SUPREME COURT OF FLORIDA

WILLIAM REAVES,

Appellant/Cross-Appellee,

CASE NO. 79,575

vs.

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

APPELLANT'S REPLY BRIEF/ANSWER TO CROSS-APPEAL

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 reply 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 supplemental record in this case will be by the symbol "SR" followed by the appropriate page number in parentheses.

POINT I

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

Appellee indulges in mere sophistry by arguing that Appellant is procedurally barred from raising this issue on appeal. The State's reliance on cited authority in support of that claim is inaposite. Steinhorst v. State, 412 So.2d 332 (Fla. 1982) merely restates the general principal that an appellate court will not consider issues not raised in the lower court. Id., at 338. In Tillman v. State, 471 So.2d 32 (Fla. 1985), this Court refused to entertain, when raised for the first time on appeal, the issue of whether properly excluded hearsay evidence was admissible under the declaration against penal interest exception to the hearsay rule.

The instant case deals not however, with properly excluded hearsay evidence, but rather with improperly excluded relevant evidence.

Relevant evidence is any evidence tending to prove or disprove a material fact. Chapter 90.401, Fla. Stat. (1991). All relevant evidence is admissible, except as provided by law. Chapter 90.402, Fla. Stat. (1991). All facts having "rational probative value are admissible unless excluded by some specific rule of evidence". Hodges v. State, 403 So.2d 1375, 1376 (Fla. 5th DCA 1981). Where evidence tends "in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission". Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3rd DCA 1982).

At the trial below, State witness Eugene Hinton refused to testify when called, was ruled "unavailable", and his former testimony from the previous trial was read to the jury. (R. 1122-1129). Appellant immediately moved the trial court to allow the jury to hear Hinton's prior statements, which drastically contravened his trial testimony (R. 1130-1131). Appellant argued that these statements were crucial to ensure adequate cross-examination and impeachment of Hinton's previous trial testimony (R. 1130-1132). Appellant then, in an effort to show the relevant, non-cumulative nature of those statements, proffered all of them and explained the probative value of each (R. 1135-1144) E.g.:

I. **STATEMENT**: Hinton twice under oath claimed that Appellant told him that immediately prior to the shooting, Appellant "had the hammer back" on the firearm. (R. 1142). The uncontroverted testimony at trial was that the murder weapon was a "striker" type weapon, i.e., it has no external hammer. (R. 1142, 1561).

INFERENCES BY JURY:

1. Appellant never made the statement.
2. Hinton is a perjurer.

II. **STATEMENT:** Hinton's various descriptions of the murder weapon under oath.

A. September 24, 1986: "The gun was brown and silver"..."the handle was brown and it was silver across the top". (SR. 54-55).

B. July 29, 1987: The gun had a "brown handle and a brown barrel". (SR. 99).

C. July 29, 1987: ...the gun "had a black barrell". (SR. 99).

INFERENCES BY JURY:

1. Hinton never saw the gun.

2. Hinton is a perjurer.

III. **STATEMENT:** Hinton smoked marijuana with Appellant on the morning of the killing when Appellant allegedly made inculpatory statements. (R. 1140; transcript of first trial, page 1175).

A. July 29, 1987: Although Hinton admits to being a drug seller, he twice denies using drugs..."I don't do drugs".

INFERENCES BY JURY:

1. Hinton's capacity to observe and recall Appellant's statements was diminished due to the ingestion of hallucinogens on the morning of the shooting.

2. Hinton is a perjurer.

None of the above-described testimony was elicited in the previous trial testimony read to the jury below. Appellant adequately demonstrated to the trial court the relevant, material and highly probative nature of this evidence. Appellee below never suggested that the proffered testimony lacked probative value or relevance. The State initially was unable to cite to any statutory or other authority which would require the

exclusion of the proffered material.[1]

Ultimately, Appellee relied upon Chapter 90.614(2), Fla. Stat. (1991) as a basis for excluding the proffered evidence, and the trial court excluded the testimony based upon that rationale. (R. 1146).

The provisions of Chapter 90.614(2), Fla. Stat. (1991), requiring that prior to admitting extrinsic evidence of a prior inconsistent statement, a witness must first be afforded the opportunity to explain or deny making the statement, are inapplicable when attacking the credibility of a hearsay declarant.

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

[Emphasis added]. Chapter 90.806, Fla. Stat. (1991).

Admittedly, counsel below did not direct the trial court to the precise provision of the evidence code enumerated above.[2]

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[1] The prosecutor alternately argued without supporting authority that Hinton's prior inconsistent statements were not admissible because "the prior record must stand on its own" (R. 1130-1131) and were "absolutely improper" because they were "extrinsic evidence". (R. 1137).

