire, the Court sua sponte interjected, reminded the juror that there were two (2) phases to capital proceedings, and asked prospective juror Hambleton if he would "weigh and consider the aggravating and mitigating

circumstances as the Court instructs you" (R 437). Juror Hambleton responded affirmatively. After the Court's admonition and instruction to Hambleton, the prospective juror indicated that he would be able to divorce himself from his preconceived idea that anyone convicted of an unlawful killing should be sentenced to death. (R 437)

Appellant then asked prospective jurors Specht and Wallace virtually the identical question that previously had been asked of jurors Dudley and Hambleton, and that had been previously ruled proper by the trial court. (R 438-439) On these occasions, however, the State's objections were sustained and the trial court then prohibited appellant from asking the question in the future. (R 439-440) The following colloquy, in the presence of the jury then occurred:

> MR. KIRSCHNER: Judge, I'm allowed--I'm certainly allowed to explore this issue.
>
> THE COURT: You're allowed to explore it, but you must ask the total question and that's not--
>
> MR. KIRSCHNER: That's my total question, Your Honor.
>
> THE COURT: Well, I'm not going to allow the question asked in that form, Counselor, and it's as simple as that. Don't ask it again.
> MR. KIRSCHNER: It's directed at--
>
> THE COURT: Don't ask it again. I've made my ruling. Live with it.
>
> MR. KIRSCHNER: May we have a side-bar?
>
> THE COURT: No, sir. You can continue voir dire but you will ask proper questions.
>
> MR. KIRSCHNER: May I be heard, Your Honor?
>
> THE COURT: No, sir. Continue.

(R 440) Appellant subsequently moved to strike the panel and for a mistrial based upon the trial court's decision to preclude questioning of prospective jurors relative to their predisposition to recommend death based merely upon a judgment of guilt in phase 1. (R 505) The motions were denied. (R 506)

Appellant subsequently challenged for cause jurors Dudley and Hambleton. (R 510) The Court denied both challenges. Appellant then was forced to utilize two (2) peremptory challenges to exclude Dudley and Hambleton. (R 513) Appellant subsequently used his remaining peremptory challenges, and moved the trial court to allow additional peremptorys, indicating on the record particular jurors that were unacceptable and that appellant would exclude if granted the additional peremptory challenges. (R 640) The motion for additional peremptory challenges subsequently was renewed under State and Federal Constitutional grounds. (R 641-642)

It is axiomatic that the selection of a jury in a criminal case is a critical stage of any trial. Francis v. State, 413 So.2d 1175 (Fla. 1982); also see; Frank v. Mangum, 237 U.S. 309 (1915); Shaw v. State, 422 So.2d 20 (Fla. 2nd DCA 1982). The improper denial of a challenge for cause constitutes reversible error. The long standing rule adopted by this Court is succinctly stated:

> If there is any basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at

> the trial he should be excused on motion of a party, or by the Court on its own motion.

Singer v. State, 109 So.2d 7, 23-24 (Fla. 1959) See also Moore v. State, 525 So.2d 870, 872 (Fla. 1988). In close cases, any doubt regarding the juror's ability to act impartially "should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality". Sydleman v. Benson, 463 So.2d 533 (Fla. 4th DCA 1985). Jurors should be above "even the suspicion of partiality". O'Connor v. State, 9 FLA. 215, 222 (Fla. 1860).

In the instant case, jurors Dudley and Hambleton indicated that the mere conviction of someone charged with killing would, in their minds, require the imposition of a sentence of death. Both those jurors agreement with that essential proposition is clear from the record.

Prospective jurors who would automatically recommend a sentence of death in any capital case are not impartial, and warrant being excused for cause. O'Connell v. State, 480 So.2d 1284 (1985). A juror believing that a sentence of death is automatic in a capital case amounts to a fundamental violation of "the express requirements in the Sixth Amendment to the United States Constitution and in Article I, Section 16, of the Florida Constitution, that an accused be tried by 'an impartial jury'". O'Connell, Id. at 1287, quoting Thomas v. State, 403 So.2d 371, 375 (Fla. 1981).

A close perusal of the trial record makes evident the fact that many members of this jury panel maintained a fundamental misunderstanding of the mechanics of the two (2) phase capital process, as well as when and under what circumstances a death recommendation would be appropriate. That basic misapprehension of fundamental principles of capital litigation was compounded by the trial court precluding appellant from further inquiry into the issue of the juror's preconceived notions that it is proper to recommend death in all cases where a defendant is found guilty of an unlawful killing. Florida Rule of Criminal Procedure 3.300(b) specifically provides that after a panel of prospective jurors has been sworn:

> (b) On examination, the Court may then examine the prospective jurors collectively. **Counsel for both state and defendant shall have the right to examine jurors orally on their voir dire**. The order in which the parties may examine each juror may be determined by the Court. **The right of the parties to conduct an examination of each juror orally shall be preserved**.

It is uncontrovertible that a trial court has considerable discretion in determining the extent of counsel's examination of prospective jurors, and it is equally true that there are situations in which trial courts are justified in curtailing voir dire. Such was not the case here. Appellant simply inquired of the panel whether they believed that anyone convicted should be sentenced to death. Most of them indicated they believed that to be true. Counsel then attempted to inquire individually of the jurors to determine to what extent their preconceptions and

misconceptions were ingrained. The trial court responded by precluding appellant from continuing into that area of inquiry.

It is submitted that refusing to allow inquiry by counsel of prospective jurors relative to their ability to be impartial, when coupled with the improper denial of cause challenges addressed to jurors who would automatically impose the death penalty, is a violation of due process of law under the Florida and federal Constitutions, and warrants granting of a new trial.

A.

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO USE A PEREMPTORY CHALLENGE IN A RACIALLY DISCRIMINATORY WAY TO EXCLUDE THE PANEL'S LONE JEWISH JUROR.

The prosecutor used a peremptory challenge to exclude Mrs. Kaplan, the lone Jewish juror on the panel, from the jury. Apppellant timely objected, claiming that Mrs. Kaplan was a member of a distinct, identifiable minority group and that there was a substantial likelihood that the challenge was exercised solely because of her membership in that group, and not based on any other legitimate legal criteria. (R 573-574) The prosecutor responded that the State's decision to exercise the challenge was based on racially neutral criteria and further that the rule prohibiting peremptory challenges based on race enunciated in Neil v. State, 457 So.2d 481 (Fla. 1984), did not apply to a jewish juror.

In Wright v. State, 586 So.2d 1024 (Fla. 1991) this Court reaffirmed the previously established procedures in place to

eliminate the racially discriminatory use of peremptory challenges required by Article I, Section 16 of the Florida Constitution. It is clear that any doubt as to whether the party objecting to the use of peremptory challenges has met his initial burden, should be resolved in that party's favor. State v. Slappy, 522 So.2d 18 (Fla. 1988). Once the objecting party has met the initial burden, the striking party must then give a clear and reasonably specific, racially neutral explanation of legitimate reasons for the state's use of its peremptory challenges. Slappy v. State, Id.; Batson v. Kentucky, 476 U.S. 79 (1986).

In Slappy, a list of five (5) non-exclusive reasons were provided to assess whether or not the strike was pretextual.

> 1. The group bias was not shown to be shared by the juror in question.
>
> 2. Failure to examine the juror, or a prefunctory examination.
>
> 3. Singling the juror out for special questioning designed to invoke certain responses.
>
> 4. The prosecutor's reason is unrelated to the facts in the case.
>
> 5. A challenge based on reasons equally applicable to jurors who were not challenged.

Slappy, 522 So.2d at 22. A close perusal of the entire record of voir dire of the venire clearly shows that Kaplan's responses were no different in kind or in context from jurors not challenged by the prosecutor.

Although Neil v. State and its progeny listed above have not directly addressed cognizable groups other than racial groups, it is becoming increasingly clear that "cognizable groups" qualifying for protection under Article I, Section 16 of the Florida Constitution and the equal protection clause of the United States Constitution include ethnic groups. And generally speaking, "an ethnic group can be identified on the basis of its members sharing certain identifiable traits, including religious, linguistic, ancestral, or physical characteristics. Alen v. State, 17 F.L.W. D622 (March 3, 1992). The U.S. Supreme Court recently held that under the equal protection clause, hispanics may not be peremptorily challenged on the basis of their race or ethnicity. Hernandez v. New York, 111 S.Ct. 1859 (1991). That reasoning has been adopted by the 3rd District Court of Appeal in Alen v. State, 17 F.L.W. D622 (March 3, 1992). Jews certainly are a cognizable ethnic group under the rationale of the above cases, and exclusion of a jewish juror based solely on her minority status violates the guarantees enumerated in Article I, Sections 9 and 16 of the Constitution of the State of Florida and Amendments 5, 6, 8 and 14 of the United States Constitution.

