FILED
SID J. WHITE
OCT 30 1995
CLERK, SUPREME COURT
By _______
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JOSEPH NAHUME GREEN, JR.,

Appellant,

v. CASE NO. 83,003

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

JOSEPH NAHUME GREEN, JR., :

Appellant, :

v. : CASE NO. 83,003

STATE OF FLORIDA, :

Appellee. :

______________________________:

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellate counsel normally presents the Statement of the Facts in a story format. Events occur that way, and it makes for more interesting reading. To some extent, I will present the murder of Judith Miscally that way. Because the state's case rested on what Lonnie Thompson saw on the night of the murder, I must not only give his version of the events, I need also to present the evidence that severely impeached his credibility. I realize, of course, this court has disapproved arguments attacking jury verdicts because the weight of the evidence is so slight that it cannot hold down their decision. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981); affirmed Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Yet, an unusual melding of factors here produced a result so unusual and so unreliable that the equally unusual Tibbs argument must be made. A well-liked woman in a small town is senselessly murdered, ostensibly by a convicted felon from Miami. Virtually the only

evidence linking Green to the murder came from a retarded drunk who initially said a white male had shot the victim. The police found no fingerprints, hair, or blood to connect Green to the murder, and their sloppy, incomplete work further weakened an already questionable prosecution.

As argued in this brief, the trial court made several errors. Normally, if this court agreed that one or more of the issues had merit, it would then conduct a harmless error analysis. Such cannot be done here. Lonnie Thompson was so severely impeached at trial and the state's case was so inherently weak that the very reliability of the jury's verdict is questioned. In short, appellate counsel suggests that the state presented such a weak case that a substantial likelihood exists the jury convicted an innocent man of first degree murder. Whatever standard of review this court uses, whether it is substantial competent evidence, or in the interests of justice, this court cannot allow Green's convictions to stand.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Bradford County on January 15, 1992 charged Joseph Green, the Appellant, with one count of first degree murder (R 1-2). He pled not guilty to that charge, and the case proceeded normally for matters of this sort. That is, he or the state filed several motions, demands, or notices, and the ones particularly relevant to this appeal are:

1. Motion for adversary Preliminary Hearing (R 19-20).

2. Motion to take deposition to perpetuate testimony (R 50-52). Granted (R 61).

3. Motion to hold material witness (R 78-79). Rule to show cause (three) (R 82-84). Order dismissing rule to show cause (R 96).

4. Motion to suppress evidence seized pursuant to a search warrant (R 101-03) and Amended Motion to Suppress (R 122-24). Denied (R 501-506).

5. Motion to unseal records of Lonnie Thompson (R 106-107). Granted (R 328).

6. Motion for Pre-trial release (R 109-110). Denied (R 422).

7. Request for judicial notice regarding criminal records of Lonnie Thompson (R 111-112).

8. Motion challenging the competency of Lonnie Thompson (R 113-14) with memorandum (R 128-34). Denied (T 1148).

9. Motion to suppress identification of Green by Lonnie Thompson (R 136-38). Denied (R 426).

10. Motion for change of venue (R 215-17), Memorandum in support of change of venue (R 218-223), Amended Motion for change of venue (R 359-373), second amended motion for change of venue (R 475-95), third amended motion for change of venue (R 509-532). Denied (R 423, T 632).

11. Motion in limine number six (limiting statements made by the deceased after being shot but before she died.) (R 462-63). Denied (R 536-37).

The jury, after hearing the evidence and law returned a verdict finding Green guilty of the murder as charged (R 564). The court denied his subsequent motion for new trial or arrest of judgment (R 570-71, 595).