[2] Counsel for the State had prior knowledge that Hinton would refuse to testify, and then misrepresented that fact to Appellant's counsel below. (R. 1149). Had Appellee revealed the truth about Hinton's intentions, perhaps counsel for Appellant, as well as the trial court, would have identified the precise statutory authority contravening the State's position.

Appellant however, conclusively demonstrated that the prior inconsistent statements made by Hinton were relevant. The burden then was on the State to show that some special evidentiary rule mandated exclusion of such evidence. Chapter 90.402, Fla. Stat. (1991); See: Hodges v. State, 403 So. 2d 1375 (Fla. 5th DCA 1981).

It is well settled that the purpose of requiring the Defendant to raise an objection at trial is to give the trial judge an opportunity to correct or cure any error that may have been made. Ward v. State, 168 So. 397 (Fla. 1936); Hall v. State, 160 So. 511 (Fla. 1935); Rubin v. Gonzalez, 160 So.2d 167 (Fla. 3rd DCA 1964). In the instant case, Appellant attempted to introduce relevant, probative, admissible evidence. Appellee asserted legally insufficient grounds to exclude that evidence. The trial court acknowledged the issue of the improper exclusion of the proffered evidence had been raised, when the Court on the record stated that the proffered documents were "being made part of the record for appellate purposes". (R. 1147). Under these circumstances, Appellee's claimed procedural bar must fail.

Appellee next blithely asserts that Hinton's testimony only related to "extraneous details surrounding Appellant's confession". (Appellee's Answer Brief page 15). The State however, relied heavily upon Hinton's testimony, and argued repeatedly and persuasively during closing arguments that the jury must find a premeditated killing because the deputy, at the time of the shooting was "begging for his life". (R. 1666; 1167; 1674; 1684). The sole basis for that argument was Hinton's

testimony. Far from being extraneous details, the excluded testimony was seminal to the jury's ability to accurately assess and weigh Hinton's testimony.

Appellee next posits that the improper exclusion of the relevant, admissible evidence below did not constitute an abuse of discretion, and if it did, that such an abuse of discretion was merely harmless error. Appellee further contends that there was a "sufficient quantity and quality of other evidence upon which the jury could have legitimately relied to reach its verdict". (Appellee's Answer Brief page 17). Appellee elects however, not to cite such evidence.

Appellant submits it is uncontroverted that the sole evidence of Defendant's statements made prior to the shooting, allegedly evincing a premeditated design to effect death, were the result of Hinton's testimony. The remaining "other evidence" for the jury's consideration contraindicate first degree murder, and in fact supports a finding of second degree murder, as well as the requisite elements of the affirmative defense of excusable homicide.

The excluded evidence adversely impacted Hinton's credibility, and hence was exculpatory evidence for Appellant. It is clear that limiting the scope of cross-examination "in a manner which keeps from the jury relevant and important facts bearing on trustworthiness of crucial prosecution testimony is improper, especially where the cross-examination is directed at a key prosecution witness". Mendez v. State, 412 So.2d 965, 966 (Fla. 2nd DCA 1982); See: Truman v. Wainwright, 514 F.2d 150 (5th

Cir. 1979); Stripling v. State, 349 So.2d 187 (Fla. 3rd DCA 1977) cert. denied 359 So.2d 1220 (Fla. 1978).

Appellee, without authority, suggests that Appellant ought be limited to the testimony elicited from Hinton at the first trial. The jury below however, was not likewise limited to Hinton's previous testimony. The jury heard a sanitized, incomplete and misleading rendition of that testimony: Sanitized, because they were precluded from hearing relevant probative evidence of prior inconsistent statements of the witness; Incomplete, in that the jury heard that the witness was, by his own admission, a "four or five" time convicted felon (R. 1145-1146), when at the time of the trial below, he was in fact a nine time convicted felon; Misleading, because the jury was deprived of the opportunity to observe the demeanor of the witness and decide for themselves what credibility his testimony ought be accorded.

Absent the opportunity to observe the demeanor of the witness, and deprived of probative, relevant, admissible evidence essential to their decision making process, the jury below was unable to reach a fair result. The exclusion of Hinton's testimony effectively deprived Appellant of a fair trial and due process of law.

POINT II

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

Appellee implies that two prospective jurors who Appellant

attempted to strike for cause, were sufficiently rehabilitated to justify the trial court's denial of cause challenges made on those jurors.