B.

THE TRIAL COURT ERRED IN GRANTING THE STATE'S CHALLENGE OF A JUROR FOR CAUSE WHERE THE JUROR COULD PUT ASIDE HER PERSONAL VIEWS AND APPLY THE LAW AS INSTRUCTED BY THE TRIAL COURT.

Over appellant's objection (R 639), the trial court excluded juror Mills for cause due to her personal views regarding the

death penalty. This was error where Mills testified that she could set aside her personal views and apply the law as instruced by the Court.

Mills repeatedly told the prosecutor that she supported the death penalty, however, she expressed some reluctance and equivocation about her ability to be a juror in a capital case. This equivocation occurred only after Mills was queried by the prosecutor as to whether she could "sign a verdict form". (R 625) She unequivocally stated that she could not sign a verdict form. Upon further questioning, she repeatedly and unwaveringly testified that she would follow the Judge's instructions, she would make her decisions according to the law, and that she could fulfill her responsibility. (R 628; 629; 631)

The law is clear that a juror may not be excluded for cause merely because she is personally opposed to the death penalty, whether for religious, philosophical, political or other reasons. In Gray v. Mississippi, 481 U.S. 648 (1987), the court reaffirmed the principal that "the relevant inquiry is whether the jurors' views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath". The Court further noted that due process is violated where one who can set his or her personal views aside is excluded despite some personal belief that the death penalty may be unjust:

> "The state's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the state's legitimate

> interest in administering constitutional capital sentencing schemes by not following their oaths". Wainwright v. Witt, 469 U.S. at 423. To permit the exclusion for cause of other prospective jurors based on their views on the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law". Witherspoon v. Illinois, 391 U.S. at 523.

Gray v. Mississippi, Id.

In the instant case, it is clear that although prospective juror Mills had reservations about serving, she believed in the death penalty, and stated she could follow the law as given to her by the trial judge. She did not equivocate until she was asked about signing a verdict form. Asking a juror whether they can sign a death verdict is clearly improper, and has been specifically disapproved. Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981) modified en banc 695 F.2d 124 (1983). Even after being asked that improper question, Mills on numerous occasions stated she could put aside whatever personal beliefs she had and follow the law.

The erroneous exclusion of even one (1) juror is constitutional error which goes to the very integrity of the legal system and cannot be harmless. Gray v. Mississippi, 481 U.S. 648 (1987); Chandler v. State, 422 So.2d 171 (Fla. 1983). The improper exclusion of Juror Mills warrants reversal.

POINT III

THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF DR. WILLIAM WEITZ, THEREBY DEPRIVING APPELLANT OF THE ABILITY TO PRESENT A DEFENSE AND DENYING HIM A FAIR TRIAL.

The defense in this case was excusable homicide. No other defense was raised. No other defense was argued. In fact, defendant affirmatively waived in writing jury instructions relating to justifiable homicide. Appellant in opening statement repeatedly told the jury that the only issue in the case was excusable homicide. (R 2319)

The portion of Chapter 782.03, Fla.Stat. relating to the defense of excusable homicide applicable to this case provides that the killing of a human being is excusable, and therefore lawful, when committed by "accident or misfortune in the heat of passion, upon any sudden and sufficient provocation". The Florida Standard Jury Instruction further provides that:

> The issue in this case is whether the killing of (victim) was excusable. The killing of a human being is excusable if committed by accident and misfortune. In order to find the killing was committed by accident and misfortune, you must find the defendant was in the heat of passion brought on by a sudden provocation sufficient to produce in the mind of an ordinary person the highest degree of anger, rage or resentment that is so intense as to overcome the use of ordinary judgment, thereby rendering a normal person incapable of reflection.

During his proffer, Dr. Weitz testified that appellant suffers from a condition known as Vietnam Syndrome. Appellant has Vietnam Syndrome as a direct result of his participation as a

combat soldier in Vietnam. Weitz testified that as a result of the syndrome, appellant experiences certain behavioral reactions that impacted on appellant's perceptions of provocation, as well as his ability to use ordinary judgment, his capacity for reflection, and the intensity of anger, rage and resentment experienced by him in the seconds immediately preceding the shooting. (R 1501-1502)

Weitz's testimony was offered to show that appellant acted in conformity with the elements of the defense of excusable homicide. Dr. Weitz was qualified as an expert in five (5) separate areas: general psychology; clinical psychology; military psychology; Vietnam Syndrome; and Post Traumatic Stress Disorders. (R 1486)

Fla. Stat. 90.702 authorizes introduction of opinion testimony by a qualified expert if scientific, technical or other specialized knowledge will assist the factfinder in understanding the evidence or in determining a fact in issue, but only if the opinion can be applied to evidence at trial. Section 90.702 however, must be read in para materia with evidence code provisions dealing with relevancy. See Fla.Stat. 90.401-90.403. Accordingly, there are four (4) requirements that must be met in order to admit an expert opinion. First, the opinion evidence must help the trier of fact. Second, the witness must be qualified as an expert. Third, the opinion must be capable of being applied to evidence at trial. Finally, the probative value of the opinion must not be substantially outweighed by the danger

of unfair prejudice. Glendening v. State, 536 So.2d 212, 220 (Fla. 1988).

The sole basis for state's objection to the admissability of Weitz's testimony was that such testimony would violate the rule of Chestnut v. State, prohibiting the introduction of evidence of an abnormal mental condition not constituting legal insanity in order to prove that an accused did not entertain the specific intent or state of mind essential to the proof of an offense. Chestnut v. State, 538 So.2d 820 (Fla. 1989)

In the instant case, the appellant was not offering a mental state defense, but rather support for the affirmative defense of excusable homicide. The expert testimony would have aided the jury in interpreting the surrounding circumstances as they effected appellant's perceptions of provocation, intensity of anger, rage, resentment, as well as the other components of excusable homicide which were directly at issue in this case.

Such "syndrome evidence" is routinely admitted in Florida courts in other contexts. Battered women syndrome is routinely admitted in Florida courts and is widely accepted in other jurisdictions. See for example Kerry v. State, 467 So.2d 761 (Fla. 4th DCA 1985), rev. den. 476 So.2d 675 (Fla. 1985); Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982), rev. den. memorandum 415 So.2d 1361 (Fla. 1982); Borders v. State, 433 So.2d 1325 (Fla. 3rd DCA 1983); see: Williams v. State, 547 So.2d 1276 n.1 (Fla. 1st DCA 1989).

Battered women syndrome, like Vietnam Syndrome, is not a discreet diagnostic category present in the DSM IIIR, but rather is a "descriptive term that refers to a pattern of responses and perceptions presumed to be characteristic of women who have been subjected to continuous physical abuse by their mate". Schuller and Vidmar, Battered Women Syndrome Evidence in the Courtroom, A Review of the Literature, Law and Human Behavior, Vol. 16, No. 3, 1992. Similarly, child sexual abuse accomodation syndrome (CSAAS) is also accepted in Florida courts. Ward v. State, 519 So.2d 1082 (Fla. 1st DCA 1988); Calloway v. State, 520 So.2d 665 (Fla. 1st DCA 1988). As with the battered women syndrome example above, CSAAS purports to describe different categories of reactions typical of child sexual abuse victims. Summit, Child Sexual Abuse Accomodation Syndrome, 7 Child Abuse and Neglect 177 (1983).

The same level of analysis holds true for rape trauma syndrome (RTS). RTS typically consists of a description of the common aftereffects of rape coupled with an opinion that a particular complainant's behavior is consistent with having been raped. Frazier and Borgida, Rape Trauma Syndrome, A Review of Case Law and Psychological Research, Law and Human Behavior, Vol. 16, No. 3, 1992. Rape trauma syndrome is admissable in a number of jurisdictions as rebuttal testimony. See e.g. Commonwealth v. Gallagher, 510 A.2d 735 (Pa.SuperCt. 1986); Perez v. State, 653 S.W.2d 878 (TexCt.App. 1983). RTS is admitted in still other jurisdictions to establish lack of consent. State v. Marks, 647

P.2d 1292 (Kan. 1982). State v. Huey, 699 P.2d 1290 (Ariz. 1985).