Green proceeded to the penalty phase of the trial. Motions relevant to that phase of the proceeding were as follows:

1. Motion to hold material witness (R 572-73). Rule to show cause (R 580).

2. Motion to exclude aggravating circumstances (R 574-77).

3. Motion to clarify verdict of guilt or exclude aggravating circumstance (R 583-85).

4. Motion in limine regarding evidence of polygraphy examination (R 593-94).

The jury, after hearing more evidence and law, recommended, by a vote of 9-3, that Green die (R 600). The court, following that verdict, sentenced him to death (R 651-655). Supporting that determination, the court found in aggravation,

1. Green has a prior conviction for a violent felony (R 643).

2. The capital felony was committed while the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a robbery (R 644).

In mitigation, the court found none of the statutory mitigators, but it did find the following other mitigation:

1. The defendant had been abused as a child. Slight weight (R 647).

2. The defendant sufferers from some neuro-psychological brain disfunction (R 647). Slight weight (R 648).

3. The defendant came from an economically disadvantaged background that included a large family and being raised by a single parent (R 648). Slight weight (R 648).

4. The defendant had rehabilitated himself by finding employment and by gaining the trust and confidence of his employers (R 648-49). Significant weight (R 649).

5. The defendant argued that the prior second degree murder of which he was convicted in 1983 was not willful (R 649). Given weight (R 649).

This appeal follows.

STATEMENT OF THE FACTS

Judy Miscally worked during the day at the Bradford Telegraph, Starke, Florida's newspaper (T 787). She was well known and liked in the community (e.g. T 137). During the evening she and her husband operated an outdoor cleaning service, and on December 8, 1991 they were clearing the parking lot of the Bradford County Courthouse (in Starke) of debris (T 788). About 10 p.m. Russell Miscally asked his wife to call their son to bring a trailer to the courthouse (T 789). She got in their truck and drove to a "Mapco" convenience store a few blocks away. She parked the vehicle near a pay telephone and got out. The area around that part of the store was poorly lit (T 1404-1405). It also had a history of people loitering and panhandling in the area (T 1399, 1406). As she attempted to make the call, a skinny black person came from behind a dumpster and accosted her, demanding money (T 911). She screamed once and he got mad When she screamed again, he shot her once with a shiny .32 caliber pistol (T 912). John Goolsby, who was waiting at a stop light about 80 yards away, looked toward the pair when he hear the shot. He saw Mrs. Miscally bend over then walk a step or two and collapse on the ground (T 818-19). He rushed over to help her and a store clerk also ran outside to help.

The police and a medical unit were on the scene within minutes. When asked what had happened Mrs. Miscally said that a skinny black man in his mid 20's had come from behind the dumpster near the store, accosted her, and demanded money (T 911). When she refused and screamed, he told her to shut up. When she screamed again he grabbed her and shot her (T 911). He then apparently fled in the direction of the dumpster without getting

anything from her (T 911). Mrs. Miscally died some time later. She never said Joseph Green shot her (T 919).

LONNIE THOMPSON

About the time of this incident, 33 year old Lonnie Thompson was at a "Lil' Champ" store about 90 yards away and across highway 301. He went there, he said, "to get me a drink of water, because I'd stopped drinking beer." (T 1179) On cross-examination, however, he admitted that during the evening, he had drunk 12 "Tall Boys" or a gallon of beer (T 1212). He said, however, that he was not drunk. "I don't get drunk." (T 1179, 1211) He had ridden his bicycle to the store and was watching for the Highway Patrol when he noticed Mrs. Miscally struggling with a person he later identified as Joseph Green (T 1181).

He saw the man was upset, wave his arms, and say something (T 1240). She would not give up the purse she had in her hand.[1] The assailant had also grabbed it with one of his hands and had grabbed her with his other hand (T 1241). He also had the gun pointing at her the entire time (T 1246) although Thompson never saw it (T 1241). Instead, "the hand going like this here (indicating)." (T 1241-42)[2]

Mrs. Miscally's purse was in the truck (T 1442, 1487).

After seeing Mrs. Miscally stumble and fall, Thompson went to the Mapco, bought

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[1]Mrs. Miscally was holding the telephone with her other hand (T 1246).