Upon questioning by Appellant, jurors Hambelton and Dudley both stated that they believed a Defendant convicted of murder automatically should receive the death penalty. (R. 432-433) Moreover, both jurors candidly admitted that they felt strongly about that issue, and would carry their preconceptions into the jury room to deliberate. (R. 432-433; 436) Juror Dudley conceded that it would be difficult to disfranchise himself from those feelings. (R. 432-433).

Following the forthright responses tendered by those two jurors, the trial court and Appellee asked juror Dudley and the panel, as a whole, a series of "follow-the-law" questions. (R. 439-440; 506-507) The prospective jurors' acquiescence to those general questions however, was insufficient to dissipate the taint of prejudice they acquired upon their candid revelations of their strongly held belief systems.

Appellee seemingly agrees that the well-settled rule applicable to excusing jurors for cause is:

> ...if there is basis for any reasonable doubt as to any jurors 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). In applying that rule to individual cases, the following guidelines should be

followed:

> 1) a juror's statement that he would render a verdict according to the evidence is not sufficient of itself to overcome what he has said about forming an opinion;
>
> 2) every juror should come to the investigation of a case free from any preconceived impression of it;
>
> 3) if there is doubt as to the juror's sense of fairness or his mental integrity, he should be excused;
>
> 4) a juror who has asserted views of bias and prejudice cannot be considered free of such merely because, under skillful questioning, he declares himself free of its influence.

Noe v. State, 586 So.2d 371 (Fla. 1st DCA 1991).

Jurors Hambelton and Dudley clearly maintained strongly held preconceived opinions relating to when the death penalty should be imposed. These juror's subsequent acquiescence to leading, "follow-the-law" questions by Appellee and the trial court cannot be said to vitiate the bias of their prejudgment belief systems, to which the jurors admitted during Appellant's inquiry. As the Third District Court of Appeal has observed:

> We have no doubt but that a juror who is being asked leading questions is more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions, and as such these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented. Grappling with similar circumstances, the court in Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 796 (1929), observed:
>
> > "It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who

> having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?"

Price v. State, 538 So.2d 486, 489 (Fla. 3rd DCA 1989); Also See Tennon v. State, 545 So.2d 382, 385 (Fla. 1st DCA 1989). The above analysis is precisely at issue in the instant case. Jurors Dudley and Hambelton unequivocally stated they believed the death penalty appropriate merely upon conviction. The subsequent agreement to follow the law and instructions of the trial judge did not remove from these jurors the "suspicion of partiality" that mandated granting Appellant's challenges for cause. O'Connor v. State, 9 Fla. 215, 222 (1860); Auriemme v. State, 501 So.2d 41, 44 (Fla. 5th DCA 1986); Singer v. State, 109 So.2d 7 (Fla. 1959); See: Hamilton v. State, 547 So.2d 630 (Fla. 1989).

Appellee next asserts that questions tendered to prospective jurors concerning their beliefs that the death penalty should automatically be imposed, based merely upon a Defendant's conviction for murder irrespective of aggravating and mitigating circumstances, were improper and misleading.

In a criminal action, it is a matter of right that the parties shall have an opportunity to conduct an oral examination of each potential juror. Fla. R. Crim. P. 3.300(b).

The purpose of voir dire is to ensure that the chosen venire is objective and impartial, and the examination of jurors

> should be so varied and elaborated as the circumstances surrounding the juror under

> examination in relation to the case on trial would seem to require, in order to obtain in every cause a fair and impartial jury, whose minds [are] free and clear of all such interest, bias, or prejudice...

Pinder v. State, 27 Fla. 370, 8 So. 837, 838 (1891). Florida courts recognize the inherent difficulty in uncovering the hidden prejudices and predispositions of jurors during voir dire, and have concluded that "counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors..." Jones v. State, 378 So.2d 797, 798 (Fla. 1st DCA 1980); Stano v. State, 473 So.2d 1282 (Fla. 1985).

In the context of capital litigation, the United States Supreme Court recently ruled that a capital Defendant's right to inquire of potential jurors whether they would automatically impose the death penalty based solely upon a finding of guilt, irrespective of any other facts, is an issue of constitutional dimension. Morgan v. Illinois, 119 L.Ed. 2d 492 (1992). In Morgan, the court explained the necessity of permitting this "reverse Witherspoon" line of inquiry as follows:

> "Were voir dire not available to lay bear the foundation of petitioner's challenge for cause against those who would <u>always</u> impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would <u>never</u> do so." [Emphasis in original]

Morgan v. Illinois, Id., at 506. The court concluded that prohibiting this kind of voir dire examination in a capital case results in a violation of the requirement of impartiality of

jurors embodied in the due process clause of the 14th Amendment. Id., at 509; Also See Bryant v. State, 601 So.2d 529 (Fla. 1992).