Evidence of post traumatic stress disorder similarly is admissable in Florida, as well as other jurisdictions. Kruse v. State, 483 So.2d 1383 (Fla. 4th DCA 1986). Courts that have examined the admissability of this type of expert testimony have generally analyzed it to see whether it meets three (3) basic criteria:

> 1. The expert must be qualified to give an opinion on the subject matter;
>
> 2. The state of the art or scientific knowledge must permit a reasonable opinion to be given by the expert; and
>
> 3. The subject matter of the expert opinion must be so related to some science, profession, business, or occupation as to be beyond the understanding of the average laymen.

Ward v. State, 519 So.2d 1082, 1084 (Fla. 1st DCA 1988) quoting Hawthorne v. State, 408 So.2d 801, 805 (Fla. 1st DCA 1982), rev. den. 415 So.2d 1361 (Fla. 1982).

The elements of Vietnam Syndrome, as enumerated by Dr. Weitz in the proffer, were essential for the jury to adequately understand whether appellant, because of his combat experiences, met the statutory prerequisites set forth to establish the defense of excusable homicide. By precluding this admissable testimony, appellant could not give to the jury the factual underpinnings that would support a finding that the homicide was excusable. Through the excision of this critical testimony,

appellant was effectively deprived of his right to present a defense, of his right to assistance of counsel, and of his right to due process of law under Article 1, Sections 9 and 16 of the Constitution of the State of Florida, and Amendments 5, 6, 8 and 14 of the Constitution of the United States.

POINT IV

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISQUALIFY THE OFFICE OF THE STATE ATTORNEY.

Prior to the first trial, appellant filed a motion to disqualify the Office of the State Attorney for the Nineteenth Judicial Circuit. The motion was based on the fact that State Attorney Bruce Colton had previously represented appellant while an Assistant Public Defender in 1973. The motion was denied after an evidentiary hearing, and this court subsequently reversed appellant's subsequent conviction for failure to grant the motion to disqualify.

On July 15, 1991, appellant filed yet another motion to disqualify the Office of the State Attorney, and another evidentiary hearing was held on July 26, 1991. The State presented testimony to the effect that Colton had attempted to shield himself from any further involvement in the current prosecution of appellant. On cross-examination, Colton testified concerning the level of his involvement during the first trial, to wit, his substantial participation in voir dire, direct examination of witnesses, closing argument in both guilt and penalty phases, and urging the jury to recommend that the death

penalty be imposed on his former client. (R 47-53) The motion to disqualify was denied, and Colton's office proceeded to prosecute appellant through guilt and penalty phases of his trial.

A lawyer's ethical obligations to former clients generally requires disqualification of the lawyer's entire law firm where any potential for conflict arises. See: Rules Regulating Florida Bar, 4-1.10. In State v. Fitzpatrick, 464 So.2d 1185 (1985), this court crafted an exception to the imputed disqualification rule where the "law firm" involved is a governmental agency. That exception, however, only applies when two (2) prerequisites have been met:

> 1. The disqualified attorney may not have provided any prejudicial information relating to his prior client's pending criminal charge, and,
>
> 2. The disqualified attorney has not personally assisted, in any capacity, in the prosecution of the charge.

State v. Fitzpatrick, Id. at 1187. It is unquestioned in this case that State Attorney Colton had actual access to privileged defense related information when he represented appellant in 1973. Reaves v. State, 547 So.2d 105,107 (Fla. 1991). Whether Colton imparted any of that privileged information during the subsequent prosecution of Reaves is unclear. What is clear is that the second prong of the test established in Fitzpatrick, Id., has been egregiously violated. Appellant, during his first trial, watched his former defender articulately, convincingly and successfully argue for the jury to recommend executing him. This is the kind of "appearance of impropriety" that our system of

justice cannot tolerate. When Colton prosecuted his former client, he "personally assisted in the prosecution of the charge" within the meaning of the second prong of the Fitzpatrick test.

In a recent case, this Court has held that in analyzing disqualification issues, the public at large must be given reason to believe that the judicial process has not been compromised, and that its integrity is above suspicion. Castro v. State, 17 F.L.W S177 (March 12, 1992). The taint of impropriety accruing by virtue of Colton's prosecution of his former client during a murder trial, and ultimately resulting in appellant receiving a death sentence cannot be whisked away, wiped from the public consciousness as if it had never happened.

Even in the most recent trial, Colton was de minimus involved in the prosecution, both by virtue of reading into evidence of prior direct testimony which he had elicited at the first trial, as well as by introduction of the very prior conviction for which he represented Reaves as an aggravating factor in the penalty phase. (R 1163; 1865; 1872) Every motion tendered by the prosecutor was "respectfully submitted by Bruce Colton", appellant's former lawyer. This court has ruled that "our system must not only refuse to tolerate impropriety, but even the appearance of impropriety as well". The taint of impropriety caused by Colton's prosecution of his former client for first degree murder is not now dissipated by meager efforts to "screen" himself from his staff. The trial court's refusal to

grant the Motion to Disqualify requires reversal of appellant's conviction and remand for a new trial.

POINT V

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL DURING THE STATE'S CLOSING ARGUMENT BASED UPON REPEATED AND CUMULATIVE PROSECUTORIAL MISCONDUCT.

During the State's closing argument, the prosecutor engaged in repeated incidents of prosecutorial overreaching in an attempt to inflame and enrage the passions of the jurors. The prosecutor's obvious intent was to inject into his argument sufficient passion and emotionality to override any inclination the jury would have to follow the Judge's instructions and the law.

This flagrant and intentional series of acts began innocuously enough with the prosecutor vouching for the credibility of the lead detective in the case, Detective Pisani, while Pisani was seated in the gallery watching the closing. When the prosecutor attempted through gesticulation to have the jurors view and reassess Detective Pisani, appellant timely objected, and the trial court sustained the objection. (R 1662) The prosecutor then attempted to refocus the jury's attention onto the defendant's character, by referring to him as a cocaine seller. (R 1671; 1668) Although the court overruled appellant's timely objection and denied the tendered mistrial motion, the court cautioned the prosecutor to avoid making defendant's character a major issue. (R 1671-1672)

The most egregious abuses however, occurred during the prosecutor's rebuttal closing argument. The prosecutor repeatedly indulged in personal attacks on appellant's counsel, as well as on appellant. For example:

1. "So we know there's not any gun battle between the two as **Mr. Kirschner would make you believe**..." (R 1735)

2. **"Don't allow yourselves to be confused with the act of the defendant**..." (R 1738)

This 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". Appellant timely objected and moved to strike the highly prejudicial comment, and the trial court complied. (R 1733, 1734)

The prosecutor then portrayed the slain deputy speaking from the grave, while pointing at the defendant and saying "that defendant, William Reaves, is the person on the morning hours of September 23, that I met at the Zippy Mart carrying that weapon and I arrested him for that". Defendant's timely objection and motion for mistrial were denied. (R 1742)

The prosecutor then argued that appellant's counsel was intentionally attempting to confuse the jury about premeditation, and that defense counsel was responsible for charges as to lesser included crimes upon which the jury was to be instructed. Once again, appellant's timely objection and motion for mistrial were denied.

Only when the prosecutor told the jury "I submit to you that if you had a gun in your face in a store after hours at 3:00 A.M. in the morning..." did the trial court intercede in the prosecutor's attempt to inflame the jury and instructed the jury to disregard the statement.

At the conclusion of the prosecutor's tirade, appellant renewed the previously denied motions for mistrial, and argued that the cumulative effect of the prosecutor's argument had deprived appellant of a fair trial.

The general rule is that improper prosecutorial remarks constitute reversible error when such remarks "have prejudiced and influenced the jury into finding the defendant guilty. Ryan v. State, 457 So.2d 1084, 1086 (Fla. 4th DCA 1984); Grant v. State, 194 So.2d 612 (Fla. 1967). Resorting to personal attacks on defense counsel is an improper trial tactic which may "poison the minds of the jury". Ryan, Id., at 1089; Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), cert. den. 386 So.2d 642 (Fla. 1980). Certainly the kind of personal attack described above, where the prosecutor directly told the jury that defense counsel was "insulting your intelligence", and additionally intimated that the instructions on premeditation and lesser included offenses were a mere creation of appellant's counsel in order to confuse and mislead the jury, constitutes the kind of personal attack that has been resoundingly and repeatedly rejected by our courts. Jackson v. State, 421 So.2d 15 (Fla. 3rd DCA 1982); Briggs v. State, 455 So.2d 519 (Fla. 1st DCA 1984).

The prosecutor also indulged in a most extreme and egregious example of violating the "golden rule" prohibition, when asking the jurors to imagine having the murder weapon pointed at them. This kind of argument is universally condemned. Jenkins v. State, 563 So.2d 791, 792 (Fla. 1st DCA 1990); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979).