[2]At trial he denied then admitted that the person who assaulted the victim had a holster (T 1243, 1246), and in his deposition Thompson claimed to have seen one on the assailant's left hip (T 1245).

another beer, and left (T 1253-54). He claimed to have never heard a police officer ask if anyone had heard or seen anything, and he never volunteered what he had seen (T 1253).

A short while later, however, the police went looking for Thompson. Officer Jeff Johnson found him, and when he asked Lonnie about the murder he told the policeman that the assailant had been a white man, tall, slim, and blonde headed. (T 1258). The man also had a white car that had a dent in one of its fenders (T 1259). Thompson had even talked with him, and this man had told him that something was going to happen (T 1259). What he told Johnson, he admitted at trial, was a lie (T 1259).

Johnson brought Thompson to the police station where the police questioned him for several hours or until about 6:30 in the morning (T 1260-61). He signed a half page statement implicating Green as Mrs. Miscally's killer (T 1260). Later that day, after the police had arrested Green, they brought Thompson back to the station and told him they wanted him to identify Joseph Green (T 1263, 2357). They ushered him into a room, and through a one way mirror, Thompson saw Green sitting alone in an adjoining office (T 1263). Thompson, who knew Green (T 1265), picked him as Miscally's killer (T 2350).

Lonnie Thompson was 33 at the time of the murder of Judy Miscally. He had an IQ of 67 which would put him in the retarded range (Defense exhibit #1). Several years earlier he had injured his head from a fall off a moving car that had knocked him unconscious (T 1193-94). He has had recurring dizzy spells and memory problems since then (T 1193-94).[3]

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[3]Thompson admitted that the prosecutor had met with him the day before trial to talk about the facts of the case (T 1218). Actually, he had met with the state four five times to

A couple of years later, someone beat him on the head with a stick (T 1194). A year before the trial another person clubbed him on the head again with a baseball bat (T 1195).

Thompson used to work at a steel plant, and while there a piece of steel "just hit my eyeball, hit the little dark part, that's all it hit." A doctor "fixed it pretty good. I ain't had no problem out of it, I know that." (T 1196)

When cross-examined at trial, Thompson initially said he had only four sixteen ounce beers on the evening of December 8 (T 1199). When shown a statement he had given to the police that evening he admitted he had told them he had drunk about a six pack (T 1200). In his deposition, he said he "may have drunk about six, maybe, or twelve." (T 1201) After further questioning by defense counsel, he settled on having drunk eight sixteen-ounce bottles of beer (T 1202).

After the shooting and leaving the Mapco store with his beer, the state's key witness went to the back of a local lounge that had used him occasionally to do odd jobs. Officer Johnson found him some time later, and once the policeman had him in his car, he drank another six beers (T 1211). When prompted by defense counsel, Thompson also recalled he had had "one little shot" of liquor at the lounge (T 1213). He claimed, however, "I wasn't drunk." (T 1211)

Thompson had seen Joseph Green an hour or so before the murder when the latter asked some band members playing at the lounge where Thompson worked for some cigarettes (T 1176). They were taking a break and he was there with them. Green came up and asked

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review his testimony (T 1219).

for a cigarette. He was, according to Thompson, wearing a trench coat, a coat jacket, and black striped pants (T 1231). When questioned by the police the morning after the homicide, he never mentioned the assailant wore a trenchcoat because, he claimed, he was "too upset." (T 1233) He had, however, noticed Green's striped pants and coat, although he was almost 100 yards from the struggle, it was night, the lighting at the store was poor (T 1403-1405), semi-trucks and other cars drove down highway 301 (T 819, 1240), and Miscally's truck partially blocked his view (T 1237).