Appellant below attempted to inquire of potential jurors whether they believed that a Defendant found guilty of murder should automatically receive the death penalty irrespective of any aggravating and mitigating circumstances. (R. 436; 438). The trial court initially overruled Appellee's objection to those questions, correctly ruling that:

> "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 court's ruling, juror Hambleton unequivocally stated that he had a strong belief that a Defendant deserved the death penalty based solely upon his conviction, knowing nothing more. (R. 436) The trial judge sua sponte interrupted that inquiry with several "follow-the-law" questions, and subsequently refused to allow further inquiry in this area by Appellant. (R. 436-440) Appellant thus was precluded from determining to what extent the remainder of the panel maintained prejudicial belief systems similar to those expressed by jurors Hambelton and Dudley. This improper restriction of Appellant's voir dire requires reversal.

POINT III

THE TRIAL COURT ERRED BY EXCLUDING RELEVANT ADMISSIBLE OPINION TESTIMONY BY A QUALIFIED EXPERT, WHERE SUCH TESTIMONY WOULD HAVE ASSISTED THE FACT FINDER IN UNDERSTANDING EVIDENCE AND FACTS IN ISSUE (RESTATED)

Appellee contends that the Battered Woman Syndrome cases cited by Appellant are inapplicable to analysis of the admissibility of Vietnam Syndrome evidence in the instant case, because the defendants in those cases "were not charged with first degree murder" (Appellee Answer Brief page 37).

Appellee is misinformed.

The first Florida case to address the issue of the admissibility of Battered Women Syndrome evidence ruled that such evidence is admissible when offered to show that the accused "reasonably believed it was necessary to use deadly force to prevent imminent death or great bodily harm to herself or her children". Hawthorne v. State, 408 So.2d 801, 806 (Fla. 1st DCA 1982) rev. den. 415 So.2d 1361 (Fla. 1982). The accused in Hawthorne, Id., stood trial for first degree murder.

Appellee next claims that the Battered Women Syndrome (BWS) cases are inapplicable to the analysis here because BWS has been asserted "in no case...to justify the death of a person not responsible for her traumatization." (Appellee's Answer Brief page 37) Appellee cites no authority to support that claim however, and BWS in fact has been admitted in numerous cases where the victim was not the abuser of the defendant.

Appellee next argues that the defendant below was precluded from presenting Vietnam Syndrome evidence because he did not believe, at the time of the shooting, that he was "in a jungle in Southeast Asia". (Appellee's Answer Brief page 37) Appellee's contention reveals a basic misunderstanding of the quantum of evidence presented in the proffer below, as well as the context

in which that evidence related to the facts surrounding the shooting. What follows is a summary of pertinent portions of Dr. Weitz' testimony on those issues:

> "Vietnam Syndrome" has come to define a series or a set of personality characteristics, of behavioral patterns, of changes that have occurred in combat veterans as a result of a combat exposure; in this case, Vietnam. (R. 1492-1493)"
>
> ***
>
> Among some of the qualities of Vietnam syndrome would be rage reaction; isolation from their environment; hyper-vigilent type alertness, what's known as "startle response"; and potentially [an] increase in alcohol-drug use; and some depression. (R. 1494)
>
> ***
>
> I believe that Mr. Reaves shows that component. There is a significant amount of concern about survivor behavior in the Vietnam syndrome where individuals are geared towards their own survival and survival of their comrades...
>
> > "Survivor behavior" involves hyper-alertness, ...being very attuned to the environment; the motivation to preserve life, to be able to pick up and sense threat producing situations and to respond appropriately to minimize threat and risk so as to protect their own lives or the lives of their friends. (R. 1496)
>
> ***
>
> Research over the last twenty years, all the diagnostic and therapy work clearly recognizes that...symptoms that evolve from combat, untreated and having not been professionally handled, will remain over a period of twenty years. Time, in and of itself, does not alter or change or decrease the symptomatology.