The prosecutor's gross, inflammatory portrayal of the slain deputy, pointing and identifying appellant as his killer, was beyond the realm of acceptable conduct, and even absent the timely objection would constitute fundamental error. Pait v. State, 112 So.2d 380 (Fla. 1959). And the intentional nature of the inflammatory remark is highlighted by the prosecutor's repeated forays into prohibited areas. In view of the recidivist nature of the prosecutor's misconducts, the court's lone curative instruction after the golden rule violation was "insufficient to dissipate the statement's prejudicial effect". Reddish v. State, 525 So.2d 928, 931 (Fla. 1st DCA 1988). The cumulative effect of these errors act to deprive appellant of a fair trial and due process of law pursuant to Article I, Sections 9 and 16 of the Constitution of the State of Florida and Amendments 5, 6, 8 and 14 of the Constitution of the United States. O'Reilly v. State, 516 So.2d 106, 107 (Fla. 4th DCA 1987); Armstrong v. State, 399 So.2d 953 (Fla. 1981).

POINT VI

THE TRIAL COURT ERRED BY ADMITTING IRRELEVANT, PREJUDICIAL EVIDENCE OF APPELLANT'S ATTEMPTED NARCOTICS TRANSACTION IN GEORGIA.

Approximately two (2) days after the shooting, appellant fled to Albany, Georgia. Upon his arrival at the bus station there, he attempted to sell cocaine to an undercover law enforcement officer. The trial court overruled appellant's timely objection to the introduction of that evidence. (R 1241; 855)

The state argued that evidence of the attempted sale was relevant because it showed how appellant was financing his "flight" from Indian River County. (R 852)

Evidence that a defendant was seen at the scene of a crime, leaving the scene, or fleeing the scene, in most instances, would be relevant to the question of guilt. Fenelon v. State, 594 So.2d 292 (Fla. 1992). Confusion and disagreement concerning the quantum of evidence necessary to show flight recently led this Court to prohibit giving the flight instruction. Fenelon, Id. It is clear that flight is only relevant to the extent it shows consciousness of guilt. Plasencia v. State, 426 So.2d 1051 (Fla. 3rd DCA 1983); Fenelon v. State, 594 So.2d 292 (Fla. 1992).

The attempted sale of narcotics to an undercover police officer in Georgia is probative neither to the killing nor the flight in the instant case. The evidence was offered merely to show bad character and propensity, as prohibited by Chapter 90.404(2)(a), Fla.Stat. This claim is buttressed by the State's

closing argument, wherein the prosecutor repeatedly referred to appellant as a "drug seller". The trial court subsequently admonished the State not to make the attempted narcotics transaction a "major issue". (R 1668; 1671)

Assuming arguendo there was some probative value to that evidence, any such value was substantially outweighed by the danger of unfair prejudice occasioned by the manner in which that fact was argued in closing. See Chapter 90.403, Fla.Stat. The admission of this evidence, in conjunction with the emphasis placed on it during the closing argument, acted to deprive appellant of due process of law and derrogation of his rights under Article 1, Sections 9 and 16 of the Constitution of the State of Florida, and Amendments 5, 6 8 and 14 of the Constitution of the United States.

POINT VII

THE TRIAL COURT JUDGE WAS WITHOUT JURISDICTION TO TRY THE CASE.

On October 2, 1991, William Hendry, Chief Judge of the Nineteenth Judicial Circuit, entered an administrative order assigning James B. Balsiger, a Judge of the County Court of Indian River County, to proceed to the Circuit Court of Indian River County to conduct and try the instant case. Subsequently, appellant filed a Motion to Disqualify the Trial Judge/Motion to Dismiss for Lack of Jurisdiction. (R 2846-2850) On February 14, 1992 a hearing was held on that motion and the trial judge summarily denied it. (R 265-266)

It is clear under Article V, Section 2(b) of the Florida Constitution, that the Chief Justice of the Supreme Court maintains the power to assign judges to "temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the power to assign judges for duty in his respective circuit". See: Treadwell v. Hall, 274 So.2d 537 (Fla. 1973); State v. Herrera, 407 So.2d 637 (Fla. 3rd DCA 1981); Rodgers v. State, 325 So.2d 48 (Fla. 2nd DCA 1975), cert. dis., 342 So.2d 1103 (Fla. 1977).

Chapter 26.57, Fla.Stat., further provides that a county judge "may be required to perform the duties of Circuit judge in other counties of the circuit as his time may permit and as the need arises, as determined by the Chief Judge of the Circuit".

Florida Rule of Judicial Administration 2.050(b)(4) provides that the chief judge of each judicial circuit may assign "any judge to temporary service for which the judge is qualified in any court **in the same circuit**. [emphasis added]

Chapter 26.57, Fla.Stat., when read in para materia with Florida Rule of Judicial Administration 2.050(b)(4), precisely defines the maximum parameters within which the Chief Judge of a circuit may reassign county court judges for circuit court duty. A chief judge of a circuit is without authority to transfer a county court judge outside the territorial limits of his circuit in order to try a capital case. To be sure, under Florida Rule of Judicial Administration 2.030, the Chief Justice of the Supreme Court maintains the power to specially assign qualified

judges to special duty throughout the state to any court for which they are qualified to serve. Fla.R.Jud.Admin. 2.030(a)(3)(A). The authority to assign judges in that manner however, is not delegable to the Chief Judge of a circuit except to the extent that the Chief Judge of a circuit may so assign judges for duty in that circuit. [emphasis supplied] Article V, Section 2(b).

The record in the instant case carries only Chief Judge Hendry's order specially appointing Judge Balsiger to try appellant's case. Judge Hendry is without constitutional authority to assign a county judge to hear a case outside of the Nineteenth Judicial Circuit. The record is devoid of any such order being entered by Chief Justice of the Supreme Court, hence Judge Balsiger was without jurisdiction to try the case. This issue was timely raised and summarily denied. Courts cannot assume jurisdiction not granted them by the constitution or by statute, and a judgment rendered by a court in a case where it has no jurisdiction is void. See: Dunnedin v. Bense, 90 So.2d 300 (Fla. 1956); West's Drugstores, Inc. v. Cornelius, 149 So. 332 (1933).

POINT VIII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR CORRECTED INSTRUCTION ON FIRST DEGREE MURDER FROM PREMEDITATED DESIGN.

The jury below was confused and divided over the issue of whether this killing was premeditated. This confusion is evident by the question propounded by the panel over seven and a half (7

1/2) hours into their deliberations, to wit: "could he be found guilty of first degree murder or explain premeditated first degree murder". (R 1800) This confusion existed despite the fact that the jury possessed all of the instructions in writing.

Appellant submits that such confusion was engendered by virtue of the insufficiency of the standard instruction on premeditation. Section 782.04(1)(1), Fla.Stat. defines first degree murder as "the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person being killed or any human being. In McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957) this Court defined the "premeditated design" element as follows:

> A **premeditated design** to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection **and deliberation** entertained in the mind before and at the time of the homicide. ...if the **design** to take human life was formed a sufficient length of time before its execution to admit of some reflection **and deliberation** on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or **design** would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent. [emphasis supplied]

Also see Littles v. State, 384 So.2d 744 (Fla. 1st DCA 1980) [quoting McCutchen]. In Owen v. State, 441 So.2d 1111, 1113, n.4 (Fla. 3rd DCA 1983), the Court wrote:

> Premeditation and deliberation are synonymous terms, which, as elements of first degree murder, mean simply that the accused, before he committed the fatal act, intended that he would commit the act at the time that he did,

> and that death would be the result of the act. [citation omitted]. Deliberation is the element which distinguishes first and second degree murder. [citation omitted]. **It is defined as a prolonged meditation and so is even stronger than premeditation**. [citation omitted] [emphasis supplied]

The standard jury instruction on premeditated murder as issued to the jury in the instant case is contrary to the constitution and misstates Florida law. The standard instruction unconstitutionally relieves the State of its burdens of proof and persuasion as to the statutory element of "premeditated design". The only attempt in defining the premeditation element is: "killing with premeditation is killing after consciously deciding to do so". There is no mention of the requirement under McCutchen, that the State prove "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation", and that "the party at the time of the execution of the intent was fully conscious of a **settled and fixed purpose** to take the life of a human being, and of the consequence of carrying such purpose into the execution". McCutchen, Id.