When asked about his status with the law on December 8, Thompson knew he was on probation, "I think probation." (T 1220) He denied, however, having any felony charges pending against him, "I don't think." (T 1220) Well, actually after a short recess at trial, he admitted he had been charged a month before the Miscally shooting with two felonies and a petit theft (T 1223, 1224). Eighteen months later, in March 1993, the state dropped the felony charges and agreed to let him plead to a misdemeanor (T 1224). Thompson believed he was getting a good deal from the state because he was a witness in the case against Green (T 1224-25).

His good fortune continued. When the state tried to violate his probation a month before Green's trial, the court dismissed the case because he his probationary period had expired (T 1225). There is no evidence Thompson knew this, and to the contrary, he believed he had gotten help from the state because of his assistance in this case (T 1228).

GREEN'S ACTIVITIES ON DECEMBER 8-9.

Joseph Green had a steady 40 hour a week job that sometimes demanded he work 50

or sixty hours (T 1515). He lived with his girl friend, Gwen Coleman, at the Starke Motor Court, a motel next to the Mapco (T 1515). She also had a steady job and received social security checks monthly (T 1515). On December 8, Green had gone to work as usual and returned about five that afternoon. He had two brothers and a sister who lived nearby. About eight o'clock he tried to borrow some money from one of them to pay his overdue motel rent (T 1517, 1520). He returned a half hour later, but left again thirty minutes later, staying away until nine thirty (T 1521). He talked with his brother on the telephone and the landlady who again reminded him he was behind in his rent (T 1522, 1616).

A short time after ten, the couple left their room to get some fresh air (T 1523). Green wore a dark pinstripe suit and a sweatshirt (T 1526, 1570). They headed north, away from the Mapco store and visited a friend who lived near the motel for a few minutes. The pair walked to Jessie's Lounge where Green asked the three men standing outside (one of whom was Lonnie Thompson) if any of them had a cigarette he could have (T 1525-26, 1528). From there they went to check the room rates at another motel, eventually ending up at the nearby Pizza Hut about eleven o'clock (T 1529).

Donald Lavery had parked his car there, and waited for his girl friend to get off work at the restaurant. He crawled under his car and tried to remove the muffler that had almost fallen off (T 1530, Perpetuated Deposition of Donald Lavery at p. 3).[4] Some friends of his

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[4]Green introduced the perpetuated testimony of Donald Lavery at trial. It was included as an exhibit, and was not paginated. To overcome this last deficiency, counsel has sequentially numbered the deposition with page number one being the title page.

arrived, and they helped, but to no avail (Deposition at pp. 4, 6). After a while Green and Coleman walked up, and the defendant offered his assistance (Deposition at p. 6). When Lavery told him he needed a saw, Green left, but returned 5-10 minutes later with one. (T 1530-32, Deposition at p. 8, 9) After another 20 minutes, or about 11 p.m. (Deposition pp. 11-12) they finally removed the muffler. Green asked Lavery for a couple of dollars, but when he said he did not have any money, the Defendant settled for some cigarettes (Deposition at p. 12). Green and Coleman then left (Deposition at p. 13).

Green went to work the next morning about five thirty (T 1534). Coleman talked with the landlady about accepting a partial payment for the rent, which she agreed to do (T 1534).

When Green learned he was a suspect in the Miscally homicide, he voluntarily went to the police station. After being warned of his rights, he answered the police officer's questions (T 1443). He was arrested while there.

WHAT KATRINA KINTNER SAW

Katrina Kintner's husband worked at the convenience store across highway 301 from the Mapco store where Judith Miscally was killed (T 1578), and it was the one from which Lonnie Thompson claimed to have seen the shooting. On the evening of December 8, Mrs. Kintner drove to the store with her two children in the back seat, parked her car in front of it, and waited until her husband got off work. While she sat there her daughter began to act up. The mother turned around to attend to her. She looked out the rear window and saw three black men standing around a white woman at the Mapco store (T 1582). The group stood near a telephone, a pickup truck was parked nearby, and a Camaro had stopped at the back

end of the truck (T 1582, 1601). The scene looked suspicious, and while taking care of her daughter, she heard a shot, like a car backfiring (T 1586). She looked up, saw the woman lying on the ground, two men fleeing north, and the car also heading that direction (T 1587, 1603). Immediately after, people from the store and others ran to help Mrs. Miscally (T 1608).

