IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner/ Cross-Respondent, v. VINNEY TRIPP, Respondent/ Cross-Petitioner.	)	CASE NO. 81,119

ANSWER BRIEF OF RESPONDENT
INITIAL BRIEF OF CROSS-PETITIONER

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PRELIMINARY STATEMENT

This case is before the Court on the state's petition for discretionary review of a certified question on a sentencing issue. Mr. Tripp has also seeks review of a number of issues the district court declined to address. This Court deferred a decision on the state's notice to strike his cross-appeal. Here he refers to himself as respondent/cross-petitioner, in keeping with the status of the case as a petition and not an appeal. Herein, references to the record on appeal appear as (R[page number]), while references to transcripts of earlier trials in this case appear as (I:R[page number]) and (II:R[page number]). References to the initial brief of the state appear as (IB[page number]).

STATEMENT OF THE CASE

The state has set out the facts pertinent to the certified question. However, since this case involves many more substantial issues on which Mr. Tripp seeks review, a fuller picture is presented below.

The state charged Mr. Tripp with attempted first-degree murder, aggravated battery, and attempted robbery with a deadly weapon. (R603) The information, filed in April 1989, alleged that the offenses occurred on December 9, 1988. (R603) Tripp's first trial commenced on August 10, 1989, before Circuit Judge Joseph Q. Tarbuck, and ended in mistrial after the court reversed an earlier decision and decided to admit the testimony of a jailhouse informant not disclosed before trial. (I:R1, 22, 350) The second trial commenced on September 12, 1989, before Judge Tarbuck. (II:R1) Following guilty verdicts, the court granted a new trial because of prosecutorial misconduct in using the victim in an emotional appeal at the conclusion of her closing argument. (R695-699) The state appealed, and this Court affirmed the order granting a new trial in a per curiam decision without opinion. (R754-755) Additional information on the first and second trials is presented in the body of the argument herein.

Following the remand, defense counsel moved to dismiss the charges for violation of Tripp's double jeopardy rights, and to suppress out-of-court and in-court identifications. (R762-767, 827-829) The court denied both rulings in a pretrial hearing on February 18, 1991. (R1-44, 874-880) Defense counsel also moved pretrial to dismiss Count II, aggravated battery, on double

jeopardy grounds. (R50) The court took the motion under advisement. (R52)

Trial commenced on February 21, 1991 before Judge Tarbuck. (R58) Defense counsel preserved the suppression issue with timely objections throughout trial. (R165-169, 225-227, 292-295) When, during the testimony of jailhouse informant Robert Roberson, the prosecutor elicited from the witness that he knew Tripp's reputation, counsel objected and moved for a mistrial. (R341) The court denied the motion but instructed the jury to disregard the answer. (R342) The state then successfully sought to publish the prior trial testimony of a second jailhouse informant, Steven Bittner, whom it could not locate. (R343-350) Defense counsel objected, and moved to introduce records showing adjudications and sentences for offenses pending against the witness at the time of the testimony and for an offense subsequently charged. (R350-351) The court excluded the evidence. (R351-352) Bittner's testimony was read to the jury. (R366-389) The state located Bittner later, before the defense had rested. (R512) Defense counsel moved to have the state reopen its case to present his testimony. (R513) The trial court refused. (R513) Bittner subsequently informed the court he had forgotten his court date. (R585) The court found him in direct contempt and sentenced him to 10 days in county jail, but released him three days later after Bittner testified he had been involved in fights in prison because he was a snitch, and threatened by acquaintances of Tripp after his release. (R862-871)

During deliberations, the jurors asked to hear Bittner's testimony again, but were instructed to rely on their own recollections. (R582) The jury found Tripp guilty of attempted first-degree murder, aggravated battery with a deadly weapon and robbery with a deadly weapon. (R590, 839)

Tripp appeared for sentencing on March 18, 1991. (R881) Defense counsel again moved to dismiss the aggravated battery count, and the court denied the motion. (R882-883) Counsel also objected to the written order denying the motion to suppress, and to a sentencing hearing conducted without a pre-sentence investigation report. (R883-887) The permitted guideline range extended from 12 to 27 years imprisonment. (R882, 904) The court pronounced a departure sentence of life imprisonment for the attempted murder, concurrent to sentences of 15 and five years imprisonment for the aggravated battery and armed robbery. (R890-893, 895-901) The court entered a four-point departure order. (R902-903) Judge Tarbuck subsequently vacated the sentences because of the absence of a pre-sentence investigation report. (R906) On the date of the new sentencing hearing, defense counsel moved to disqualify the judge from the case. (R907-911) The judge commented that in his opinion the motion was made solely in hopes of obtaining a more lenient sentence, and denied it as untimely. (R915-916) The court reimposed the same sentences as at the earlier sentencing hearing, and stated it was relying on the same reasons for departure previously filed. (R917-920)

Timely notice of appeal was filed, and the Office of the Public Defender was appointed to represent Mr. Tripp in this appeal. (R929, 932)

STATEMENT OF THE FACTS

A. SUPPRESSION HEARING

Deputy Susie Joye of the Escambia County Sheriff's Office testified that in December 1988, a patrol officer had stopped someone who resembled a composite drawing of a suspect from a robbery several weeks earlier. (R15) A police artist had made the drawing from a videotape of the robbery. (R19) The suspect, Tripp, accompanied Joye to the sheriff's office and was photographed. (R16) He denied any involvement in the robbery. (R24) Joye testified that she showed a packet of booking-type photographs to Jacques and Lisa Stevens the same day, December 23rd, and that a file photo of Tripp was among those shown. (R17-18, 20) Neither witness identified anyone from the pictures. (R17-18) Joye believed that Jacques Stevens was actually Keith Swanson, the name he had given to officers at the robbery scene. (R20) She testified that she did not know Mrs. Stevens was also a witness, or would not have allowed her to look at the pictures with her husband. (R20) After the Stevenses failed to identify anyone, Joye put the photographs back in her files. (R23)

Deputy Kent Vancil testified he was the lead investigating officer in this case. (R26) He also showed Lisa Stevens a group of photographs, to the best of his recollection on January 3,

1989. (R27) This was a group of Polaroid photographs. (R27) Although Vancil had been on vacation and at some point found Tripp's picture among others on his desk when he returned, he testified in this hearing that Tripp's picture was not included in the January 3rd showing. (R28, 34-38) Mrs. Stevens did not identify anyone from this group of photos. Next, on January 6, Vancil showed another set of photographs to Mr. and Mrs. Stevens, him at work and her at home. (R27, 36) Both selected Tripp's photograph. (R33) Vancil was uncertain whether anyone other than Tripp appeared in more than one of the photo lineups viewed by the Stevenses. (R36)

B. TRIAL

On December 9, 1988, Mary Louise Harrell was working alone as the clerk in a Kwik Shop convenience store on Massachusetts Avenue in Pensacola. (R96-98) A video camera in the store, which pointed toward the front door, was operating that night. (R103) Kids outside the store told Harrell they were using the telephone. (R98-99) A young black male walked in, wearing a cap. (R100) He walked past the coffee station on his way to the bathroom, and Harrell thought he said the pot was empty. (R100) Harrell looked to see that the pot was full, then returned behind the counter. (R100) Her next recollection was the voice of a police officer telling her it wouldn't hurt. (R101) An emergency room physician testified that Harrell had multiple lacerations and fractures of the skull and face, and that she suffered a concussion. (R130-132) The doctor testified that her injuries were consistent with blows inflicted by a clawhammer. (R129-130)

A plastic surgeon who operated on her said she took at least five blows to the head. (R136-137) Harrell testified that she suffered a broken jaw and cheekbone and lost several teeth, among other injuries. (R104-105) She missed a year's work, but said that by the time of her trial testimony in 1991, she was fine. (R101)

Jacques Stevens lived near the store with his wife Lisa and several other relatives. (R143) On December 9, they had a "social day" at home that included beer drinking. (R144, 171) By 9:00 to 9:30 p.m., they had not yet eaten dinner when he and Lisa walked to the Kwik Shop for a loaf of bread. (R144) As he looked for bread inside the store, Jacques heard someone say, "Help me." He heard the words again, saw blood on the floor, and looked behind the counter to see a woman lying in the door to the storeroom. (R148-149) Jacques then scanned the store, and saw a black male bobbing his head over the shelving to look at the Stevenses from 20 to 30 feet away. Jacques asked the man, "Did you do this?" (R152) He received no answer, but the man walked around the rear of the store, then came face to face with the Stevenses. (R152) Jacques saw nothing in his hands, so he moved as if to jump on the man, who ran out the door. (R153-154) Jacques chased him to a stop sign before stopping, exhausted. (R155) The man turned around and told Jacques, "You are a slow motherfucker," then trotted off. (R155) During the chase, Jacques saw the man throw something from his jacket that sounded like a bottle breaking as it hit the ground. (R156)

Jacques Stevens returned to the store, and told an officer, Charles Cephas, what he had seen and done. (R159) Jacques identified himself by a false name, Keith Swanson, but gave his correct address and work phone number. (R159) He testified he lied to avoid prosecution on outstanding warrants stemming from charges of disorderly intoxication and driving without a valid license. (R164) Jacques described the man he chased as 5-7 to 5-10 in height (Jacques is 6 feet tall), a slight to medium build and a light complexion. (R159-161) At trial in 1991, Tripp appeared as tall or slightly taller than Jacques. (R171) Jacques also testified that the man he chased was wearing a shirt with designs on it -- flowers, boats or stripes. (R178) Lisa Stevens described the man as 17 to 18 years old, 5-7 to 5-8 in height, wearing blue jeans, a pinstripe shirt, green jacket and blue and white baseball cap. (R287) Lisa testified that it seemed the man stopped to stare at them for 60 to 90 seconds, but Jacques acknowledged that the videotape showed they were in the store together no more than 18 seconds. (R178, 300)

After Jacques told the officer that the man had dropped something during the chase, they both searched the area and discovered a clawhammer. (R157) Police developed no useful prints from the hammer. (R138-142)

A week to 10 days after the robbery, Deputy Joye showed the Stevenses a photospread at their house. (R164) Neither witness identified anyone from the spread. (R163, 290) At about this time, Jacques revealed his real name to police. (R164) He was booked in jail on a $1,000 bond, which he made and was released.