Additionally, the standard instruction relieves the State of the burdens of proof and persuasion as to the requirement that the premeditated design be fully formed before the killing. While the standard instruction states that "killing with premeditation" is killing after consciously deciding to do so, it relieves the State of its burden by creating a presumption, to wit, "it will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused

convince you beyond a reasonable doubt of the premeditation at the time of the killing". Thus, the jury is told that it need only find premeditation at the time of the killing, and not before, as required by McCutchen. Finally, the standard instruction does not inform the jury that the premeditated design element, carrying with it the element of deliberation, requires more than simple premeditation.

A jury instruction that relieves the State of the burden of proof or of persuasion as to an element of the offense is unconstitutional. See: Mullaney v. Wilbur, 421 U.S. 684 (1975); Sandstrom v. Montana, 442 U.S. 510 (1979) [discussing Mullaney]; Francis v. Franklin, 471 U.S. 307 (1985).

The jury in this case was not instructed as to felony murder. The sole issue for their consideration, especially in view of the fact that the defendant was precluded from presenting his defense of excusable homicide, was whether or not the killing was premeditated. By incorrectly instructing the jury on the element of premeditation, the trial court deprived appellant of a fair trial pursuant to Article 1, Sections 9 and 16 of the Constitution of the State of Florida, and Amendments 5, 6, 8 and 14 of the Constitution of the United States.

A.

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE STANDARD JURY INSTRUCTION ON REASONABLE DOUBT.

Appellant raised an objection to the standard jury instruction on reasonable doubt in pretrial motion #6.

Florida Standard Jury Instruction 2.03 defines reasonable doubt as follows:

> A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt or, if, having a conviction, it is one which is not stable, but one which waivers and vascillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty.

In In Re: Winship, 393 U.S. 358 (1970), the Supreme Court held that the reasonable doubt standard is "indispensable" because it impresses on the trier of fact the "necessity of reaching a subjective state of certitude of the facts and issue". Id. at 364. In Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978), the Court in reversing petitioner's state court convictions, condemned the following jury instruction defining reasonable doubt:

> It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after careful consideration of all facts and arguments..."

The court wrote that the instruction "was the exact inverse of what it should have been". Id. at 24. Although it is proper to instruct the jury that a reasonable doubt cannot be "purely speculative", a court is "playing with fire" when it goes beyond that. U.S. v. Cruz, 603 F.2d 673, 675 (7th Cir. 1979). It is improper to instruct that the government need not prove guilt

"beyond all possible doubt". U.S. v. Shaffner, 524 F.2d 1021 (7th Cir. 1975). Further, an instruction equating a reasonable doubt with a "real possibility" has been condemned because it may "be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense". U.S. v. McBride, 786 F.2d 45, 51-52 (2nd Cir. 1986).

Appellant contends that the "abiding conviction of guilt" language in the Standard Jury Instruction in essence instructs the juror "if you have an abiding conviction of guilt, that will be sufficient to convict in lieu of proof beyond a reasonable doubt". Where a jury instruction is challenged, the question is not what the court thinks the instruction means "but rather what a reasonable juror could have understood the charge's meaning. Francis v. Franklin, 471 U.S. 307, 315-316 (1985); Cage v. Louisiana, 111 S.Ct. 328 (1990). Since the jury could have taken the "abiding conviction of guilt" standard as eliminating the requirement of proof beyond a reasonable doubt, the standard instruction is improper on that ground. The trial court's issuing of this improper instruction deprived appellant of a fair trial below.

B.

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUESTED SPECIAL INSTRUCTION RE: BURDEN OF PROOF.

In the instant case, the defense asserted was excusable homicide. Appellant waived justifiable use of deadly force instructions and relied solely upon the language contained in the

excusable homicide instruction. At the charge conference, appellant requested the following 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.

While appellant had the burden of presenting evidence that the homicide was excusable, the burden of proving guilt beyond a reasonable doubt never shifted from the State. Stated another way, the prosecution had to prove beyond a reasonable doubt that the homicide was not excusable. See Andrews v. State, 577 So.2d 650 (1st DCA 1991).

By issuing the requested instruction, any ambiguity brought on by infirmities in the standard instructions as claimed above well may have been cured. It has long been held that it is an indsipensable requisite to a fair and impartial trial that the Court "correctly and intelligently instruct the jury on the essential and matieral elements of the crime charged and required to be proven by competent evidence". State v. Delva, 575 So.2d 643 (Fla. 1991) quoting Gerds v. State, 64 So.2d 915 (Fla. 1953).

POINT IX

THE TRIAL COURT ERRED IN ADMITTING OVER DEFENSE OBJECTION A GORY AND INFLAMMATORY AUTOPSY PHOTOGRAPH OF THE DECEASED; THE VICTIM'S PANTS, SHOES AND UNIFORM SERVICE BELT.

Exhibit 66 is a photograph of the victim taken by the medical examiner, after the unsuccessful emergency surgery to

save the deputy's life. The photograph is exceedingly gruesome and without relevance.

The purpose of legitimate photographic evidence is to assist the State in presenting its case to the jury. Such evidence should not detract from the issues by inflaming the jury against the accused. In the instant case, Exhibit #66 merely was one of several photographic exhibits introduced through the medical examiner. (R 1074-1080) Appellant below objected only to Exhibit #66, for it was the only exhibit that was not relevant. Assuming minimal relevancy, its probative value would be far outweighed by unfair prejudice, or would be rendered unnecessary as needless presentation of cumulative evidence. See Chapter 90.403, Fla.Stat.

While it is true that a photograph of the victim showing relevant injuries is generally admissable, Allen v. State, 340 So.2d 536 (Fla. 3rd DCA 1976), there are limits to a Court's discretion in admitting such photographs. One which has as its primary effect the inflaming of the passion of ordinary persons to an extent that would likely interefere with disspassionate evaluation of the evidence or issues should not be admitted. Jackson v. State, 359 So.2d 1190 (Fla. 1978) and photographs which depict emergency procedures which have been performed on the victim after the injury may be improper. Rosa v. State, 412 so.2d 891 (Fla. 3rd DCA 1982).

The problem of inflaming the passions of the jury becomes exacerbated when the admission of the photograph is seen in light

of the admission of other irrelevant, highly emotional evidence, including the victim's shoes, pants and uniform service belt. (R 1061; 1074; 819; 808-809) The State argued different theories of relevancy, including the lame assertion that Exhibit #9, a pair of black shoes, were offered to show that evidence at the crime scene was "carefully collected". (R 819) The State's assertion that the shoes and clothing identified the deputy as being a law enforcement officer is equally infirm. Identification of Raczkoski as a law enforcment officer was a fact never at issue below.

Introducing into evidence these items of dubious if any evidentiary value acted to deprive appellant of his right to fair trial and due process of law under Article 1, Sections 9 and 16 of the Constitution of the State of Florida and Amendments 5, 6, 8 and 14 of the Constitution of the United States.

A.

THE TRIAL COURT ERRED BY PERMITTING UNIFORMED INDIAN RIVER COUNTY SHERIFF'S DEPUTIES TO REMAIN IN THE COURTROOM DURING THE TRIAL.

Appellant's pretrial motion #25 seeked to exclude uniformed sheriff deputies from viewing the trial while in uniform. (R 2830-2832) The trial court initially reserved ruling. (R 258) Appellant again raised the objection at trial, after five (5) uniformed Indian River County Sheriff's officers appeared on the first day of the trial, and additional officers appeared on February 21st. (R 1322)

In the emotionally charged atmosphere of a capital murder case involving the death of a law enforcement officer, one cannot deny that the presence of the victim's brother uniformed officers in the gallery served as an inflammatory injection of passion and emotion into a trial that already involved volatile, emotional issues. In the instant case, this further injection of potential bias and influence with the jury was unnecessary, since the trial court had the inherent power to control the Court's processes and procedures, and the issue was timely raised prior to the inception of the trial.

Although the uniformed deputies present in the gallery certainly maintain rights of expression and assembly under Florida and Federal Constitutions, appellant's right to a fair trial in this instance supercedes the deputies' right to observe. This is especially so when appellant did not object to the deputies' presence in the courtroom, just to the presence of conspicuously uniformed deputies. See Article I, Sections 9 and 16 of the Fla. Constitution and Amendments 5, 6, 8 and 14 of the U.S. Constitution. The officers here were not observing, but rather were testifying by acting as an emotionally charged influence upon the jurors. In conjunction with the items of inflammatory evidence that were erroneously admitted in the point above, permitting the uniformed deputies to observe this trial and taint its fairness resulted in cumulative error. See: Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977).

POINT X

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISMISS THE JURY VENIRE.