THE POLICE INVESTIGATION

On the night of the murder, the police used flashlights to search the ground and the area around the murder scene for any evidence (T 1043). They found only a .32 caliber shell casing. They did not cordon the crime scene off, or return when it was daylight to conduct a more thorough search (T 1060). They did not examine Mrs. Miscally's truck for evidence, nor the purse inside it. They found no fingerprints, and collected no hair, fiber, or blood samples (T 1056, 1073).[5] They did, however, seize, pursuant to a search warrant, the clothing Green ostensibly wore on the evening of December 8 (T 1134). The police never asked Mrs. Kintner about what she had seen (T 1589), and she never volunteered her information. She believed the police had already arrested a suspect and did not need her evidence (T 1596).

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[5]Mr. Brahmbbatt, the landlord at the motel where Green lived claimed to have looked out of a window where she lived about the time of the shooting. She saw Mrs. Miscally hitting a dumpster with a stick, walk toward her truck, then collapse (T 1090-91). A police officer saw the stick, thought it had nothing to do with the homicide, and sharpened one end of it with a knife so he could stick it in the pavement to show where the shell casing had been found (T 1047). It did not work well, so it was thrown aside (T 1047). Only after talking to Mr. Brahmbbatt was the piece of wood later seized (T 1048).

SUMMARY OF THE ARGUMENTS

Joseph Green raises ten issues in this appeal: Eight guilt phase and two penalty phase arguments.

ISSUE I. Lonnie Thompson provided the only evidence linking Green to the murder, but he was retarded or at least had an IQ of 67, and on the night of the murder he had drunk at least a gallon of beer. Additionally, when first questioned by the police he said a white male had killed Ms. Miscally. The state presented no physical evidence linking Green to the murder, and Green could explain where he was before and after the time of the murder. There is, in short, little competent evidence supporting the jury's verdict of guilt.

ISSUE II. The court denied that it had the authority to order a new trial on the ground that the weight of the evidence was so insubstantial that it could not hold down a conviction. That was error. This court has given trial courts that power in civil cases, and with similar reasoning such authority should extend to the criminal law.

ISSUE III. Green allegedly approached Mrs. Miscally demanding money. She screamed. He shot. Events moved so quickly that while the defendant may have had the intent to shoot her, he had insufficient time to fully premeditate her murder.

ISSUE IV. That the jury should have returned a guilty verdict was predictable given that the murder of a well known and well-liked person was committed in a small town, in a small county. One juror changed his lifestyle because of Mrs. Miscally's death. Another remarked that because of the time of day, the location of the homicide, and what the victim was doing at the time of her death, a similar crime could have occurred to him or his family. Such candor

from jurors who passed judgment on Green clearly showed that Mrs. Miscally's murder had deeply troubled this rural community. The court should have moved the trial.

ISSUE V. The state successfully prevented the defense from asking Thompson about his drug use because Green could not establish that this witness had used any cocaine on the night of the murder. That was a correct ruling. The court, however, allowed the state to explore a defense witness' history of alcohol abuse although she testified she had not drunk any for several years and specifically not on the night of Mrs. Miscally's death. That was error of sufficient magnitude to warrant a new trial.

ISSUE VI. After the police questioned Thompson most of the evening of December 8-9, they let him go. Later that day, they picked him up, told him they needed him to identify Green as the victim's killer, and brought him to the police station. They led him to a room where, through a one way mirror, he saw Joseph Green in an adjoining office alone, except for another police officer. After studying Green for "15-20" minutes, Thompson said he was the one who had committed the murder. This show-up identification, not only was inherently prejudicial, it became fatally defective here because the police told Thompson he needed to identify Green as the

killer. Additionally, at the time he allegedly saw Green shoot the victim, he was well on his way to being drunk, he viewed the incident from almost 100 yards, the lighting was poor, it was late evening, and traffic along highway 301 occasionally blocked his view. He was not particularly interested in what was going on there, being more concerned with getting a drink of water and looking out for the highway patrol. Additionally, his description of Mrs.