> So the fact that he's still impacted by Vietnam experiences and survivor behavior, hyper-alertness, is able to sense fear or stress in others, even non-verbally, is very common in combat veterans and shouldn't be any surprise to those who are familiar with the literature. (R. 1498)
>
> ***
>
> His rage reaction is higher. His impulse control is reduced. He's more likely to respond quickly and specifically to remove the threat or decrease the probability of a threat to his own life. Clearly, that behavior was exhibited by the defendant. (R. 1499)
>
> ***
>
> I believe that Mr. Reaves' sense of fear in the law enforcement officer, the escalation of stress and anxiety, his perception of loss of control; then watching a law enforcement officer turn and move away behind the vehicle and reach for a weapon in a very short span of time, that Mr. Reaves perceived that as life threatening and potentially a threat to his own existence. (R. 1500)[Emphasis added]

The witness testified that Vietnam Syndrome is a condition generally accepted in the psychological community, and that he was "convinced to a reasonable degree of psychological certainty" that Appellant suffered from the disorder (R. 1494-1495). Weitz further testified that the condition impacted Appellant's perception of provocation, 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 prior to the shooting. (R. 1501-1502) Heat of passion, provocation, anger, rage and resentment, ordinary judgment, and capacity for reflection are all elements of the defense of

excusable homicide. See: Florida Standard Jury Instructions for homicide/excusable homicide; Chapter 782.03, Fla. Stat. (1991).

The behavioral dynamic described by Dr. Weitz clearly was complex and beyond the common knowledge of ordinary laypersons. The proffered expert testimony would have assisted the jury in understanding the evidence, as well as determining whether Appellant's actions met the criteria established for excusable homicide. As such, the evidence was relevant and admissible. See Chapter 90.702, Fla. Stat. (1991).

POINT IV

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

Appellant asserts that the disqualification issue raised here already has been rejected by this court in Reaves v. State, 574 So.2d 105 (Fla. 1991). Appellee further claims that Reaves, was "remanded for a new trial by the same State Attorney's office". (Appellee's Answer Brief pages 42-43).

The only 'law of the case' established in Reaves, however, is that "there is no question that State Attorney Colton had actual access to privileged defense related information in this prior proceeding". Reaves v. State, 574 at 107. It is equally uncontroverted that Colton was lead counsel in the first trial, and that he persuasively and successfully argued to the jury to impose the death penalty on his former client. (R. 47-53).

The substantial participation by Colton in the prosecution of his former client cannot be "undone", and such participation

appears clearly violative of this court's recent pronouncement in Castro v. State:

> In Fitzpatrick, the disqualified attorney had had no conversations or contact with other state-attorney personnel regarding the defendant's case. Under such circumstances, we held that the entire state attorney's office need not be disqualified. However, we cannot say the same result should follow where the defendant or the public at large is given reason to believe the judicial process has been compromised. Our judicial system is only effective when its integrity is above suspicion. Our system must not only refuse to tolerate impropriety, but even the appearance of impropriety as well. [Emphasis added]

Castro v. State, 597 So.2d 259, 260 (Fla. 1992). In State v. Fitzpatrick, 464 So.2d 1185 (Fla. 1985), this court crafted an exception to the imputed disqualification rule when the law firm involved is a governmental agency. One of the prerequisites to invoking that exception requires that the former defender-turned-prosecutor must not have "personally assisted, in any capacity, in the prosecution of the charge". Id., at 1188.

It is difficult to imagine a State Attorney assisting more in the prosecution and ultimate conviction of a former client, than Colton assisted in the prosecution of Appellant below.

Appellee accuses Appellant of "taking [the language of Fitzpatrick] literally". (Appellant's Answer Brief page 42). Appellant would concede that point.

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

Contrary to Appellee's claim, Appellant timely objected to the prosecutor's characterization of Appellant as a cocaine seller. The prosecutor first attempted to disquise this bad character evidence as an incident of flight. (R. 1668) When shortly thereafter Appellee began to make that evidence a feature of the trial, Appellant tendered his objection and motion for mistrial. (R. 1671-1672) "An objection need not always be made at the moment an examination enters an impermissible area of inquiry". Jackson v. State, 451, So.2d 458 (Fla. 1984); See: Roban v. State, 384 So.2d 683 (Fla. 4th DCA 1989) rev. den. 392 So.2d 1378, 1379 (Fla. 1980). Appellant's objection to the prosecutor's improper argument was made sufficiently contemporaneous for the trial court to cure. The court however, overruled the objection, cautioned the prosecutor not to make it a "major issue", and denied Appellant's motion for mistrial. (R. 1672)

Appellee next contends that the prosecutor's outrageous portrayal of the slain deputy speaking from the grave was permissible "rebuttal", essentially because Appellant opened the door to such argument. (Appellee's Answer Brief page 46) Appellee fails to acknowledge however, that the argument claimed to precipitate such prosecutorial "rebuttal", was in fact Appellant's rebuttal to claims made by the State in it's first closing argument to the jury. (R. 1695) Appellee may not precipitate rebuttal in order to "open the door" to the introduction to inadmissible evidence, or, as in this case, to outrageous prosecutorial overreaching. See, e.g., Rodriquez v.