Prior to trial, appellant filed a Motion to Determine Source of Jury Venire/Motion to Dismiss Jury Venire. Chapter 40.01, Fla. Stat. was recently amended, and reads as follows:

> Jurors shall be taken from the male and female persons at least eighteen (18) years of age who are citizens of the United States and legal residents of this State and their respective counties and who possess a driver's license or identification card issued by the Department of Highway Safety and Motor Vehicles pursuant to Chapter 322 or who have executed the affidavit prescribed in Chaper 40.011.

The amendment to Chapter 40.011, Fla.Stat. became effective on January 1, 1992, approximately six (6) weeks prior to the inception of the trial below. On February 17, 1992, the first day of trial, it was determined that the jurors were in fact drawn from registered voter rolls, rather than the driver's licenses required under the amended statute above. Appellant renewed his motion to strike the panel and to have the Court order that the jurors be drawn pursuant to the new statute. The trial court's denial of this motion was in direct derogation of the statutory obligation to draw prospective jury venires from driver license lists. The mere fact that the legistlature in its infinite wisdom did not require the Department of Highway Safety and Motor Vehicles to assemble the data and make lists of that data available to the various counties, is insufficient to justify depriving appellant of a lawfully drawn venire.

Appellant acknowledges that the mere presence of a non-qualified elector sitting on a petit jury would not be sufficient cause to invalidate a verdict returned by that jury in the absence of a claim of prejudice. Pitts v. State, 307 So.2d 472 (1975) cert. dis. 423 U.S. 918 (1975). In the instant case, however, the entire jury was composed of members:

> 1. who were not duly qualified electors pursuant to the statute, and
>
> 2. were not selected pursuant to the legislative enactment which is intended to assure that petit juries more accurately represent the demographic characteristics of the various county populations.

The trial court's refusal to seat a jury of duly qualified electors renders the verdict invalid and warrants a new trial.

POINT XI

THE TRIAL COURT ERRED BY REFUSING TO APPOINT CO-COUNSEL FOR APPELLANT.

Shortly after appellant's counsel was appointed, he filed a motion to appoint co-counsel. (R 2385-2412) An extensive hearing was held on the motion. Testimony was elicited from Richard Green, who was qualified as an expert in the area of capital litigation. Appellant's counsel also submitted an affidavit, and ultimately was called by the Court as a witness and cross examined by the State as to counsel's claim that without assistance in this case, his representation would likely be ineffective.

The two (2) attorney approach to capital litigation has been adopted by major national attorney organizations. See: Standards

for the Appointment and Performance of Counsel in Death Penalty Cases. The National Legal Aid and Defender Association (NLADA 1987); American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Approved as amended by the ABA House of Delegates, February 7, 1989). Because of the rapid developments in the complex body of law affecting death penalty cases, as well as the harsh and irrevocable nature of the penalty, "the respnosibilities of trial counsel are sufficiently onerous **to require the apointment** of two (2) attorneys at trial in order to assure that the capital defendant receives the best possible representation". Commentary to Guideline 2.1, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)[emphasis supplied].

Our federal system requires that any defendant charged with a capital crime wherein the government seeks to impose death, shall be assigned two (2) counsel premised only upon the defendant's request. 18 U.S.C. 3005 (1948) That prophylatic rule was crafted because ""it is more likely than not that an alleged offense of the type for which congress has purportedly continued the death penalty will be a complex and difficult case to prepare and try" and such an offense is likely to generate revulsion and prejudice, making enforcement of procedural rules more important." U.S. v. Shepherd, 576 F.2s 719, 728 (7th Cir. 1978); quoting U.S. v. Watson, 496 F.2d 1125, 1128 (4th Cir. 1973).

The State of California has developed a discretionary approach. California Penal Code Section 987 provides a trial court discretion to appoint additional counsel in a capital case upon the written request of the first attorney appointed. Although such an appointment is not an absolute right under the California scheme, in construing the statute, the California Supreme Court has ruled that "if it appears that a second attorney may lend important assistance in preparing for trial or preparing the case, the Court **should rule favorably on the request**". Keenan v. Superior Court, 31 Cal.3rd 424,430, 64 p2d 108, 114 (1982). Thus, a trial court's discretion to refuse additional counsel where there is a showing of genuine need is clearly restricted under the California format. The additional testimony elicited at the hearing, in conjunction with the affidavits admitted into evidence, clearly show that representation by two (2) counsel is standard practice in contemporary capital case litigation. (R 2385-2412; 75-124)

The showing made by appellant on this issue renders the trial court's refusal to appoint counsel an abuse of discretion and error warranting reversal under Article I, Sections 9 and 16 of the Constitution of the State of Florida, and Amendments 5, 6 8 and 14 of the Constitution of the United States.

POINT XII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO COMPEL DISCOVERY.

On January 7, 1992, the State of Florida filed a supplemental answer to discovery listing witness Dr. McKinley Cheshire. (R 2608) On February 4, 1992, the deposition of Dr. Cheshire was taken in West Palm Beach. During the course of that deposition, Dr. Cheshire revealed that he had received two (2) items of correspondence from Assistant State Attorney Barlow. The first was an eight (8) page letter dated January 6, 1992, and the second was a two (2) page letter dated January 17, 1992.[1] During the deposition, and under the direction of Assistant State Attorney Barlow, Dr. Cheshire refused to produce the two (2) letters in question, due to Prosecutor Barlow's claim that the information contained in the letter was "work-product" and as such privileged and confidential. Dr. Cheshire clearly and unequivocally stated his reliance upon the information contained in the correspondence from Prosecutor Barlow, as witnessed by the colloquy below:

> Q. (Kirschner) Did the course of your investigation into this case, was that as a result of the - the information that you received in the January 6 letter?
>
> A. (Cheshire) And the seventeenth (17th) letter.
>
> Q. (Kirschner) Okay, and so the answer is yes?

---

[1]The letters between Prosecutor Barlow and Dr. Cheshire, as well as the deposition of Dr. Cheshire, are absent from the trial record. Both the letters and the deposition are subject of Motions to Supplement the trial record previously filed with this Court.

A. (Cheshire) Yes.

Q. (Kirschner) And did you rely upon the information...contained in the January 6 and the January 17th letter in conducting your investigation in this case?

A. (Cheshire) I relied upon the letter and the listing of documents that are listed in the letter.

Q. (Kirschner) And so you did rely on the information in the letter as well?

A. (Cheshire) Yes.

Q. (Kirschner) That's the January 6th letter? And the January 17th letter? Is that correct?

A. (Cheshire) Yes.

[See Cheshire deposition, pages 14 and 15]. On February 7, 1992, appellant filed a motion to compel discovery/motion for sanctions, in an attempt to compel the State of Florida to reveal the communications contained within the above-described correspondence. (R 2836-2839) A hearing was held on the motion on February 14, 1992, and the trial court deferred ruling pending review of the letters in question as well as the deposition of Dr. Cheshire (R 283-287) The motion was renewed during trial on February 18, 1992 (R 757) The motion was denied, and the sealed letters as well as the deposition of Dr. Cheshire were made part of the trial record on February 20, 1992. (R 1100; 1158-1159; 1320)

The state claimed that the communications between Barlow and Cheshire were subject to the "work product" privilege accorded pursuant to Rule 3.220(g). In view of Cheshire's reliance upon the material contained in the letters however, in conjunction

with the Assistant State Attorney releasing material to Dr. Cheshire knowing the doctor would be subject to discovery, constituted a waiver of any privilege the prosecutor may have had. If indeed the communication contained "work product" materials, the prosecutor was not compelled to disclose those materials to Dr. Cheshire. He voluntarily chose to do so. Because of this, any privilege was waived. Once Cheshire was listed as a witness, the materials upon which he relied became fully discoverable.[3] See: Hoyas v. State, 456 So.2d 1225 (Fla. 3rd DCA 1984) [attorney client privilege waived by defendant's voluntarily disclosure of privileged material.] Appellant to this day does not know the extent to which the trial court's refusal to disclose discoverable materials prejudiced appellant.

PENALTY PHASE ISSUES

POINT XIII

THE TRIAL COURT ERRED BY FINDING THIS HOMICIDE HEINOUS, ATROCIOUS OR CRUEL PURSUANT TO 921.141(5)(h)

The heinous, atrocious or cruel aggravating factor is intended to include "those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies---the consciousless or pitiless crime which is

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[3]Appellant, in his motion for disclosure of evidence filed on April 17, 1991, specifically requested disclosure of information and/or statements made by representatives of governmental entities, including the prosecutor's office, relating to any of the judicial proceedings associated with the prosecution of appellant. (R 2372-2378 [3]

unnecessarily **torturous** to the victim". State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. den. 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974) [emphasis supplied].