Miscally's assailant radically changed as the police questioned him. Originally he was a white male. Then it was a black person. As time went on this person wore more clothes, and by the time Green went to trial, Thompson could recall seeing the defendant wearing black pants, a white dress shirt, suspenders, a gun holster, and a trenchcoat. The court erred in allowing this person identify Green as the one who had shot Judy Miscally.

ISSUE VII. The court also erred by conducting an inadequate hearing to decide Thompson's competency to testify and then concluding that he could take the witness stand. The state proved, only that he could tell the difference between a blue suit and a red suit, and that he had used no drugs immediately before the hearing. Such a limited inquiry never established Thompson's ability to recall events on the night of the murder. Given that Thompson has an IQ of 67, his determination to drink himself into oblivion on December 8, and his willingness to lie on virtually any subject, the court had no evidence proving his competence to testify. It became a fatal flaw because his testimony provided the only evidence linking Green with this murder.

ISSUE VIII. The police sought and obtained a warrant to search the motel room where Green lived. That warrant in turned relied on an affidavit in which the sole basis for establishing probable cause came from an unnamed and otherwise unidentified eyewitness. The court erred in denying Green's Motion to Suppress because the police never gave the reviewing magistrate any reasons to believe the eyewitness was credible or that he had seen what he claimed to have witnessed. Such a deficiency was fatal.

Additionally, the warrant never limited the discretion of the executing officers to what

they could seize. It said only that they could take whatever clothes Green wore on December 8. It never described what they were, and not with the particularity required by the Fourth Amendment.

ISSUE IX. After being shot, but before she died, Judy Miscally described the events that led to her death. The court found the description an excited utterance that could be admitted as an exception to the rule against admitting hearsay. Yet, there is very little evidence this victim still operated under the effects of the excitement of the shooting so that her ability to reflect was temporarily suspended. To the contrary, she responded to questions, and when she could not describe the type of gun her assailant had, she asked the medic attending her if he "knew what a Glock" looked like. Obviously, though she may have been in pain from the bullet wound, she had sufficient presence of mind to formulate questions and consider her answers. The court should have excluded such responses, however, because they exhibited a calm, reflective mind, and not one still under the control of the shock of the shooting.

ISSUE X. Green sought at the penalty phase part of his trial to introduce evidence and argue that the jury should recommend life based on any residual or lingering doubt that he committed the murder. While appellate counsel realizes this court has expressly refused to acknowledge such evidence and argument as valid mitigation, this case presents a compelling argument for it to re-examine this issue. The state's case stands or falls on Lonnie Thompson's testimony. Yet, he must be among the most noncredible, incredible witnesses this court has ever seen. No other evidence ties the defendant to the crime with very strong cords. Doubt that is insufficient to justify a not guilty verdict but legitimately lingers because

of the uncertainties of life and the finality of death should influence a sentencing recommendation.

ISSUE XI. Green wanted to introduce evidence in the penalty phase of his trial that he had passed a polygraph examination. The court predictably refused to let him do that. While this court has repeatedly supported rulings by trial courts such as the one here, it should re-examine the grounds for excluding polygraph results. As Green presented at a hearing on the admissibility of them, the art and science of polygraphy has made significant advances in reliability since a United States District Court decided Frye v. United States, 293 F 1013 (D.C. Cir. 1923). In any event, if courts regularly allow psychologists to testify that a child's testimony was consistent with the truth, this court should allow an expert to testify that a defendant exhibited no deception based on physiological reactions to questions asked of him.