State, 494 So.2d 496 (Fla. 4th DCA 1986).

Appellee acknowledges "a few instances where the State misspoke" and that some "comments were inappropriate". (Appellee's Answer Brief pages 44;49); Appellee urges this court to put the complained of errors "in context". (Appellee's Answer Brief page 46) There is no appropriate "context" however, for repeated prosecutorial excesses that act to poison the minds of the jury and deprive a criminal defendant of a fair trial. See: Redish v. State, 525 So.2d 928 (Fla. 1st DCA 1988); Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984) rev. den. 462 So.2d 1108 (Fla. 1985).

POINT VI

Appellant relies on the argument and citations to authority enumerated in his initial brief to this court.

POINT VII

Appellant relies on the argument and citations to authority enumerated in his initial brief to this court.

POINT VIII

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

Appellant asserts that the Florida Standard Jury Instruction on premeditated murder is insufficient in that it fails inform the jury on the critical element of "premeditated design". A "premeditated design" is "a fully formed and conscious purpose" and "a settled and fixed purpose" to take the life of another. McCutcheon v. State, 96 So.2d 152, 153 (Fla. 1957).

Appellee merely argues that the standard jury instructions

are presumptively valid, since they were adopted subsequent to McCutcheon, Id., and the standard instructions omitted the language referenced above.

Appellant is cognizant of that omission; that is why the issue has been raised.

Use of the standard jury instructions however, was authorized by this Court "without prejudice to the rights of any litigant objecting to the use of one or more of such instructions". In the Matter of the Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 598, Modified 431 So.2d 599 (Fla. 1981). This court's approval of the standard instructions "does not relieve the trial judge of his resposibility of correctly charging the jury". Yohn v. State, 476 So. 123, 126 (Fla. 1985).

This is not a felony murder case. The case below was submitted to the jury solely on the issue of whether or not the State proved beyond and to the exclusion of every reasonable doubt all elements of premeditated murder. The standard jury instruction omitted the crucial elements of "premeditated design" discussed above, thereby depriving the jury of adequate guidance with which to decide the factual issues presented. As one Court has written: "Amid a sea of facts and inferences, instructions are the jury's only compass". U.S. v. Walters, 913 F.2d 388, 392 (7th Circ. 1990). Appellant objected prior to the trial and offered an amended instruction curing the defect. The issue again was timely raised at trial. The trial court's refusal to sustain the objection and issue a corrected instruction was error

mandating reversal.

POINT VIII B

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUESTED SPECIAL INSTRUCTION RE: BURDEN OF PROOF WHEN ASSERTING THE AFFIRMATIVE DEFENSE OF EXCUSABLE HOMICIDE. (RESTATED)

Appellee concedes that the State has the ultimate burden of proving beyond a reasonable doubt that the homicide was not excusable. (Appellee's Answer Brief page 59) Appellee correctly points out that Florida Standard Jury Instruction 3.04(D) on justifiable use of deadly force contains a directive to the jury to find the Defendant not guilty if there is a reasonable doubt about whether the Defendant was justified in using deadly force.

There is no such parallel provision however, in the standard jury instruction on excusable homicide. Thus, when the jury hears or views the instruction on the affirmative defense of justifiable use of deadly force, they are explicitly cautioned that the burden remains on the State to prove beyond a reasonable doubt that such defense is not applicable. The jury receives no such directive as part of their instructions on the affirmative defense of excusable homicide.

Appellee also correctly observes that the standard instruction on excusable homicide "does not have, and has never had, a similar provision". (Appellee's Answer Brief page 59). That omission however, is an infirmity in the standard instruction Appellant attempted to cure, rather than a rationale upon which Appellee may rely to justify an inadequate and misleading standard instruction.

If such a provision is necessary in order to adequately apprise the jury of the burden of proof when the Defendant raises the affirmative defense of justifiable use of deadly force, it is similarly required to put the jury on notice of such burden when a Defendant raises the affirmative defense of excusable homicide. 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). The mere fact that a standard instruction has been adopted by this court does not forever waive a Defendant's right to challenge its substance. See: Yohn v. State, 476 So.2d 123 (Fla. 1985).