The only evidence presented by the State construable as "unnecessarily torturous" were the statements made by hearsay declarant Eugene Hinton, whose testimony at the previous trial was that Deputy Raczkoski pleaded for his life by stating "Don't shoot me, don't kill me, man. You can leave. Please don't kill me, don't shoot". At the previous trial, Hinton further testified that Reaves told Deputy Raczkoski "I wouldn't do that if I were you: and "One of us got to go, me or you". No other evidence was presented that even is susceptible of an interpretation of unnecessary torture or taunting.

Hinton's statements, however, were demonstrably unreliable, and each succeeding statement given by the witness over time, became increasingly vituperative and detailed, presumably in the hopes that Hinton's own criminal justice problems could be solved by inventing ever more outlandish versions of what appellant said in the early morning hours shortly after the shooting.

Because each aggravating circumstance must be proved beyond and to the exclusion of every reasonable doubt, and because the only evidence of torturous acts came from a blatantly unbelievable, nine-time convicted felon witness, appellant submits that the heinous, atrocious or cruel aggravating factor has not been proved.

This Court recently more precisely defined the requirements of "heinous, atrocious or cruel" by opining that "this factor is permissible on ly in torturous murders---those that **evince extreme and outrageous depravity** as exemplified either by the desire to inflict a high degree of pain or utter indifferencee to or enjoyment of the suffering of another. William v. State, 574 So.2d 136, 138 (Fla. 1991)[emphasis supplied].

It is clear that absent some proof beyond a reasonable doubt that the murder was committed in a manner which sets it apart from the norm of other capital felonies, the mere number of gunshot wounds will not permit a finding of heinous, atrocious or cruel. Even seven (7) gunshot wounds recently has been held insufficient to support finding this aggravating circumstance. McKinney v. State, 579 So.2d 80 (Fla. 1991)

It is equally clear that when dealing in cases where the killing is perpetrated by gunshot, the length of time the victim endures following fatal shots is not sufficient to support a finding of "heinous, atrocious or cruel". Whether death is immediate or whether the victim lingers and suffers is rather, a "pure fortuity". Mills v. State, 476 So.2d 172, 178 (Fla. 1985). In Teffeteller v. State, this Court ruled in a gunshot homicide case that "the fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies". 439 So.2d 840, 846, (Fla. 1983)

Two more recent cases warrant discussion here. In Rivera v. State, a trial court finding of "heinous, atrocious or cruel" was reversed where a police officer was shot a total of three (3) times with one wound to his arm and two (2) wounds to his chest. Witnesses testified that all three (3) shots were fired within approximately sixteen (16) seconds of each other. Rivera V. State, 545 So.2d 864, 866 (Fla. 1989). The Court in Rivera relied upon Brown v. State, a case strikingly similar to the factual scenario in this case. In Brown, a law enforcement officer was shot, then heard to say to his attacker "Please don't shoot" and subsequently was shot two (2) more times. This court ruled that factual scenario did not set the case apart from the norm of capital felonies to the extent that it warranted a finding of "heinous, atrocious or cruel". Brown v. State, 526 So.2d 903, 907 (Fla. 1988).

In short, even if the testimony of Hinton were to be believed, the facts presented in the instant case would not justify the trial court's finding of the "heinous, atrocious or cruel" aggravating circumstance.

POINT XIV

THE TRIAL COURT ERRED BY FAILING TO FIND TWO STATUTORY MITIGATING CIRCUMSTANCES WHICH MUST BE FOUND AS A MATTER OF LAW SINCE A REASONABLE QUANTUM OF EVIDENCE, UNCONTRADICTED BY ANY COMPETENT EVIDENCE, SUPPORTS THEM.

Dr. Weitz testified during the penalty phase after being qualified as an expert in five separate areas: general psychology; clinical psychology; military psychology; Vietnam

Syndrome; and post traumatic stress disorders. (R 2037) Weitz testified that based upon his treatment of five to six thousand Vietnam era veterans, as well as his evaluations and examinations of appellant, that William Reaves suffers from Vietnam Syndrome, a behavioral disorder generally recognized in the psychological community. (R 2045)

Weitz testified that due to appellant's condition, at the time of the shooting he was under the influence of extreme mental or emotional disturbance, which is a statutory mitigating circumstance pursuant to Chapter 921.141(6)(b). (R 2052)

In its sentencing order, the trial court refused to find applicable the mitigating factor of extreme mental or emotional disturbance. The Court based its rejection of that statutory mitigating factor on "rebuttal testimony by a psychiatrist, Dr. McKinley Cheshire, that the defendant was not suffering from any such emotional or mental disturbance". (R 3017)

Dr. Cheshire however, gave no such testimony. Cheshire testified that appellant knew the difference between right and wrong, and that Reaves exhibited adult anti-social behavior. (R 2231) It is ironic that Dr. Weitz also diagnosed appellant as legally sane, and suffering from anti-social behavior. (R 2042)

Legal sanity however, is not the issue addressed in Chapter 921.141(6)(b). The issue rather is: Did the appellant suffer from condition <u>not</u> rising to the level of legal insanity. That question was neither tendered to Dr. Cheshire nor addressed by

him. Hence, this statutory mitigating circumstance was uncontroverted.

When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990).

Dr. Weitz further testified that appellant's affliction with Vietnam Syndrome substantially impaired Reaves' ability to conform his conduct to the requirements of the law, a statutory mitigating circumstance pursuant to Chapter 921.141(6)(f). In its sentencing order, the trial court focused exclusively on the issue of the extent to which appellant was under the influence of cocaine at the time of the shooting. The sentencing order below completely ignores the psychological and behavioral factors impacting on appellant's ability to appreciate the criminality of his conduct and to conform that conduct to legal requisites. Both the state and Dr. Cheshire chose to ignore that issue as well.

The state elected not to address a reasonable quantum of competent evidence relating to the two (2) statutory mitigating factors described above. Under these circumstances, the trial court's refusal to find those mitigating circumstances is error warranting resentencing.

POINT XV

THE TRIAL COURT ERRED BY FAILING TO FIND PROPOSED NON-STATUTORY MITIGATING CIRCUMSTANCES.

The court below found three (3) mitigating circumstances to have been reasonably established:

> 1. That the defendant was honorably discharged after having served in the military.
>
> 2. That the defenant enjoyed a good reputation in his community until he reached the age of fifteen (15) or sixteen (16) years.
>
> 3. That the defendant was a good and considerate son to his mother and siblings.

Appellant proposed fifteen (15) non-statutory mitigating circumstances to the court below in its sentencing memorandum. The focus of those tendered non-statutory mitigators was based upon certain uncontroverted evidence adduced at the trial relative to appellant's service in Vietnam. Prior to entering the armed forces at the age of nineteen (19), appellant had no significant history of criminal behavior. In the first week of November, 1969, appellant arrived in the Central Highlands of South Vietnam and was assigned to the Fourth Infantry Division, Charlie Company, "Road Runner" Platoon. Approximately one (1) week later, Road Runner Platoon ran into a U-shaped ambush, took heavy fire and sustained casualties. The platoon saw its "point-man" shot through the head, and another hit in the ankles. Both died almost immediately. (R 2005-2009) One week later to the day, Road Runner Platoon became involved in another major fire fight for Hill 474. (R 2203) The state's rebuttal witness,

Lieutenant Colonel Cinquino, described the Central Highlands in 1969 as a "free-fire" combat zone where contacts with the enemy occurred at a frequency of at least once a week. Cinquino acknowledged that as a slightly older, West Point graduate, he was better equipped to handle the rigors of combat than many of the younger draftees. He further acknowledged that a nineteen (19) year old joining Charlie Co. on November 9, 1969, would have had "a very severe introduction to combat". (R 2198-2208)

Appellant below requested the trial court to find as mitigating circumstances the following:

> 1. That appellant served as a combat soldier in the Central Highlands of the Republic of Vietnam from November of 1969 until November of 1970.
>
> 2. That as a result of his combat service, he was awarded the combat infantryman's badge and the air medal.
>
> 3. That he was considered to be a good, reliable soldier.
>
> 4. That he was honorably discharged as a result of his service.
>
> 5. That after his service in Vietnam, appellant's life was dramatically altered, that he became addicted to narcotics and violence used to support his drug habit, and that his experience as a combat soldier in Vietnam was "**at least in part responsible for that radical change in his behavior**".
>
> 6. That through his adolescence he was a good brother to his siblings and son to his mother.
>
> 7. That appellant was a positive influence on his friends and acquaintances in the Gifford community in which he was raised.
>
> 8. That through his adolescence he was a well-behaved, normal child who manifested respect for the elders of the Gifford community.