ISSUE XII. The court found that Green committed the murder during the course of an attempted robbery. The only evidence supporting that finding was hearsay. The state also never charged Green with that crime. Under those circumstances Green had no opportunity to defend himself against that charge. In any event the state never proved that crime was the dominant reason Green killed Miscally. To the contrary, the hearsay shows that he was angry at her when she screamed, and that was why he shot her.

ARGUMENT

ISSUE I

A FUNDAMENTAL INJUSTICE WILL OCCUR IF THIS COURT AFFIRMS GREENS CONVICTION FOR FIRST DEGREE MURDER AND SENTENCE OF DEATH.

In Tibbs v. State, 397 So. 2d 1120 (Fla. 1981) this court held that "Henceforth, no appellate court should reverse a conviction or judgment on the ground that the weight of the evidence is tenuous or insubstantial." Id. at 1125. On the other hand, in the same opinion it also provided a limited exception to this rule:

> By eliminating evidentiary weight as a ground for appellate reversal, we do not mean to imply that an appellate court cannot reverse a judgment or conviction 'in the interest of justice.' The latter has long been, and still remains, a viable and independent ground for appellate reversal. Rule 9.140(f) of the Florida Rules of Appellate Procedure (1977) provides the relevant standards:
>
> In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.
>
> This rule, or one of its predecessors, has often been used by appellate courts to correct fundamental injustices, unrelated to evidentiary shortcomings, which occurred at trial.

Id. at 1126. (emphasis in opinion. footnote omitted.)

Joseph Green invokes this last quoted portion of Tibbs to argue that a fundamental

injustice occurred in his case when a) he was convicted of the murder of Judith Miscally, and b) the court denied his motion for new trial because the weight of the evidence could not support the conviction. Factually, part a) has four parts 1) the lack of any evidence other than Lonnie Thompson's testimony linking Green to the murder, 2) Thompson's contradictory and contradicted versions of what he claimed to have seen, 3) his inability to accurately testify, and 4) Green's alibi by disinterested witnesses. Issue II focuses on part b.

1. **THE STATE'S CASE AGAINST GREEN**

Besides Lonnie Thompson's testimony, the state had only Judith Miscally's statements given shortly after being shot to identify her assailant. She said that a slim, black male in his mid-twenties had shot her (T 912). John Goolsby, who was waiting at an intersection near the Mapco store, only saw two figures standing near a truck, apparently having a conversation (T 817). He could not tell what sex or race either was. He noticed only that one appeared six inches taller than the other. His attention became more focussed when he heard the shot and saw Mrs. Miscally stumble and fall. By that time, however, the other person had disappeared (T 819).

A .32 caliber shell casing was the only physical evidence picked up at the scene (T 1474). The police never found the gun, nor did their search of Green's room uncover the holster only Lonnie Thompson said he saw Green wear (T 1436). The defendant had no blood on him, nor was gunpowder found on the clothes seized by the police when they searched his motel room (T 1070). They also collected no Negroid hairs on her or any hairs from Miscally on Green or his clothes (T 1073, 1311).

Lonnie Thompson said Mrs. Miscally and the defendant were struggling over her purse in front of her truck. Despite the improbability of that because it was in her vehicle, the police never dusted the truck, the purse, or apparently anything else for fingerprints (T 1442, 1474, 1477). No murder weapon was ever found although the victim described it as a "shiny semiautomatic." (T 912) Besides a brief nighttime search of the crimes scene, the law officers did precious little to find any evidence linking Green to the homicide. Apparently after they had spent the night coaxing a half page statement from Lonnie they believed they had enough evidence to convict Green.