(R165) Lisa Stevens looked at a second set of photographs presented by Deputy Vancil on January 3rd, but identified no one. (R291) On January 6th, Vancil showed a third photospread to the Stevenses, Jacques at work and Lisa at home. Both identified Tripp as the man Jacques had chased from the store. (R166-168, 292) Both also identified Tripp at trial. (R168, 295)

At the time of trial in 1991, Jacques Stevens faced a violation of probation hearing on the disorderly intoxication charge that had been pending in December, 1988. (R191) Jacques had asked Deputy Vancil to put in a good word for him at a previous court appearance, but said he had no reason to intentionally misidentify Tripp. (R180, 194) He testified under subpoena. (R195)

Brooks Sanderson, a sheriff's artist, made a drawing of the suspect from the store videotape. (R257) In the course of repeatedly pausing the display, he damaged the tape to such an extent that the assailant's face is almost impossible to discern. (R257-266) No copies of the tape were made before Sanderson damaged it. (R267)

Deputy Susie Joye testified that a patrol officer stopped Tripp on December 23, 1988, because he resembled Sanderson's drawing. (R248, 254) Tripp accompanied her to the police station, where he was photographed. (R249) Joye placed the Polaroid photograph on Vancil's desk, then showed the Stevenses a photospread that included a file photograph of Tripp. (R251) They identified no one, but one of the two said that another

person depicted -- not Tripp -- had a nose similar to the man in the store. (R255-256)

Deputy Kent Vancil returned from vacation on or about January 3, 1989, to find names and photographs on his desk, as well as a drawing. (R218) He assembled a photospread from Polaroid photographs, and showed it to Lisa Stevens. (R218-219) Contrary to his testimony in the suppression hearing, Vancil testified that he could not recall whether Tripp was included in this photospread. (R234-235) He had said in an earlier sworn statement that Tripp's photograph was included. (R238) Lisa identified no one. (R220) Vancil learned at that time that Jacques Stevens had used a false name, and learned of his outstanding warrants. (R220) Vancil compiled another spread and showed it to the Stevenses separately on January 6th. Both identified Tripp as the man they'd seen in the Kwik Shop. (R221-227)

Vancil testified that in August, 1989, a previous prosecutor had him interview persons with whom Tripp had been jailed, to determine if they had information on the case. (R240) He returned on August 31, and developed two potential witnesses, Robert Roberson and Steven Bittner. (R240-245)

Robert Roberson testified that he and Tripp were housed together for three to four weeks in 1989. (R312) At one time, according to Roberson, Tripp discussed his case. Bittner was present, Roberson said. (R314-315) Tripp purportedly said he robbed a convenience store, that he hit the lady on the head and she fell. (R316) He said that when he couldn't get the cash

register open, he hit her several more times. (R317) Asked what he used, Tripp said it was a hammer, which he threw down after he ran out. (R17) Roberson had testified earlier that Tripp said the store was a Circle K, but could not remember at trial the name of the store Tripp had mentioned. (R333) The witness stated that he had seen coverage of Tripp's case on a television to which the inmates had access, but saw no coverage the morning he first talked to Vancil. (R327) Roberson met Vancil a week or two after the conversation with Tripp, then talked to the prosecutor. (R318) On his pending charge of violation of community control, he had expected a state prison sentence. (R317) Instead, following his testimony in Tripp's September, 1989 trial, he received probation in a hearing in which Vancil appeared in his behalf. (R325-326, 330-332) Roberson also testified that he and Bittner were mistreated by other jail inmates after it was learned they had snitched. (R320) He stated that during an earlier trial, Tripp had told a guard to lock him up with "the cracker" so he could kill Roberson. (R321)

In transcribed testimony from an earlier trial, Steven Bittner testified that he overheard the conversation in which Tripp described the crime to Roberson. (R370-371) Bittner said that while in jail, he had seen a newscast involving the robbery which showed a picture of Tripp but no videotape. (R373) Bittner also testified that when he learned Roberson was going to testify against Tripp, he said he would also come forward if Roberson's testimony was not sufficient. (R386) At the time of his testimony, Bittner said he expected to receive community control

or up to 11-1/2 months in county jail on his pending charges. (R387) (Documents which defense counsel sought unsuccessfully to introduce showed Bittner received five years probation with a condition of 90 days in county jail less then a month after his testimony. (R346))

Peter Neumann, a television news director, testified that his station broadcast several stories about the Kwik Shop robbery in August, 1989, and that one on August 7th included the store videotape of the incident. (R394-403)

Jerry Bailey testified for the defense. He was in the same group of cells as Bittner, Roberson and Tripp. (R422) He testified that on the morning of Vancil's visit to the jail, the television news had included a story on the case, which was then going to trial. (R424) Roberson was one of four or five persons who watched the story, according to Bailey, then discussed what they had seen. (R425) Bailey also testified that he was the first to speak to Vancil, and that upon his return to the cells he told the others what the deputy wanted to know. (R425) Roberson appeared very interested in the questions Vancil had asked. He also asked Bailey why he didn't make something up to help himself out. (R425-426) Roberson said he thought it might help him to say something to Vancil. (R427) Bittner was within earshot. (R428) When within several days Roberson and then Bittner were moved to another cell, Bailey and the others knew they had "snitched." (R428)

Tripp, 21 years old at the time of this, his third trial, testified in his own behalf and denied the charges. (R443) He

said he had been in the Kwik Shop once or twice, as it was within walking distance of his grandmother's apartment, but was not there the day of the crime. (R442, 455) He recalled being stopped by a deputy outside the apartment complex, and voluntarily accompanying an officer to the police station to be photographed. (R445-446) When he was told that he resembled a drawing from a videotape of the store robbery, he said he didn't know what the officer was talking about. (R446) Tripp testified that he did not make the statements attributed to him by Roberson and Bittner, and assumed they fabricated the testimony to obtain more lenient punishment for their crimes. (R451-452) He admitted threatening Roberson, but only because Roberson had lied about him. (R453)

Additional pertinent facts appear in the body of the argument. Excerpts and still photographs from the videotape were admitted in evidence and now reside the appellate record, as do the several photospreads used.

SUMMARY OF THE ARGUMENT

Jurisdictional Issue

I. This Court has already answered the certified question in the affirmative. The state's reformulation of the question yields the same answer. This issue is directly controlled by State v. McKinnon, 540 So.2d 111 (Fla. 1989). Enhancement of a felony under section 775.087, Florida Statutes, is authorized only when the jury specifically finds, as part of the count on

which enhancement is sought, that the defendant carried a deadly weapon or committed an aggravated battery as part of the crime.

Cross-petition

I. The state's conduct in twice provoking mistrials should have barred appellant's third trial. In light of its actions in soliciting a jailhouse informant during jury selection which resulted in the initial mistrial, the state's misconduct in making use of the victim in an emotional appeal during closing argument of the second trial was designed to goad appellant into requesting a mistrial. Thus, reprosecution is barred under the double jeopardy clause of the federal constitution. Alternatively, the prosecutor's action demonstrated reckless indifference as to its consequences, barring retrial under a different standard which this Court may adopt under the state constitution. A reckless indifference test is more practicable than a test of intentional goading, and better serves a defendant's substantial interest in completion of trial before the initial tribunal.

II. The state showed appellant's photograph to witnesses two and three times as part of lineups. In addition to the repetition of appellant's image, his photographs stood out from the others. In totality, the defense showed a high likelihood of impermissibly suggestive procedures, shifting to the prosecution the burden of showing that the in-court identification was reliable despite the impropriety. The state probably could not have met this burden, had it been compelled to make the attempt. The error in admitting the identification from the sole eyewitnesses was harmful, reversible error violating the

defendant's state and federal constitutional rights to due process of law.

III. The prosecutor's tactic of eliciting from a state witness testimony that strongly implied appellant had a reputation for violence fatally tainted the proceedings. The question rebutted nothing, attacked appellant's character without it having been placed in issue, and wholly lacked evidentiary foundation. In a prosecution for three crimes of violence, the exchange was so prejudicial that a curative instruction could have little effect. Mistrial was the only true remedy.

IV. The trial court erred in admitting prior trial testimony of a witness not shown to be absent from the state, as required by court rule. Subsequent events showed the witness was not absent from the state. The court next erred in refusing to allow introduction of judgments and sentences entered against the witness after the prior testimony. This evidence would have demonstrated bias and motive. Finally, the court erred in refusing to allow reopening of the case, which had not been submitted to the jury, when the witness physically appeared before closing arguments. Consequently, appellant was denied his constitutional right to confrontation of adverse witnesses.

V. The trial court erred in adjudicating appellant guilty and sentencing him for aggravated battery, a charge duplicative of the attempted murder. The aggravated battery and attempted murder required identical elements of proof. Alternatively, the elements of the aggravated battery were wholly subsumed within the attempted murder. Under either view, the aggravated battery

falls within an exception to the presumption of multiple convictions contained in section 775.021(4)(b), Florida Statutes.

VI. In ruling on appellant's motion to disqualify him before the second sentencing hearing, the trial judge essentially commented on the truthfulness of the allegations contained in the motion. At that point, disqualification was mandatory. An alternative basis for the ruling, the motion's untimeliness, does not ameliorate the court's error in commenting on the motion. Additionally, defense counsel established good cause for failing to meet the 10-day rule for filing the motion (assuming it even applies to pre-sentencing motions to disqualify).

VII. The trial judge failed to enter written departure reasons contemporaneous with the second sentencing hearing. The judge merely orally adopted its previous written order. The reasons given at that time were nullified when the sentence was vacated, and a new order was necessary. Thus, no written order existed at the time of the resentencing, mandating resentencing within the guidelines.

VIII. The four reasons given by the trial court do not reasonably justify departure. Threats to witnesses, the first reason, applies to only one of the two witnesses mentioned in the trial court's order. As to the second witness, the threat was made under circumstances far different from those under which the reason is usually upheld, and thus does not reasonably justify departure. Use of excessive force in the robbery, the second reason, inheres in the attempted murder of which appellant was also convicted. It is illogical to state that one who intends to

kill uses excessive force when no death results. Timing of the offenses relative to release from supervision does not justify departure, under recent case law. Finally, an escalating pattern of criminality does not justify departure when it rests solely on the instant offense plus two delinquent acts committed while a juvenile. Moreover, if a pattern defined by only two criminal episodes can never reasonably justify departure, addition of a misdemeanor trespass committed while a juvenile adds so little the equation that it cannot warrant departure.