9. That appellant was actively involved in the Friendship Baptist Church of Gifford and participated to a substantial degree in Church activities.

Findings of fact in support of mitigation will not be respected if not supported by sufficient, competent evidence. See: Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981); Campbell v. State, 571 So.2d 415, 420 (Fla. 1990) The rule is:

> [W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find the mitigating circumstances has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains competent, substantial evidence to support the trial court's rejection of these circumstances.

Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). The mitigating circumstances propounded by appellant below were uncontroverted and justify a finding of mitigating factors where sentencing is required.

POINT XVI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

A capital sentencing scheme is constitutional only to the extent that it is structured to avoid arbitrary application of the death penalty. See: Furman v. Georgia, 408 U.S. 238 (1972). Appellant argues here that subsequent to Proffitt v. Florida, 428 U.S. 242 (1976), the operation of Section 921.141, Fla.Stat. has promoted freakish and arbitrary application of the death penalty. In Proffitt, Id. the court held that the statute as written could be consistent with the Eighth Amendment. The Court did not

contemplate the regression toward arbitrary application that since has occurred.

Rather than being reserved for the most conscienceless and pitiless criminals, the Florida Death Penalty is reserved for those with lawyers unfamiliar with the law, and for those tried by improperly instructed juries. It is seldom meted out correctly, much less even-handedly in the trial courts, and Florida's appellate review system simply fails to comply with the dictates of Proffitt, Id.

I. THE JURY

A. The jury plays a crucial role in capital sentencing yet, the jury instructions are such as to assure arbitrariness in reaching the penalty verdict.

1. Henious, atrocious or cruel.

Pope v. State, 441 So.2d 1073 (Fla. 1983) bars jury instructions limiting and defining the "heinous, atrocious or cruel" circumstance. This assures its arbitrary application in violation of the dictates of Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Since this court has been unable to apply this circumstance consistently, there is every likelihood that juries, given no direction in its use, apply it arbitrarily and freakishly.

B. Majority Verdict. The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates due process under cruel and unusual punishment clauses.

Accepting for the purpose of argument that there is no federal constitutional right to a jury in capital sentencing, appellant argues that Florida's right to a jury[4] must be administered in a way that does not violate due process.

A guilty verdict by less than a "substantial majority" of a twelve (12) member jury is so unreliable as to violate due process. See: Johnson v. Louisiana, 406 U.S. 356 (1972). It stands to reason that this same principal applies to capital sentencing so that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote.

Appellant concedes that this court has rejected the contention that a penalty verdict for death must be unanimous. Alvord v. State, 322 So.2d 533 (Fla. 1975) In Alvord however, this court did not specifically decide the separate issue of whether a bare majority verdict was constitutional. Among the State's employing juries in capital sentencing, only Florida allows a death penalty verdict by a bare majority.

C. Advisory Role. The standard instructions do not inform the jury of the great importance of its penalty verdict. In violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its verdict is just "advisory".

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[4]The right to a jury in capital sentencing predates the 1968 Constitution and is therefore incorporated in Article I, Section 22, Florida Constitution. Cf. Carter v. State Road Dept., 189 So.2d 793 (Fla. 1966)

II. COUNSEL

Almost every capital defendant has a court-appointed attorney as in this case. The choice of the attorney is the judge's---defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the present. See, e.g. Elledge v. State, 346 So.2d 998 (Fla. 1977) [no objection to evidence of non-statutory aggravating circumstances]; Grossman v. State, 525 So.2d 833 (Fla. 1988) [no objection to victim impact information forbidden by the 8th amendment]; Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984)[counsel acted under actual conflict of interest in 1977 appeal to the appellant's detriment]. The list of such cases is extensive. The quality of counsel is so strained that this Court has chastised appellate capital attorneys as a class for failing to serve their clients by filing briefs containing "weaker arguments". Cay v. State, 476 So.2d 180, 183 n.1 (Fla. 1985)["neither the interests of the client nor the judicial system are served by this trend"]

III. THE TRIAL JUDGE

A. The Role of the Judge. The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penatly verdict. On the other, it is considered the ultimate sentencer so that constitutional errors

in reaching the penalty verdict can be ignored. See, e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989)

B. The Florida Judicial System. Not unlike other Southern states, Florida has an unfortunate history of racial discrimination in the judiciary resulting in racially discriminatory application of the law. Florida's system of at large judicial elections in large judicial circuits perpetuates this history in violation of the equal protection and due process clauses of the State and federal constitutions.

IV. APPELLATE REVIEW

A. Proffitt. In Proffitt v. Florida, 428 U.S. 242 (Fla. 1976), the parallity upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the even-handed application of appellate review and the independent reweighing process envisioned in Proffitt has rendered the statute unconstitutional.

B. Aggravating Circumstances. Great care is needed in construing capital aggravating factors. See: Maynard v. Cartwright, 108 S.Ct. 1853 (1988)[eighth amendment requires greater care in defining aggravating circumstances than does due process]. The rule of lenity, i.e., that laws must be strictly construed in favor of the accused, applies not only to substantive criminal prohibitions, but also to the penalties they

impose. Bifulco v. United States, 447 U.S. 381 (1980). It is not merely a maximum of statutory construction: it is rooted infundamental principles of due process. Dunn v. United States, 442 U.S. 100 (1979). Cases construing our aggravating factors have not complied with this principle. For example, as to application to the heinous, atrocious or cruel aggravating factor, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) [finding HAC] with Raulerson v. State, 420 So.2d 567 (Fla.1982)[rejecting HAC on same facts]

The "prior violent felony" aggravating circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the accused would be that the circumstance should apply only where the prior felony conviction occurred before the killing. The cases have instead adopted a construction favorable to the State, ruling that the factor applies even to contemporaneous violent felonies. See: Lucas v. State, 376 so.2d 1149 (Fla. 1979).

C. Appellate Reweighing. Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffit, 428 U.S. at 252-253. Such matters are left to the trial court. See: Smith v. State, 407 So.2d 894, 901 (Fla. 1981)["the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rests with the Judge and jury"].

D. Procedural Technicality. Through use of the contemporaneous objection rule, Florida has institutionalized

disparate application of the law in capital sentencing. See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) [absence of objection barred review of use of improper evidence of aggravating circumstances].

E. Tedder. The failure of the Florida appellate review process is highlighted by the Tedder cases. As this Court frankly admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently.

V. OTHER PROBLEMS WITH THE STATUTE

A. Lack of special verdicts. Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts.

Our law, in effect, makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and Amendments 5, 6 8 and 14 of the federal constitution.

B. No power to mitigate. Unlike someone serving a sentence for anything ranging from a life felony to a misdemeanor, a condemned inmate cannot ask the trial judge to mitigate his sentence because Florida Rule of Criminal Procedure 3.800(b) forbids mitigation of a death sentence. Whatever the reason for this provision, it violates the constitutional

presumption against capital punishment and favors mitigation in violation of Article I, Sections 9, 16, 17 and 22 of our constitution and Amendments 5, 6, 8 and 14 of the federal constitution.

C. Presumption of Death. Florida law creates a presumption of death where but a single aggravating factor appears. This creates a presumption of death in every felony murder case and in almost every premeditated murder case. Once one of these factors is present, there is a presumption of death to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to outweigh the presumption of death. That there is a presumption of death is proven by the fact that death is called for when the aggravating and mitigating circumstances are in equipoise: Section 921.141(2)(b) and (3)(b) require that the mitigating circumstances outweigh the aggravating ones.

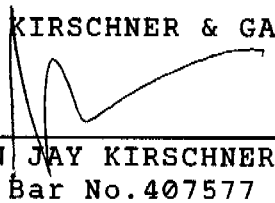
The rationale above yields the conclusion that Florida's death penalty statute stands in derogation of Article I, Sections 2, 9, 16, 17, 21 and 22 of the Constitution of the State of Florida and Amendments 5, 6, 8, 9 and 15 of the Constitution of the United States.

CONCLUSION

Based on the foregoing argument and citation to authority, appellant requests this Court to vacate appellant's conviction and remand this case for a new trial.

Respectfully submitted,

CARBIA, KIRSCHNER & GARLAND, P.A.

BY: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail delivery this 17th day of September, 1992 to the Office of the Attorney General, Elisha Newton Dimick Building, 111 Georgia Avenue, West Palm Beach, Florida 33401.

JONATHAN JAY KIRSCHNER, ESQ.