POINT IX

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

Appellee contends that the slain deputy's shoes and service belt were admitted as evidence in the trial below to identify him as a law enforcement officer, while conceding "there was a multitude of evidence establishing Richard Raczkoski was a deputy" (Appellee's Answer Brief page 63). Appellee claims the necessity of such cumulative identification evidence was to support the "theory" of felony murder. The trial court below however, properly rejected this theory, and the case was submitted to the jury solely on the charge of premeditated murder. (R. 1571) Appellee correctly asserts that evidence is admissible if it tends to prove a material fact in issue.

Identity of the victim was never an issue in the trial below, and the clothing items enumerated above should not have been admitted.

POINT X

Appellant relies on the argument and citations to authority enumerated in his initial brief to this court.

POINT XI

Appellant relies on the argument and citations to authority enumerated in his initial brief to this court.

POINT XII

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

Appellee's claim that Appellant cannot show prejudice based upon the trial court's improper denial of Appellant's Motion To Compel Discovery is without merit. The contents of correspondence between the Assistant State Attorney and Dr. Cheshire were not available to Appellant until after the due date of Appellant's brief as established by this court. Appellant could not in good faith argue the prejudicial value of evidence he never had been allowed the opportunity to review. Those documents are now available, and Appellant is able to demonstrate prejudice in the trial court's denial of Appellant's Motion To Compel below.

A review of the previously sealed discoverable materials reveals that the letters contained information that would have been utilized in cross-examining Dr. Cheshire during the penalty phase. The letters contained an abridged, biased and imcomplete

version of the circumstances of the shooting, composed by the Assistant State Attorney, and upon which Dr. Cheshire, by his own admission relied in formulating his opinions.

It is well settled that the right to a full, effective cross-examination is absolute and the denial of that right may easily constitute reversible error. Mendez v. State, 412 So.2d 965 (Fla. 2nd DCA 1982); Coxwell v. State, 361 So.2d 148 (Fla. 1978). The trial court's order refusing to compel discovery and thus abridging Appellant's right to adequate confrontation and cross-examination of Dr. Cheshire requires reversal.

PENALTY PHASE ISSUES

POINT XIII

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

Appellee claims that the additional factors of the victim's status as a law enforcement officer and the Defendant's claimed opportunity to flee prior to the shooting support the trial court's finding that the killing below was heinous, atrocious or cruel. The victim's status as a law enforcement officer however, was already considered pursuant to Chapter 921.141(5)(e) [preventing a lawful arrest or effecting an escape from custody], Chapter 921.141(5)(g) [to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws], and Chapter 921.141(5)(j) [law enforcement officer engaged in the performance of his official duties] by the trial court below, and using that status as a basis for additionally finding HAC would constitute impermissible doubling of aggravating factors. See:

Suarez v. State, 481 So.2d 120 (Fla. 1985). The asserted opportunity for the Defendant to flee or withdraw prior to the shooting does not relate to any of the statutory criteria enumerated in Chapter 921.141(5)(h).

The trial court's finding of HAC was improper.

POINT XIV

Appellant relies on the argument and citations to authority enumerated in his initial brief to this court.

POINT XV

Appellant relies on the argument and citations to authority enumerated in his initial brief to this court.

POINT XVI(I)(1)

WHETHER THE HEINOUS, ATROCIOUS OR CRUEL INSTRUCTION ISSUED TO THE JURY BELOW WAS CONSTITUTIONALLY INFIRM. (RESTATED)

Prior to trial, the court below denied Appellant's constitutional challenge to the heinous, atrocious or cruel (HAC) statutory aggravating factor enumerated in Chapter 921.141(5)(h) and its accompanying standard jury instruction. (R 2771-2788; 2892). At the charge conference in phase two, Appellant again raised his constitutional objection to the standard instruction for the HAC aggravating factor, and tendered a revised instruction which Appellant claimed would meet constitutional muster. (R. 2945-2950; 2270).

Appellee argues that the jury instruction issued below was "unlike the jury instruction found wanting in Espinosa v. Florida, 120 L.Ed.2d 854 (1992)". (Appellee's Answer Brief page 89). Appellant disagrees, the language of the standard jury

instruction on the HAC aggravating factor, approved by this court and issued to the jury below suffers from the same infirmities that have led to the rejection of similar instructions by the Supreme Court. Maynard v. Cartwright, 486 U.S. 356 (1988); Shell v. Mississippi, 498 U.S. _____, 111 S.Ct. 313 (1990). The operative language used in the Florida Standard Instruction on the HAC aggravating circumstance is similar to the language that was meaningless and applicable to all first degree murder cases in Shell, Id., and Maynard, Id., above.