ARGUMENT

Jurisdictional Issue

SECTION 775.087, FLORIDA STATUTES, DOES NOT AUTHORIZE ENHANCEMENT OF A FELONY FOR USE OF A FIREARM OR COMMISSION OF AN AGGRAVATED BATTERY UNLESS THE VERDICT ON THAT COUNT SPECIFICALLY REFLECTS AN AFFIRMATIVE FINDING ON THE AGGRAVATING CIRCUMSTANCE.

This case presented a number of trenchant issues, many of which might have been cast into certified questions of great public importance for this Court's consideration. At best, this is the least of them:

> DOES THE ABSENCE OF A SPECIFIC FINDING BY THE JURY ON THE VERDICT FORM THAT THE DEFENDANT EITHER CARRIED, DISPLAYED, USED, ETC. ANY WEAPON OR FIREARM OR THAT HE COMMITTED AN AGGRAVATED BATTERY DURING THE COMMISSION OF THE FELONY SUBJECT TO BEING RECLASSIFIED PRECLUDE EXECUTION OF THE MANDATORY LANGUAGE OF 775.087(1) WHICH REQUIRES THE RECLASSIFICATION OF OFFENSES UNDER CERTAIN CIRCUMSTANCES?

As Judge Wolf stated in his concurring opinion, it was neither "necessary [n]or appropriate to certify a question to the supreme

court," for "[t]here was absolutely no basis for classifying the attempted first-degree murder as a life felony on the guidelines scoresheet." Slip op. at 7.

This Court has already answered the question posed by the district court in the affirmative. State v. Overfelt, 457 So.2d 1385 (Fla. 1984). Finding the district court's phrasing "somewhat broad," the state has recast the question in the terms of Tindall v. State, 443 So.2d 362 (Fla. 5th DCA 1983). (IB6) No matter; Overfelt answered that question in the affirmative as well. Appellee states a narrow truth in asserting that Overfelt "did not disapprove" Tindall. (IB9) The Tindall court certified conflict between its decision and that of the district court in Overfelt. This Court approved the district court decision in Overfelt, and cited Tindall as an example of the view it rejected. Subsequently, the Fifth District Court of Appeal acknowledged that Overfelt cited and impliedly, if not expressly, overruled its decision in Tindall. Henry v. State, 483 So.2d 860 (Fla. 5th DCA 1986); Davis v. State, 486 So.2d 45 (Fla. 5th DCA 1986). See also, Fischer v. State, 488 So.2d 145 (Fla. 3d DCA 1986). Thus, Tindall was officially declared dead in 1986.

Overfelt clearly holds that, before the state may subject an offender to enhancement under section 775.087, it must put the issue before the jury in a form in which there can be no doubt whether the verdict supports enhancement. This is a bright line, easily administered, which keeps judges and juries in their proper orbits. As stated in Overfelt, "it is the jury's function

to be the finder of fact with regard to matters concerning the criminal episode." 457 So.2d at 1387.

This issue is directly controlled by State v. McKinnon, 540 So.2d 111 (Fla. 1989). Here, as in McKinnon, the jury made no specific finding of use of a weapon or commission of an aggravated battery during the offense on which enhancement was sought. In both cases, findings on other counts purportedly supported the enhancement. This Court found the inference improper, holding that "[c]onviction on one count in an information may not be used to enhance punishment for a conviction on another count." Id. at 113. Likewise, Tripp's conviction for attempted robbery with a weapon and aggravated battery cannot be used to enhance his punishment for conviction of attempted first-degree murder.

The annotation on the scoresheet shows that the trial judge relied on use of a deadly weapon for the enhancement. The state points to the aggravated battery as an alternative. Because the jury did not find that Tripp committed an aggravated battery within the attempted murder count, this circumstance can no more support enhancement than the use of a deadly weapon. Moreover, the state has produced no authority for the proposition that attempted murder may be enhanced under section 775.087 because it was committed by acts also constituting an aggravated battery. The state's position in this respect would force it to abandon the independent aggravated battery conviction. See Foster v. State, 596 So.2d 1099, 1102 (Fla. 5th DCA 1992), approved, 18 Fla. L. Weekly S103 (Feb. 4, 1993)

Consequently, the reclassification of attempted murder is invalid. The reclassification of attempted armed robbery is also invalid, as conceded by the state and acknowledged by the district court. Slip op. at 3. The district court decision vacating those sentences and remanding for resentencing should be approved.

Cross-Petition

I. APPELLANT'S RETRIAL WAS BARRED BY THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

At the outset of this, Tripp's third trial, defense counsel moved to dismiss the charges for violation of his rights under the double jeopardy clauses of the federal and state constitutions. (R827-830) Circuit Judge Joseph Q. Tarbuck, who presided over the first two trials, denied the motion in a short hearing. (R6-13)

Briefly, the first trial in August, 1989 ended when Judge Tarbuck reversed his earlier decision to exclude the testimony of a jailhouse informant whom the state discovered on the day of jury selection and disclosed to the defense on the day of trial. (I:R17-22, 329-350) The court granted a mistrial to give defense counsel an opportunity to investigate the circumstances of the witness' testimony. (I:R350) The second trial commenced in September, 1989. It ended in a mistrial caused by the prosecutor's use of the victim to engender sympathy and outrage in closing argument. (R679-699) The state appealed the order granting the mistrial, and this Court affirmed the trial court's decision in a per curiam decision without opinion. (R755)

The state's conduct in provoking the mistrials twice declared in this case should have barred Tripp's third trial. In light of what had gone before, the prosecutorial misconduct in closing argument of the second trial was designed to goad Tripp into requesting a mistrial, barring reprosecution under the Fifth Amendment to the U.S. Constitution. Alternatively, the prosecutor's actions demonstrate reckless indifference as to its consequences, barring reprosecution under Article I, Section 9 of the Florida Constitution.

A. FEDERAL DOUBLE JEOPARDY

Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), established the federal constitutional test for a double jeopardy bar to reprosecution after a mistrial caused by prosecutorial misconduct. In United States v. Tateo, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964), the Court rejected a double jeopardy claim, but stated that if the circumstances suggested that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear of acquittal, different considerations would obtain. Subsequently, in United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976), the Court held that the double jeopardy clause bars retrial where bad faith conduct by the prosecutor threatens harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford a more favorable opportunity to convict. Id. at 611. Turning away from this line of authority, the Court in Kennedy adopted a test that would bar retrial "[o]nly where the governmental conduct in question is intended to "goad" the

defendant into moving for a mistrial. . . ." 456 U.S. at 676. The Court found this a more manageable standard than any other. Id. at 675. Justice Powell, the swing voter in the 5-4 opinion, wrote in concurrence that because subjective intent is often unknowable, the court considering a double jeopardy motion should rely primarily upon the objective facts and circumstances of the particular case. Id. at 679-680. On the facts of Kennedy, Justice Powell saw no sequence of overreaching prior to the question that prompted the mistrial, noted the prosecutor's surprise at the mistrial motion, and observed that the trial and appellate courts credited the prosecutor's statement that there was no intention to cause a mistrial.

Here, the factors deemed significant by Justice Powell in Kennedy demonstrate an intent to goad a mistrial motion. First, prosecutorial overreaching had already provoked one mistrial. The prosecutor had solicited jailhouse informants on the day of jury selection in the first trial, August 7, 1989, and disclosed the informant it had harvested three days later, at the outset of trial on August 10. The state asserted it had not violated discovery rules because the informant had only recently been "discovered." More accurately, the state waited until the outset of trial to seek this information. The trial court initially excluded the informant's testimony. Evidently, however, the state's case was going poorly, for after presenting other witnesses, the prosecutor succeeded in obtaining reconsideration and reversal of that decision. She gained a substantial advantage from the mistrial which followed, for it gave the her time to

unearth a second informant to testify against Tripp upon retrial the following month.

In the second trial, the prosecutor could hardly have been surprised at the mistrial motion, a second factor noted by Justice Powell. Defense counsel objected to her moving the victim to the center of the gallery where she could be seen by the jury. As stated by defense counsel at that point, "I think the only reason for this is so she can be seen by the jury and the jury can look at her, have sympathy and empathy for her and thereby prejudicing the defendant's case." (II:R465) In its order granting the new trial, the court noted that during a bench conference, the prosecutor "did not indicate that she intended to refer to the victim." (R695) The prosecutor subsequently made use of the victim to engender the very reaction defense counsel had feared, gesturing to her, the defendant and the photographs of her injuries while telling the jury to hold the defendant responsible. (II:R518)

The third consideration deemed significant by Justice Powell was whether the trial court believed the prosecutor intentionally caused a mistrial. The prosecutor never said she did not intend to cause a mistrial, though naturally she argued against it following the guilty verdicts. In admonishing the prosecutor for her misconduct, the court stated that its only purpose could have been to arouse prejudice and passion, and stated that she had been following a practice of "winning at any cost." (I:R533) The court's order granting the new trial echoed these comments, and noted the frail appearance of the victim. (R697) Although the

record is thus silent on whether the trial court believed the prosecutor intentionally caused a mistrial, the trial court's conclusion that she acted to win at any cost suggests she was willing to take a mistrial rather than an acquittal. A Not Guilty verdict was the only possibility against which she could not reasonably insure. This consideration, in combination with the other circumstances of the case -- including her conduct resulting in the first mistrial and her awareness of the potential for prejudice in moving the victim to a location better suited to her objective -- demonstrates that the prosecutor's argument was intended to goad a mistrial motion. Accordingly, Tripp's third trial should have been barred.

B. STATE DOUBLE JEOPARDY

In a concurring opinion in Oregon v. Kennedy, Justice Brennan noted that the Court's decision did not prevent state courts from concluding that retrial would violate the double jeopardy provision of the Oregon Constitution. 456 U.S. at 680-681. The Oregon Supreme Court considered that question in State v. Kennedy, 666 P.2d 1316 (Ore. 1983). The court ruled that retrial violates the state constitution when "improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal." Id. at 1326. The court noted that in those circumstances, mistrial is not attributable to the defendant's choice of a new trial over completion over the error-infected trial, but to "the

state's readiness, thought perhaps not calculated intent, to force the defendant to such a choice." Id.

The Arizona Supreme Court also rejected the Oregon v. Kennedy standard as the test to be applied under its state constitution. Pool v. Superior Court, 677 P.2d 261 (1984). After noting its power in a federal system to independently interpret its own organic law, the court explained its disagreement with the U.S. Supreme Court decision:

> We cannot agree with the fundamental premise of the plurality in Oregon v. Kennedy, that a test broader than intent to provoke a mistrial, "would offer virtually no standards." We agree with the opinion of Justice Stevens for the four-member minority that so specific an intent must necessarily involve a subjective inquiry and is too difficult to determine. Also, we believe that the Court's decision fails to give effect to its own pronouncements regarding the purpose of the double jeopardy clause. The Court acknowledges that the clause gives the defendant an interest in having the prosecution completed by the tribunal before which the trial is commenced. This "interest" expresses a policy against multiple trials. The fundamental principle is that:
>
> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 271 (citations omitted). Concluding that attachment of jeopardy turns on enforcement of the state double jeopardy guarantee against multiple trials, the court held that jeopardy attaches when a mistrial is declared under these conditions:

> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
> 2. such conduct is not merely the result of legal error, negligence, mistake or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Id. at 271-272. In a footnote, the court held that a prosecutor's knowledge or intent must be measured by objective factors, including the situation at hand, the evidence of actual knowledge and intent and other pertinent factors creating an appropriate inference or conclusion. Id., n.9. The court also stated that where the test is met, the state "has intentionally exposed the defendant to multiple trials for the same crime and has destroyed his expectation of completing the proceeding before the original tribunal." Id. at 272. This, concluded the court, "is exactly what the double jeopardy provision was intended to prevent." Id. The court's holding and comments echo the concurring opinion of Justice Stevens in Kennedy, in which three justices joined him in favoring a test which would encompass situations in which the prosecutor "seeks to inject enough unfair prejudice into the trial to ensure a conviction but not so much as to cause a reversal of that conviction." 456 U.S. at 689. Recently, another state adopted such a test. The Pennsylvania Supreme Court held that its state constitution "prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct

of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." Commonwealth v. Smith, 615 A.2d 321 (Pa. 1992).

As demonstrated by the state supreme courts in Kennedy, Pool and Smith, states may interpret their constitutional counterparts to federal constitutional provisions independently, even when the wording is similar. This Court so stated in Traylor v. State, 596 So.2d 957 (Fla. 1992), en route to holding that the privilege against self-incrimination in the Florida Declaration of Rights provides greater protection to the individual accused than the corresponding federal provision. Although this Court has held that the state double jeopardy provision was intended to mirror the framers' intentions on the question of multiple punishments, Carawan v. State, 515 So.2d 161, 165 (Fla. 1987), this does not wed the Court to shifting United States Supreme Court interpretations of the federal provision. Moreover, this case concerns an aspect of the double jeopardy guarantee different from that on which Carawan turned. The U.S. Supreme Court majority opinion in Kennedy represented a move away from its earlier decisions in this area, a shift which four of the nine justices could not join. The only influence of this shift on this Court's interpretation of the double jeopardy clause of the state constitution, if any, should flow from the analytical force supporting the decision.

For reasons set out in the excerpts from Pool and in Justice Stevens' concurring opinion in Kennedy, the Kennedy standard does not adequately serve the double jeopardy guarantee against

multiple prosecutions. Does the absence of specific intent to cause a mistrial by a prosecutor who merely wishes to force a choice between a conviction ensured by the misconduct and a new trial lessen the ordeal of a defendant subjected to two -- here three -- trials because of the misconduct? No. Here, having already forced a second trial by her insistence on proceeding with a "newly discovered" witness, the prosecutor was at the very least recklessly indifferent to the possibility of a second mistrial, satisfying those parts of the Oregon, Arizona and Pennsylvania tests which differ from the U.S. Supreme Court standard. She moved the victim to the center of the courtroom, within the jury's view, represented to court and counsel that she was doing so to facilitate the victim's right to be present, and then used the victim as a human exhibit, to great emotional effect. In the order granting the motion for new trial, the trial judge stated: "[I]t seems apparent that said conduct at the trial in question was solely to invoke the sympathy and prejudice of the jury in order to obtain a conviction." (R697) Did the prosecutor intend a mistrial? Probably not if she could get away with it. Yet, as noted by Justice Stevens, "the defendant's choice -- to continue the tainted proceeding or to abort it and begin anew -- can be just as 'hollow' in this situation as when the prosecutor intends to provoke a mistrial." Oregon v. Kennedy, 456 U.S. at 689 (Stevens, J., concurring). In such circumstances, where the prosecutor has provoked a third trial, if not in the more common second-trial scenario, only a standard which provides greater protection against the dangers of

multiple prosecutions provides meaningful double jeopardy protection. The Arizona, Oregon, or Pennsylvania tests provide that protection. Taking guidance from these decisions, this Court should devise a standard to be applied under Article I, Section 9 of the Florida Constitution, either as a general rule or in the rare circumstances of a second mistrial attributable to prosecutorial misconduct.

Cross-petitioner is unaware of precedent in which this Court independently evaluated a claim of a double jeopardy bar to retrial after mistrial under article I, section 9 of the Florida Constitution. To date, the Court has considered these claims under the Oregon v. Kennedy standard. See, e.g., Happ v. State, 596 So.2d 991 (Fla. 1992); Robinson v. State, 574 So.2d 108 (Fla. 1991); Johnson v. State, 545 So.2d 411 (Fla. 3d DCA 1989). However, consistent with the principles of federalism expressed in Traylor, supra, this Court should construe the double jeopardy clause of article I, section 9 "freely in order to achieve the primary goal of individual freedom and autonomy." 596 So.2d at 963.

The Third District Court of Appeal has twice declined an invitation to apply a standard different from that adopted in Kennedy. State v. Iglesias, 374 So.2d 1060 (Fla. 3d DCA 1979); Duncan v. State, 525 So.2d 938 (Fla. 3d DCA 1988). In Iglesias, the appellee urged a gross negligence standard, lower than the reckless indifference standards applied by the Oregon and Arizona supreme courts. Recklessly indifferent conduct, unlike negligent conduct, is not a mistake made in good faith but an act

approaching if not exceeding bad faith. See Iglesias, 374 So.2d at 1063. Second, the possibility that courts might be more reluctant to grant mistrials if that action chanced a bar to reprosecution is speculative at best, and a policy question distinct from the enforcement of a constitutional right. It is equally plausible that adoption of the standard urged here would influence prosecutors to exercise greater care, necessitating fewer reversals and retrials. Duncan rests on Iglesias, and furthermore met the "intentional goading" standard of Kennedy, rendering the court's evaluation of a different standard mere dicta. Iglesias and Duncan thus do not present persuasive authority for a rejection of the standard urged here.

For these reasons, the trial court erred in dismissing the charges with prejudice. Reversal and acquittal are required.

II. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS OUT-OF-COURT AND IN-COURT IDENTIFICATIONS OF APPELLANT WHICH RESULTED FROM VIEWINGS OF IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC LINEUPS.

Defense counsel moved to suppress evidence of identification of Tripp by two witnesses from photographic lineups as well as the resulting in-court identification at trial. (R762-768) The trial court denied the motion at the conclusion of an evidentiary hearing, and subsequently entered a written order to that effect. (R14-43, 874-876) Defense counsel preserved the issue with timely objections at trial. (R165, 168, 225, 227, 292, 295)

The trial court erred. The procedures were so unnecessarily suggestive and conducive to irreparable misidentification as to

deny Tripp his federal and state constitutional rights to due process of law. The defense met its burden of showing a high likelihood of impermissibly suggestive procedures, shifting to the prosecution the burden of showing that the in-court identification was reliable despite the impropriety. The evidence strongly suggests the state could not have met this burden, had it made the attempt. Therefore, Tripp's convictions must be reversed.

A pretrial identification procedure may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" that it denies an accused due process of law. Stovall v. Denno, 388 U.S. 293, 301-302, 87 S.Ct. 1967, 18 L.Ed. 2d 199 (1967). A subsequent in-court identification is inadmissible if there is "a very substantial likelihood of misidentification." Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972). A pretrial identification obtained from a suggestive procedure may be introduced into evidence only if found to be reliable and based upon the witness' independent recall. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed. 2d 140 (1977); Neil, 409 U.S. at 199-200. Once the defense has met its burden of showing an impermissibly suggestive procedure, the state bears the burden of showing reliability or an independent source for the in-court identification. Edwards V. State, 538 So.2d 440, 444 (Fla. 1988). See generally, LaFave and Israel, Criminal Procedure, sec. 7.4. (1984)

The several pretrial photographic viewings by witnesses Jacques and Lisa Stevens created a very substantial likelihood of

misidentification for two reasons: first, repetition of the defendant's picture in the lineups -- once for Jacques, twice for Lisa -- created the danger that the subsequent identification stemmed not from the brief encounter at the scene of the crime but from the subsequent viewing. Second, the photographic lineups themselves called attention to Tripp in comparison with the others pictured. In combination, both factors created a procedure so suggestive that it denied due process.