Such an instruction is too vague to provide sufficient guidance to the sentence, and as a result, must fail. Maynard, Id.

APPELLEE'S ANSWER TO ISSUE RAISED ON CROSS-APPEAL

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE STATE'S MOTION TO APPOINT AN EXPERT TO CONDUCT A COMPELLED PSYCHIATRIC EXAMINATION OF APPELLANT, IN THE ABSENCE OF ANY STATUTORY OR OTHER AUTHORITY AUTHORIZING SUCH EXAMINATION. (RESTATED)

Appellee, prior to trial, requested the trial court to appoint its privately retained mental health expert to conduct a compelled psychiatric examination of Appellant. (R. 197-206; 2538-2541) The trial court subsequently entered an order denying the motion because the trial court believed it was not authorized to do so absent the Defendant raising the insanity issue. (R. 2574)

Appellee seemingly sheds crocodile tears[3] in arguing that the trial court's ruling prejudiced the State by denying Appellee the ability to rebut testimony elicited through defense witness Dr. William Weitz. This claim appears disingenuous in view of Appellee's collateral claim (appearing a mere five pages before the cross-appeal issue) that Dr. Weitz's testimony "was adequately contradicted by the State's expert witness and other rebuttal evidence." (Appellee's Answer Brief page 85) Appellee's failure to rebut evidence that the two statutory 'mental mitigators' enumerated in Chapter 921.141(6)(b) and 921.141(6)(f), Fla. Stat. applied in the instant case was not due however, to the State's inability to have their privately retained expert personally interview Appellant. It rather was the result of Appellant's complete failure to ask their expert during his testimony any questions relating to those statutory mitigating factors.

Appellee next claims that "by precluding the State from having its own expert witness examine Appellant, the trial court denied the State the right to rebut the defense expert". (Appellee's Answer Brief page 96). To the contrary, the State's expert clearly is permitted to testify concerning multifarious aspects of the defense expert's testimony, including but not limited to:

1) the expert's training

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[3] "I will neither yield to the song of the siren, nor the voice of the hyena, the tears of the crocodile, nor the howling of the wolf". Chapman, George (1559-1634), in Familiar Quotations (J. Bartlett ed. 1980)

2) the expert's experience

3) the expert's bias, prejudice, or interest

4) the sufficiency of the expert's investigation

5) the diagnostic criteria utilized by the expert

6) the evaluative techniques utilized by the expert

7) the sufficiency of the database relied upon by the expert

8) the conclusions reached by the expert

In fact, Dr. Cheshire testified for Appellee on some of those issues in the trial below. (R. 2223-2238)

The Federal and Florida Constitutions contain parallel provisions prohibiting the State from compelling a criminal defendant to be a witness against himself. Article I, Section 9, Fla. Const.; Amendment 5, U.S. Const. The constitutional guarantee against compelling a defendant to bear witness against himself must be broadly and liberally construed in order to secure the protections designed to be accomplished by them. Jones v. Stoutenburgh, 91 So.2d 299 (Fla. 1957); State ex rel. Beyer v. Willard, 54 So.2d 179 (Fla. 1951).

When a criminal Defendant's competency and/or sanity are at issue, there are two narrowly drawn exceptions to the constitutional guarantees against self-incrimination cited above. Those exceptions are contained in Fla. R. Crim. P. 3.216, relating to sanity, and 3.210 relating to competency. Absent questions about competency or sanity, there is no further authority to compel a criminal defendant to bear witness against himself. In the absence of enabling authority to permit such a

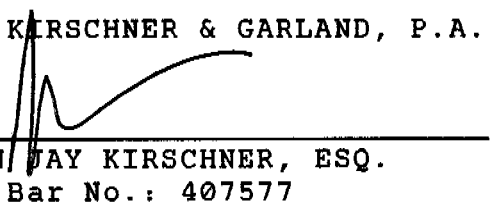
compelled examination, the trial court acted within its authority and its decision ought not be disturbed.

CONCLUSION

Based upon 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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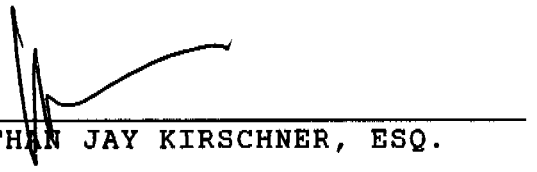
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Sara D. Baggett, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, on this 22nd day of January, 1993.



JONATHAN JAY KIRSCHNER, ESQ.