In his order denying the motion to suppress, Judge Tarbuck made detailed factual findings. He found that on or about December 23, 1988, two weeks after the event, Jacques and Lisa Stevens viewed a photographic lineup in which the defendant was included, but made no identification. (R874) He further found that on January 3, 1989, both witnesses viewed a different lineup of Polaroid photos, including one of the defendant taken on December 23. (R875) Neither made an identification. The court found that on January 6, each witness separately viewed a third photo lineup that featured a third picture of Tripp, and that on this date, both witnesses identified Tripp from the scene of the robbery. (R875) The court found that in each lineup, a different photograph of Tripp was used, and that others also appeared more than once. (R875)

Photographic lineups are inherently less reliable than live lineups, a relevant factor in determining the likelihood of misidentification. Simmons v. United States, 390 U.S. 377, 386 n.6, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); Mata v. Sumner, 696 F.2d 1244, 1254 (9th Cir.), vacated as moot, 464 U.S. 957, 104

S.Ct. 386, 78 L.Ed.2d 332 (1983). The circumstances of the three photographic lineups here magnified the indicia of unreliability. Procedures involving the repeated use of a single photograph in successive arrays until a positive identification is obtained are viewed with great caution by the courts. People v. Jones, 567 N.Y.S. 2d 311 (N.Y. App. 1991); United States v. Donaldson, 978 F.2d 381, 386 (7th Cir. 1992). The substantial danger of repeated viewings is that the witness will recall the accused's picture not from the opportunity to view him at the time of the offense -- which here was quite brief -- but from the prior photographic viewing. As to the identification by Lisa Stevens, whose view was even more brief than that of Jacques, her exposure to Tripp's photographed image twice heightened the prospect that she unconsciously transferred her recollection of the photograph to the person she saw in the Kwik Shop.[1] In the literature of eyewitness identification research, commentators have observed that this phenomenon often occurs. See E. Loftus, Eyewitness Testimony 151 (1979); J. Brigham & D.L. Cairns, "The effect of mugshot inspections on eyewitness identification accuracy," 18 J.Applied Soc. Psychology 1394 (1988). In reported Florida cases involving multiple lineups, the witnesses identified the accused as the perpetrator during the initial viewing. See, e.g., Holsworth v. State, 522 So.2d 348 (Fla. 1988); Smith v. State,

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[1]Although the trial court's order reflects that Jacques Stevens also viewed the January 3rd array, this observation lacks record support.

362 So.2d 417 (Fla. 1st DCA 1978). Not so here; the Stevenses identified Tripp only upon their second (Jacques) and third (Lisa) viewings, after having his image implanted in their minds by earlier viewings. In ruling on the motion, the trial court stated that because the Stevenses did not select Tripp from the earlier lineups, they were not unduly influenced by his reappearance. (R42) Actually, the inverse is true: having failed to select Tripp in earlier opportunities, the Stevenses were unduly influenced upon his reappearance to select his image as one they had seen before.

Judge Tarbuck noted in his order that Tripp's photograph was not the only one repeated in the three viewings. The record is at best equivocal on this question. Officer Vancil, who showed the last two sets of photographs, could not tell whether anyone but Tripp was repeated in the viewings on December 23 (Def. Ex. 2) and January 6 (State Ex. 16). An inspection of the photographs in the record on appeal yields no other obvious repeaters. Nor, evidently, is anyone but Tripp repeated in State Ex. 17, which, according to Vancil at trial, includes pictures shown to Lisa Stevens on January 3 and later retrieved from his working file. (R233-234). Moreover, the fact that a cursory visual inspection shows Tripp as the only obvious repeater is itself an indicator of suggestiveness. The fact that the first photograph shown was 14 months old is not terribly significant; Tripp's features had changed little. Courts rejecting claims of impermissibly repetitious displays have focused on the lack of resemblance in the photographs used. See, e.g. Kubat v. Thieret,

867 F.2d 351,358 (7th Cir. 1989); United States v. Donaldson, 978 F.2d 381, 386 (7th Cir. 1992). Compare also, Stewart v. State, 474 So.2d 1010 (Ind. 1985). In Stewart, the victim viewed only two arrays, each including a photograph of the accused, one four years old and one recent. The court noted the dissimilarity in his appearance in the pictures and rejected a claim of likely misidentification, but noted it "could not say in another case the repetitive display of one individual's visage would not constitute undue suggestiveness." Id. at 1012. This is that case. Here, having viewed Tripp -- and, from the evidence in the record, only Tripp -- once and twice, respectively, the Stevenses were more likely to select him as a familiar face on January 6 not from their recollection of the incident but from their prior exposure to his photograph.

Tripp stood out in the January 6 array not just from the repeated appearance of his image but because of the composition of the arrays themselves. In Defense Ex. 2, from the Dec. 23 showing, Tripp appears markedly younger than the others displayed. In State Ex. 17, the Polaroids, his image is larger than the others, as he is standing closer to the camera, and he is in a different pose. His proximity to the camera heightens the impact of his eyes, a striking feature of Tripp which comes through in all three photographs, but more prominently in State Exs. 16 and 17. In No. 17, the photograph of Tripp selected by the Stevenses on January 6 is the most prominent of the spread for several reasons, in addition to the effect of the eyes. First, his complexion appears lighter, perhaps a product of

lighting conditions. Second, unlike the others, his photograph is cut off at the chin, further drawing attention. Third, again, he appears to be the youngest of those displayed. If asked to select which of the photographs looks the most different, one would choose that of Tripp.

While it may be contended that neither the repetition of Tripp's image nor the fact that his photograph stood out in the arrays alone meets the standard of impermissible suggestiveness, together these factors created "a very substantial likelihood of misidentification." Neil, 409 U.S. at 198. A third consideration is Jacques Stevens' questionable motive for making an identification, after police learned he had given a false name and had charges pending under his real name. For all these reasons, evidence of the pretrial identification should have been suppressed. This showing shifted the burden to the state to show reliability of the in-court identification despite the suggestive procedure. Edwards, 538 So.2d at 444. Accord, Commonwealth v. Holland, 571 N.E.2d 625, 629 (Mass. 1991). The record suggests that an attempt to meet this burden would have failed. The United States Supreme Court has listed five factors important to an evaluation of an identification obtained by a suggestive procedure: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between

the crime and the confrontation. Manson, 432 U.S. at 114-117, Neil, 409 U.S. at 199-200.

On the first factor, the Stevenses and the suspect were in the store together for 18 seconds. (R178) Of that time, they were face to face mere moments. (R177) Jacques Stevens said he again saw the suspect's face during a subsequent chase. However, this was at night, there was no testimony of lighting conditions, Stevens had been drinking beer that day and was, at that point, exhausted from the chase. The second factor is the witness' degree of attention. Jacques testified that after seeing Ms. Harrell in a pool of blood, both he and his wife were very frightened and he was looking to see if the suspect had a gun. (R173-174) Lisa Stevens also confessed uneasiness and concern. (R300-301) Research shows that increased anxiety impairs facial recognition. L. Taylor, Eyewitness Identification 21-22 (1982). The third factor is the accuracy of the witness' prior description of the criminal. Jacques told police the person he'd chased was 5-7 in height, and no more than 18 years old. Tripp was 18 at the time. At the time of trial in 1991, he was Jacques' height, 6 feet, or taller. (R160, 171) On a fingerprint card from his arrest in January 6, 1989, Tripp is listed as 5-6. (R202) Tripp testified that he was unsure of his height on that date when asked by jail personnel, who then used an estimate without actually measuring him. (R449) The record reflects no description of facial features which could be used for additional comparison. The fourth factor is the level of certainty expressed at the time of the confrontation. Jacques Stevens

testified he was 99 percent sure on January 6, and absolutely certain at trial. (R167, 170) Lisa was similar certain of her trial identification. (R295-296) On balance, studies suggest that confidence is not a very good indicator of eyewitness accuracy. E. Loftus & J. Doyle, Eyewitness Testimony: Civil and Criminal S.3.14 (1987) A second consideration on this factor is the problem of cross-racial identification. Loftus and Doyle, supra, S. 4.11. The fifth factor provided in the Supreme Court checklist is the length of time between the crime and confrontation. The crime occurred on December 9, the identification of Tripp from a photographic array on January 6, an interim of 28 days. This is a substantial period of time for someone to retain the image of a face briefly seen, then match it to a photograph.

The five factors explored above must be weighed against the corrupting effect of the suggestive procedure. Neil, 409 U.S. at 199. The brief exploration of these factors provided above demonstrates that had the trial court forced the state to attempt to meet its burden, it could not have overcome the presumed taint. Therefore, under the totality of the circumstances, suppression of both the photographic identifications and in-court identification were required. The trial court's refusal to exclude this evidence created harmful and hence reversible error.

III. PROSECUTORIAL MISCONDUCT IN ASKING A WITNESS ABOUT APPELLANT'S REPUTATION IN THE CONTEXT OF A THREAT CAUSED IRREPARABLE PREJUDICE, DEPRIVING APPELLANT TRIAL BY AN IMPARTIAL JURY.

Jailhouse informant Robert Roberson testified that Tripp had threatened him after learning Roberson had told a police officer and the prosecutor that Tripp had admitted committing the crime. After defense counsel had attempted to establish that someone who is falsely accused may make such a threat, the state on redirect asked whether Roberson had reason to believe Tripp could carry out the threat. (R340) Following an overruled objection, Roberson responded in the affirmative and added that they were in the same cell. The following exchange then occurred:

> PROSECUTOR: You knew his reputation?
> WITNESS: Right.

(R341) Defense counsel immediately objected and moved for a mistrial. The state asserted the question and answer were relevant to rebut implied contentions in cross-examination that Roberson had fabricated the disclosure and that an innocent man might also make threats. (R341) The court agreed that the question was wholly without foundation and gave an instruction to disregard, but denied the motion for mistrial. (R341-342)

The question and answer were egregiously improper. They carried no relevance and rebutted nothing, yet suggested to the jury that Tripp had a reputation for violence. In a prosecution for three crimes of violence, the exchange was so prejudicial that a curative instruction could have little effect. Mistrial was the only real remedy.

Section 90.404, Florida Statutes, governs admissibility of character evidence. Section 90.404(2)(a) provides for admission of a pertinent character trait offered by an accused, or by the prosecution to rebut that trait. Here, aside from the total lack

of an evidentiary foundation for the question about Tripp's reputation, he had not placed his character in issue. Unless a defendant places his character in issue, it may not be attacked by the state. Von Carter v. State, 468 So.2d 276, 278 (Fla. 1st DCA 1985). In Long v. State, 407 So.2d 1018 (Fla. 2d DCA 1981), a petit theft prosecution, the state elicited testimony characterizing the defendant as a shoplifting suspect. The appellate court reversed, finding the testimony a clear violation of the Williams[2] Rule, on which section 90.404(2) is modeled. The court added that there was no proof Long had committed any previous thefts. Id. at 1019. Here, similarly, the question and answer concerning reputation, suggesting Tripp had a violent character, characterized him as the type of person who could commit crimes of violence such as those charged. As in Long, there was no admissible evidence of prior crimes of violence to serve as a foundation for such reputation evidence. In this prosecution, in which the jury's emotions could easily have been aroused by the circumstances of the crime, the question and answer were much more prejudicial than in Long.

Appellate precedent holds that threats by the defendant against witnesses are admissible to prove guilt. See, e.g., Manuel v. State, 524 So.2d 734, 735 (Fla. 1st DCA 1988). Presumably, the rationale is that an innocent man need make no threat to keep the truth from coming out, though this assumes a

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[2]Williams v. State, 110 So.2d 654 (Fla. 1959).

witness is telling the truth. By what logic does a threat against a witness who may have fabricated the incriminating evidence show the guilty knowledge of the accused? Even if it can be said that the threat is probative of guilty knowledge, perception of ability to carry out the threat is not. Thus, the state's assertion that the evidence rebuts the defense implication that an innocent man might also make threats is irrational. The sole possible basis for its admission lies in its effect on the witness. Hence flows the state's second assertion, that the question and answer on reputation rebutted the implication that the witness made up his testimony. The likely theory here is that Roberson was acting against his interest in testifying against a man he believed could cause him harm. In fact, the defense showed that Roberson could have gained his knowledge of the case from television coverage, and that he became an informant to curry favor from the state on pending charges. Any rehabilitation of the witness stemming from this impeachment was necessarily limited to his exposure to the coverage and the disposition of his charges. Thus, the question on reputation was not rehabilitation but insinuation wholly unrelated to cross-examination. In effect, the state was attempting to enhance the credibility of its own witness. The Evidence Code permits support of the credibility of one's witness in only one manner, reputation for truthfulness. S. 90.609, Fla. Stat. (1989). General credibility vouching is forbidden.

For these reasons, the question and answer suggesting that Tripp had a reputation for violence caused error of tremendous

magnitude. The court's attempt at a curative instruction was inadequate to allay the prejudice and confusion of issues already embedded in the juror's minds. The exchange so fundamentally tainted the proceedings that a curative instruction could be of no effect. See Coleman v. State, 420 So.2d 354, 356 (Fla. 5th DCA 1982). Moreover, a thorough curative instruction includes a statement conveying to the jury the gross impropriety of the remark. No rebuke was given here. See Jones v. State, 571 So.2d 1374, 1376 (Fla. 1st DCA 1990) (firm rebuke to prosecutor as well as admonition to jury to disregard remark is necessary to neutralize harmful effect). Harmful, reversible error resulted.

IV. THE TRIAL COURT ERRED IN ADMITTING THE PRIOR TESTIMONY OF AN ABSENT STATE WITNESS, AND IN REFUSING TO ADMIT EVIDENCE OF CONVICTIONS AND SENTENCES IMPOSED ON THE WITNESS AFTER THE TESTIMONY.

The state successfully sought to introduce testimony given by jailhouse informant Steven Bittner in Tripp's second trial. (R343) Earlier, the prosecutor and his investigator detailed efforts to locate Bittner, who had received a subpoena, and was believed to be in Pensacola. (R270-273) The state asserted that its efforts met the requirements of Florida Rule of Criminal Procedure 3.640(b), and equated the requirement that the witness be out of state in that provision with the more general unavailability requirement of section 90.804(1)(e), Florida Statutes. (R349-350) Defense counsel objected, and noted that Bittner had received a lenient disposition of charges pending at the time of his testimony and had subsequently been convicted of

additional charges. (R345-347, 351) Counsel asserted the right to introduce evidence of disposition of both cases if the court admitted Bittner's prior testimony. (R345-347) Counsel also stated that if Bittner had appeared for this trial, he would have questioned him on the prospect of contempt charges if he had failed to appear and possible perjury charges if he had changed his testimony. (R350) The court disallowed any evidence of the subsequent convictions, and Bittner's September, 1989 testimony was read to the jury. (R351) The state located Bittner just before the defense rested, and defense counsel moved to have the state reopen its case so he could testify. (R513) Later, facing contempt charges, Bittner first said he forgot his court date, then after several days in jail, said he also feared reprisals had he testified. (R585-597, 862-871) He said he had been threatened by acquaintances of Tripp. (R863)

The court made several erroneous rulings. First, it erred in allowing the prior testimony after the state made no showing that Bittner was absent from the state. As subsequent events showed, he was not. The criminal procedural rule requiring proof of absence from the state to admit testimony from a prior mistrial is independent of the general unavailability requirement of the hearsay rule. Even if the standard is the same, the hearsay rule requires opportunity and similar motive for effective cross-examination as at the instant trial, impossible here because of events subsequent to the earlier testimony. Thus, Tripp was denied his Sixth Amendment right to confrontation of adverse witnesses. At the very least, the trial court denied

confrontation and due process rights in precluding defense counsel from introducing evidence of the subsequent convictions, its second error. Finally, it erred again in refusing to allow Bittner's live testimony when he appeared before the case was submitted to the jury. This would have remedied the earlier errors.

Florida Rule of Criminal Procedure 3.640(b) governs admissibility of prior trial testimony when a new trial is granted. The provision reads, in pertinent part:

> The testimony given during the former trial may not be read in evidence at the new trial unless it is that of a witness who at the time of the new trial is absent from the State, mentally incompetent to be a witness, physically unable to appear and testify, or dead, in which event the evidence of such witness on the former trial may be read in evidence at the new trial as the same was taken and transcribed by the court reporter.

In contrast, the showing required to admit former testimony under section 90.804(2)(a) as an exception to the hearsay rule is as follows:

> (1) "Unavailability as a witness" means that the declarant:
> (e) Is absent from the hearing, and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means.

Rule 3.640(b) requires absence from the state, while section 90.804 requires only an inability to find the witness. In construing court rules, principles of statutory construction apply. Rowe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981). The same principle of strict construction governing the Florida Criminal Code under section 775.021(1), Florida Statutes, thus

also applies to the Rules of Criminal Procedure. Where the language of either a statute or rule is plain and unambiguous, a plain and ordinary meaning must be ascribed to it. Rowe, 394 So.2d at 1059. Provisions relating to the same subject matter should be construed with reference to each other so that effect may be given to all the provisions of each if this can be done by any fair and reasonable construction. State v. Hayles, 240 So.2d 1 (Fla. 1970).

These principles dictate that Rule 3.640(b) be construed to mean just what it says, that in order to admit prior trial testimony following a mistrial, the witness must be out of state. A contrary reading violates the principle of strict construction, denies the rule its plain and ordinary meaning, and robs it of content independent of the hearsay rule. Rule 3.640 was drafted to cover a specific scenario, and serves a policy of upholding the right of an accused to confront adverse witnesses if forced to undergo a second trial unless certain conditions are met. Section 90.804 concerns only the hearsay aspect of admission of prior testimony, not necessarily trial testimony. If held to the terms of both provisions by the party opposing admission, the party seeking to admit prior testimony following the grant of a new trial must clear the requirements of section 90.804 and Rule 3.640. In such circumstances, the provisions operate in conjunction with one another, and are not in conflict. Here, the state did not show Bittner was out of state, only that he was absent and could not be located to testify in the state's case. His appearance before closing argument and subsequent testimony

in the contempt proceedings show that he was not only in state, but in town. The court should have barred admission of his prior testimony because the state made an insufficient showing under Rule 3.640.

The court further erred in refusing to allow the defense to put in evidence Bittner's convictions and sanctions imposed after his testimony in the second trial. Section 90.804(2)(a) provides for admission of prior testimony if the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination." This requirement ostensibly serves the requirement of the confrontation clause that the prior examination serve as an effective substitute for cross-examination at trial. See generally, California v. Green, 399 U.S. 149 (1970). Here, the prior cross-examination was not an effective substitute, for it failed to demonstrate the favorable disposition of pending charges for Bittner's testimony, his subsequent conviction on new charges, and the prospect of contempt and perjury charges if he failed to appear at the third trial and testify consistently with his earlier testimony. Exploration of these areas would have constituted substantial impeachment, expressly provided for in section 90.608, Florida Statutes (bias) and section 90.610 (prior convictions). At the very least, the court should have allowed the defense to introduce evidence of the subsequent convictions and punishments. Section 90.610 allows a party to attack the credibility of a witness "by evidence that the witness has been convicted of a crime." At the time of this trial, Bittner had

been convicted of crimes which the trial court barred Tripp from exposing to the jury as a measure of his credibility. Section 90.610 does not expressly limit introduction of prior convictions to those in existence at the time the testimony is taken.

A federal court has noted that in requiring only an opportunity and motivation under the federal counterpart to Florida Rule 90.804, the rule also incorporates a concept of fairness. United States v. Pizarro, 717 F.2d 336, 349 (7th Cir. 1983). Tripp was deprived of the fairness required by the provision, and by the confrontation clause implicated therein. Additionally, the denial of defense counsel's request to introduce evidence of the subsequent convictions and sentences deprived Tripp his Fifth Amendment right to present material, exculpatory evidence. See generally, Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The trial court eschewed an opportunity to correct its error by putting Bittner on the stand when the state located him before closing arguments. The defense expressly requested this step, and stated it would not object to the state's reopening its case. (R513) At that time, the case had not been submitted to the jury, so the court could have granted the request without violating Florida Rule of Criminal Procedure 3.430.

For these reasons, admission of Bittner's prior trial testimony violated Tripp's right to due process of law and confrontation of adverse witnesses, in violation of the Fifth Amendment to the United States Constitution as well as Article I, Sections 9 and 16 of the Florida Constitution. The error was not

harmless beyond a reasonable doubt. The state's case rested on the dubious identification testimony of two eyewitnesses, see Point III, infra, and the testimony of jailhouse informants Roberson and Bittner that Tripp had admitted committing the crime. The defense also presented a jailhouse informant, who suggested Roberson fabricated his testimony to help his own cause after being exposed to television coverage of the case. The jurors evidently attached some significance to Bittner's testimony, for they asked to receive it again. (R582) Even assuming his live testimony would have matched his testimony at the second trial, the matters defense counsel was precluded from presenting via cross-examination or introduction of evidence would have placed his credibility on an even more tenuous footing. Under these circumstances, the state cannot prove beyond a reasonable doubt that the error did not contribute to the verdict. See State v. DiGuilio, 491 So.2d 1129, 1123 (Fla. 1986).

V. THE TRIAL COURT ERRED IN IMPOSING ADJUDICATION AND SENTENCE FOR AGGRAVATED BATTERY, AN OFFENSE REQUIRING IDENTICAL ELEMENTS OF PROOF AS ATTEMPTED FIRST-DEGREE MURDER.

On several occasions, defense counsel moved to dismiss count II, aggravated battery, as duplicative of the charges of attempted first-degree murder and attempted robbery with a deadly weapon, counts I and III. The court initially took the motion under advisement, then denied it at the sentencing hearing. (R883-888) The jury found Tripp guilty of attempted first-degree murder, aggravated battery with a deadly weapon and causing great

bodily harm, and attempted robbery with a deadly weapon. (R839) On Count II, the information had charged only a battery plus use of a deadly weapon, omitting the alternative element of great bodily harm. (R599) The evidence at trial showed that the assailant hit the victim several times with a hammer, then hit her several more times in evident frustration over his failure to open the cash register.

Section 775.021(4)(a), Florida Statutes, provides as follows:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading at trial.

This provision, unchanged in the 1988 amendment which added subsection (4)(b), is a rule of construction calling for separate judgments and sentences for all criminal offenses committed in an episode or transaction, whether from a single act or several acts. In Carawan v. State, 515 So.2d 161 (Fla. 1987), construed this rule in conjunction with the rule of lenity codified in section 775.021(1), Florida Statutes, which commands a construction of statutory language susceptible of different interpretations most favorably to the accused. The Court concluded that the two offenses in question there, attempted manslaughter and aggravated battery, essentially address the same evil. Id. at 170. The Court found that the offenses stemmed

from a single act, and emphasized the difference between act and transaction. Id., n.8. Finding no evidence the legislature intended multiple punishments under those circumstances, the court concluded that multiple punishments were not intended and ordered one of the convictions vacated. Id. at 170-171.

In response to Carawan, the Legislature added subsection (4)(b) to Section 775.021. Ch. 88-131, S.7, Laws of Florida. The new provision reads:

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exception to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

In Smith v. State, 547 So.2d 613 (Fla. 1989), this Court held that the amendment abrogated Carawan.

The aggravated battery conviction falls under one of the two exceptions to the presumption in favor of multiple convictions. Under section 775.021(4)(b)1, the aggravated battery and attempted murder required identical elements of proof. In making this determination, one must necessarily look to the accusatory pleading, and if necessary to the evidence at trial as well. If the examination were limited to the statutory elements, subpart 1 would have no application independent of subparts 2 or 3, which require statutory analysis. An offense which under the statute

requires elements of proof identical to another offense will always be either a lesser included offense (subpart 2) or an offense in which the statutory elements are subsumed within those of the other (subpart 3).

The Court may have been on the same track in Cave v. State, 18 Fla. L. Weekly S104 (Feb. 4, 1993), in holding that aggravated battery was not a lesser included offense of armed robbery because the language of the count charging armed robbery did not contain all the elements of aggravated battery. Or, the majority may have been following the analysis of Justice Kogan, who reads section 775.021(4)(b)3 to preclude conviction for offenses the statutory elements of which are subsumed by the greater offense as it is charged, not as it appears in the statute. Id. at S105 (Kogan, J., concurring specially). To give effect to both section 775.021(4)(b)1 and 3, one of these interpretations must carry the day. Provisions relating to the same subject matter should be construed with reference to one another so that effect may be given to all the provisions of each if this can be done by any fair and reasonable construction. State v. Hayles, 240 So.2d 1 (Fla. 1970). To quote Justice Kogan, "we certainly should not presume that the legislature created an exception that is an exception to nothing." Cave, 18 Fla. L. Weekly at S105.

Under either view, the aggravated battery in Count II must fall. Here, the state charged attempted murder by striking the victim with a hammer, and aggravated battery, an intentional touch or strike or infliction of bodily harm, by use of a deadly weapon, i.e., the same blow. Thus, aggravated battery required

identical elements of proof as attempted murder, triggering section 775.021(4)(b)1, or contains statutory elements wholly subsumed by the the attempted murder, invoking section 775.021(4)(b)3. In either event, the aggravated battery conviction must be reversed, the sentence vacated, and the scoresheet recalculated to determine a new sentencing range.

VI. THE TRIAL JUDGE ERRED IN COMMENTING ON THE TRUTHFULNESS OF THE ALLEGATIONS MADE IN A MOTION TO DISQUALIFY HIM.

Over defense objection to the absence of a pre-sentence investigation report, the trial judge sentenced Tripp and committed him to the custody of the Department of Corrections on March 18, 1991. (R883-893) The court entered an order vacating the judgments and sentences on April 17, and scheduled a new sentencing hearing for May 1. (R906) On May 1, defense counsel filed a motion to disqualify the judge. (R907-908) The motion included affidavits by Tripp and his counsel, both dated April 30. (R909-911) During the May 1st hearing, the state asserted that the motion was untimely. (R913-914) In ruling on the motion, Judge Tarbuck said:

> Now, with regard to the comment made by the Court to defense counsel when defense counsel said that there may be some plea agreement, I probably did say that. In fact, I recall saying you can make a plea agreement but it's going to have to be for a substantial period of time in light of this man's prior criminal record and in light of the brutality involved in the commission of this crime. I do not see that that's prejudicial in any way, nor have I prejudged the case. And I realize that while you may have made allegations and I'm not entitled to respond to those, I feel like the affidavit and also

> the motion is just made strictly to obtain another sentencing judge in this case in hopes of obtaining a more lenient type sentence. Also, I'm going to rely on the State's representation that this motion to disqualify me is untimely filed. Deny the motion and proceed with resentencing.

(R915).

Florida Rule of Criminal Procedure 3.230, governing disqualification of a judge, provides in part (d) that the judge shall examine the motion and supporting affidavits solely to determine legal sufficiency, "but shall not pass on the truth of the facts alleged not adjudicate the question of disqualification." In adding an explanation of events and denying allegations of a motion to disqualify, a trial judge violates this provision, necessitating reversal of the order denying recusal. Haggerty v. State, 531 So.2d 364, 365 (Fla. 1st DCA 1988). Accord, Taylor v. State, 557 So.2d 138, 142 (Fla. 1st DCA 1990) (if judge passes on truth of allegations in motion, denial must be reversed even where the motion is legally insufficient).

Judge Tarbuck erred in passing upon the truth of the allegations. Although he did not brand them as false, in opining that the motion was "just made strictly" to obtain another sentencing judge, he effectively disputed the allegations that his comment during plea negotiations and subsequent cancellation of the pre-sentence investigation demonstrated his prejudice against Tripp. His actions went beyond those of the judge in Nansetta v. Kaplan, 557 So.2d 919 (Fla. 4th DCA 1990), who merely defended himself. Judge Tarbuck made a counterattack. In these circumstances, Haggerty, Taylor and related cases require

reversal of the denial of the motion to disqualify. Accordingly, Tripp's sentences must be vacated.

The untimeliness of the motion does not alter this result, for two reasons. First, timeliness is a component of legal sufficiency upon which a judge must pass in ruling upon a Rule 3.230 motion without passing on the merits of the motion. To deny recusal to one whose motion is untimely filed while granting it to another who files a timely yet legally insufficient motion would nullify the prophylactic purpose of requiring judges to pass on such motions without commenting on the merits. Second, defense counsel demonstrated good cause for failing to meet the 10-day requirement of Rule 3.230(c).[3] Until April 17, when the order vacating sentence was entered, there was no pending proceeding from which to seek the trial judge's disqualification. Presumably, having been committed to the Department of Corrections, Tripp had to be returned to Pensacola. Under these circumstances, it is unreasonable to have expected trial counsel, a busy chief assistant public defender, to have contacted his client, consulted with him, had him execute an affidavit and prepared and filed the motion to recuse within four days of the order, April 21, 10 days before the scheduled resentencing. Moreover, the state failed to show prejudice flowing from the

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[3]This assumes the rule's reference to trial is equally applicable under these facts to a sentencing hearing. As the latter is a smaller-scale production than trial, and a recusal much less likely to cause delay, limitation of the 10-day notice requirement to trial may be intentional.

untimeliness of the motion. The rule provides for no response, and any ruling rests on the sufficiency of the motion, not on its merits.

For these reasons, the trial judge erred in denying the motion to disqualify himself from the May 1 sentencing hearing. Resentencing is required.

VII. THE TRIAL COURT ERRED IN FAILING TO ENTER A DEPARTURE ORDER CONTEMPORANEOUS WITH THE SENTENCING HEARING.

The trial judge imposed a departure sentence during the March 18, 1991 sentencing hearing and issued a corresponding written departure order. (R890-893, 902-903) The judge vacated those sentences because he had not considered a pre-sentence investigation report, compulsory under Florida Rule of Criminal Procedure 3.710 before sentence may be imposed on a first offender. (R906) After receiving the report, he reimposed the same sentences on May 1, and stated he was refiling the same departure reasons previously entered. (R913-920) The record reflects no written departure order other than the one filed March 18 in conjunction with imposition of the sentences later vacated.

This scenario demonstrates that the court failed to enter written departure reasons contemporaneous with imposition of sentence on May 1. Consequently, the sentences must be vacated and the cause remanded for resentencing within the guidelines.

When a trial judge imposes a departure sentence without giving written reasons for departure, the sentence must be

vacated and the case remanded for resentencing within the guidelines. Pope v. State, 561 So.2d 554 (Fla. 1990). Here, at the time of sentencing, there were no written reasons for departure. The reasons given contemporaneously with the March 18 imposition of sentence were nullified when the sentence was vacated. This is especially true given the fact that during the March 18 sentencing, the trial judge had no pre-sentence investigation report to consider. The information contained therein could materially have affected the departure reasons. Consequently, under Pope, departure is barred on remand.

If this Court concludes that written reasons existed at the time of the May 1 hearing, they were not contemporaneous with imposition of sentence. The trial judge merely referred back to his earlier departure order during the May 1 hearing, at which he had additional information from the PSI report not available during the March 18 hearing. The original reasons were rendered stale by availability of the additional information in the report. Cf. Kilo v. State, 578 So.2d 833, 834 (Fla. 1st DCA 1991) (Zehmer, J., concurring) (appearance of having prejudged the issue is necessary concomitant of judge having prepared habitual offender sentencing order prior to hearing in which court is to receive information that will affect the ultimate decision). Thus, resentencing to a guideline sentence is required under Ree v. State, 565 So.2d 1329 (Fla. 1990), and Smith v. State, 598 So.2d 1063 (Fla. 1992).

VIII. THE REASONS GIVEN BY THE TRIAL COURT FOR EXCEEDING THE PERMITTED GUIDELINE RANGE DO NOT REASONABLY JUSTIFY DEPARTURE.

The departure order lists four reasons for departure: (1) escalating pattern of crime, (2) temporal proximity of the offense to release from custody for another offense, (3) use of excessive and unnecessary force, and (4) threats to witnesses. The reasons will be addressed in reverse order, following an initial observation. A departure reason must "reasonably justify" exceeding the applicable guideline range, and review of that decision is for abuse of discretion. Sec. 775.021(5), Fla. Stat. (1991); Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984).

> Fourth, the Defendant threatened to kill Robert Robinson during earlier trial proceedings and Steve Bittner, another witness for the State, failed to appear as a witness after having been duly served with subpoena. Bittner's original reason for failing to respond to the subpoena is that he forgot the date and after he was ordered incarcerated for contempt of court, Bittner asked to be reheard and at that time advised that he did not appear at the trial out of fear of the Defendant.

(R902) In the abstract, this Court has upheld threats to witnesses as a valid reason for departure. Here, however, the reason does not reasonably justify departure from a permitted guideline sentence of up to 27 years, for several reasons. First, the court relied in part on witness Bittner's fear of appearing at trial. Bittner testified that he had been threatened inside prison and after his release by acquaintances of Tripp, but did not testify that the threats were made at

Tripp's direction or with his knowledge. In Allen v. State, 479 So.2d 257 (Fla. 2d DCA 1985), the court held that, absent a showing that the defendant was responsible for threatening a witness, threats to the witnesses by others could not justify departure. From the departure order, one cannot discern whether the trial judge would have departed for this reason without the invalid consideration of Bittner's fear of testifying. Moreover, as to the threats to Robinson, Tripp notes that the state would not have been able to present this evidence but for its conduct in provoking two earlier mistrials. The threat occurred during one of those trials. Additionally, the threats made here were in a different context than that of the usual case in which it serves as a departure reason. See, e.g., Rodriguez v. State, 547 So.2d 708 (Fla. 2d DCA 1989) (defendant threatened children if they told anyone about his lewd behavior). From the state's point of view, it stemmed from Roberson betraying a confidence among jail inmates. From the defendant's point of view, it arose from Roberson fabricating damaging evidence to help himself out. Under these extraordinary circumstances, the threat does not reasonably justify departure.

> Third, the evidence in this case affirmatively shows that the Defendant used excessive and unnecessary force in and about the perpetration of the crime of attempted robbery. In this case, it appears from the evidence that the Defendant hit the victim twice in the head with a clawhammer thereby incapacitating her. When the Defendant could not open the cash register, he hit the victim at least three more times in the head with the clawhammer while the victim was totally defenseless and unable to escape due to her having been rendered unconscious by the original blows to her head.

(R902-903) The court neglected to note that Tripp was convicted of attempted first-degree murder for the actions it characterizes as excessive and unnecessary force in committing the armed robbery. Again, in the abstract, excessive force has been upheld as a valid departure reason. Hansborough v. State, 509 So.2d 1081, 1087 (Fla. 1987). Here, however, the "excessive force" resulted in conviction for attempted murder. Without the additional blows relied upon by the trial court in this reason, there would be no attempted murder conviction. Thus, this reason rests on a factor already scored. Victim injury was also scored, so reliance on the excessive force inherent in the murder conviction also violates the precept that a departure reason cannot rest on a factor which has been scored. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). In Williams v. State, 531 So.2d 212 (Fla. 1st DCA 1988), this Court upheld excessive force as a reason for departure because the defendant struck numerous blows with a blunt instrument, which "went well beyond the overt act which is an essential element of attempted first degree murder." Id. at 218. Tripp respectfully suggests the Court's reasoning was faulty there. In an attempt to kill by bludgeoning, the force cannot possibly be excessive if the victim does not die. The overt act is the total effort used in the attempt. Here, the second set of blows constituted the murder attempt. At what point in the attack did the intent rise beyond infliction of great bodily harm and into a desire to kill, and, considering that no death occurred, at what point did the attack go beyond the overt act inherent in the offense? These questions are

impossible to answer. For these reasons, excessive force did not reasonably justify departure.

> Secondly, the present offense, attempted premeditated murder, robbery with a deadly weapon, and aggravated battery with a deadly weapon occurred less than one month after Defendant's release from his commitment to HRS.

(R902) In Smith v. State, 579 So.2d 75 (Fla. 1991), the Florida Supreme Court held that one successive criminal episode of no greater significance than the first, even though committed only 30 days after release from incarceration, is not a sufficient reason to depart from the guidelines. Id. at 77. The instant trial court did not rely on the gravity of the prior and instant offenses as to this reason, merely their temporal proximity. This reason is invalid under Smith. Moreover, that Court agreed with the reasoning of the dissent in the district court opinion there, in which Judge Cowart noted that the additional episode is but a facet or aspect or natural part of a larger matter already integrated into the scoresheet. Id. Here, both the instant offenses and prior offense were scored, as was legal constraint for the earlier offense. These matters having already been integrated into the scoresheet, they cannot justify departure.

> First, it appears the Defendant has embarked upon an escalating pattern of crime inasmuch as it appears the Defendant was adjudicated delinquent for trespassing on November 10, 1986. On March 8, 1988, Defendant was adjudicated delinquent for aggravated assault with a firearm arising out of an incident which occurred in November of 1987. Defendant was committed to HRS and paroled in late November, 1988, and just weeks after his release from such HRS commitment the present offenses were committed.

(R902) This is the most problematic of the four reasons. The legislature has specifically sanctioned "escalating pattern" as a valid departure reason, which may be shown by a progression of increasing violence. S. 921.001(8), Fla. Stat. Here, the escalating pattern rests on only three episodes: a trespass, an aggravated assault with a firearm, and the instant offenses.

First, cross-petitioner urges this Court to find that a prior record consisting solely of juvenile charges may never support a departure for escalating pattern. Several district courts have held to the contrary. See, e.g., Velez v. State, 596 So.2d 1197 (Fla. 3d DCA 1992); Simmons v. State, 570 So.2d 1383 (Fla. 5th DCA 1990). These decisions contradict the principle contained in the guidelines and in the Juvenile Code that delinquent acts committed by minors are distinct from crimes committed by adults. Under section 39.053(4), Florida Statutes (1991), a juvenile adjudication shall not be deemed a conviction. Section 921.001(5), Florida Statutes, refers to the defendant's "prior record," "offenses for which adjudication has been withheld," and "criminal conduct." It does not specifically include juvenile dispositions or speak of delinquent conduct. Under the principle, expressio unius est esclusio alterius, the use of terms that connote for adult criminal acts implies the exclusion of juvenile delinquent conduct. Moreover, the guidelines elsewhere specifically provide when and where juvenile offenses are to be taken into account. Fla. R.Cr. P. 3.701(d)5(c). When the legislature has specifically provided for the consideration of juvenile offenses in other guideline areas,

the absence of expressed intent that juvenile conduct be considered in determining whether an escalating pattern justifies departure must be presumed intentional.

If this Court finds that delinquent acts committed by a juvenile may be used to show an escalating pattern, departure is still not justified here. Cross-petitioner submits that a two-point pattern, whether escalating or persistent, can never support departure. As noted above, in Smith v. State, 579 So.2d 75 (Fla. 1991), the Florida Supreme Court disapproved departure for a successive criminal episode of no greater significance than the first, even though committed only thirty days after release from incarceration. The Court there agreed with the dissent below of Judge Cowart, in which he stated that the additional episode is but an aspect of a larger matter already integrated into the scoresheet which thus cannot reasonably justify departure. Id. at 77. In another dissent, Judge Cowart has observed: "While two points do determine and define the length, and delineate the ends, of a line, one straight line of unknown length makes a poor, one-dimensional 'pattern' with no depth or breadth, and no temporal dimension." Lipscomb v. State, 573 So.2d 429, 436 (Fla. 5th DCA) (Cowart, J., dissenting), rev. dismissed, 581 So.2d 1309 (Fla. 1991). If, then, two criminal episodes cannot form a pattern, either continuing or escalating, sufficient to reasonably justify departure, Tripp's prior aggravated assault and instant offenses alone would not suffice. That leaves the juvenile trespass adjudication. Addition of the trespass creates a third point, true, but adds so little to the

equation that the record falls short of demonstrating an escalating pattern of criminal conduct reasonably justifying departure. The difference between a guideline sentence and a departure (the extent of which is unreviewable) should not rest on the absence or existence of a minor offense committed while a juvenile. If the other instant and prior crimes do not demonstrate an escalating pattern reasonably justifying departure, the trespass supplies inadequate additional justification to make the reason valid. This Court should also note that if neither juvenile offense -- trespass or aggravated assault -- had been scored, it probably would not constitute a "significant" record justifying departure. See Puffinberger v. State, 581 So.2d 897, 899 (Fla. 1991).

Therefore, none of the reasons provided in the court's order reasonably justify departure. The sentences must be vacated and the case remanded for resentencing within the guidelines.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, Tripp requests that this Honorable Court answer the certified question in the affirmative, approve the district court decision and remand for resentencing. Tripp also requests that this Court grant relief commensurate with its disposition of the issues raised in the cross-petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Gypsy Bailey, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, on this 23rd day of March, 1993.

GLEN P. GIFFORD
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