That Green ostensibly needed money to pay his motel bill became the only motive the state found to link him to the murder (T 936)[6]. The owner of the place he lived had promised to evict him if he failed to pay his bill (about $78) by 11:00 a.m. December 9, the day after the murder (T 1094, 1100). Yet, the manager had made these threats before. Green had always produced the money (T 1098), and there was no reason to believe he would not have the money again. In any event Gwen Coleman, his girlfriend, had talked with the landlord, and he was willing to accept a partial payment of the rent (T 1534). Moreover, the defendant had a steady job, and his employer had, from time to time, lent money to his workers (T 1098, 1851-55). Green, of course, was seen trying to bum cigarettes and panhandle that evening. But none of the people he approached ever said he tried to force them to give him money, got

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[6]During the closing argument, the state minimized finding any motive for the shooting. "I would suggest to you that it would be a waste of time to try to decide or understand the motivation behind something of that sort." (T 1640)

angry when they refused, or fought with them. Instead, he simply left. For example, earlier in the day, he asked a friend's girlfriend for some money, and when she refused, he begged some cigarettes. After getting them he left (T 1168-70).

Thus, the defendant panhandled by asking for money, and, if it was refused, for cigarettes. None of the testimony offered by the state or the defense exhibited Green as hostile or angry with the people he had approached.

Had this been the only evidence the state had that Green murdered Miscally, its case obviously could never have survived a motion to dismiss either before or at trial. The picture became more complex with Lonnie Thompson's testimony. The result, however, is the same.

2. LONNIE THOMPSON

The prosecution would have been hard pressed to find a worse witness than Lonnie Thompson to carry its case for them. His IQ of 67 put him well within the mentally retarded range, and on the night of the murder his only concern was getting more beer. He admitted drinking at least a gallon of it that night (T 1212), though it may have been considerably more. His memory just gave out, and we know for sure only that getting another beer consumed much of what he did. For example, immediately after the shooting, while the police and medics attended the victim and tried to find out what had happened, Thompson got on his bike, rode to the Mapco store n and bought another beer (T 1253-54). Although he claimed to have seen the shooting, he told no one. Even when the police asked people at the convenience store if they had seen anything, Thompson denied having heard the request for information (T 1253).

His intellectual functioning, already minimal and getting worse on December 8-9, had been furtherweakened by the beatings on the head he had suffered through the years. When he was 16, a fall from a moving car had knocked him unconscious (T 1193-94). Later, someone hit him in the head with a large stick (T 1194). Then about a year before the Miscally shooting, he suffered a third head injury when he was beaten with a stick about the size of a baseball bat (T 1195). As a result, Thompson had dizzy spells and memory problems (T 1193-94). On re-direct, when asked if those head injuries had affected his ability to recognize people, he admitted, "Maybe some of them." (T 1266). The state's key witness even admitted he had talked with the prosecution about his testimony before trial. Well, actually, after some prompting he remembered he had reviewed his trial testimony with them four or five times (T 1219). That the state would want to talk with him is understandable since it took the police the better part of the evening of December 8-9 to get a half page statement from him.

That he had problems recalling the past became evident when asked about his status with law (T 1220). After some coaxing at trial, he admitted the state had charged him with two felonies and a petit theft a month before the Miscally shooting (T 1223, 1224). Six months before Green's trial, it dropped the felony charges and let this witness plead to a simple misdemeanor (T 1224). He knew that he had receivedfavored treatment because he had helped convict Green (T 1224-25).

His good fortune continued. When the prosecutor sought to violate his probation a month before the defendant's trial, the court dismissed the case because Thompson's

probationary period had expired (T 1225). Thompson believed he had gotten help from the state because of his assistance in this case (T 1228).

3. **WHAT THOMPSON TOLD THE POLICE**

The problems Thompson's statement presented to the prosecution justified its concern with the accuracy of his recall. When first questioned by the police he said a white male with blond hair had shot Mrs. Miscally (T 1258). That story changed, according to the police but not Thompson, when he learned she had died (T 1356, SR 20). Then he said her killer was a black male with an afro (T 2360). He gave no description of the killer's clothes (T 1217). With time, however, he remedied that deficiency.[7]

By the time Thompson testified at trial, the assailant wore black pin striped pants, a pin striped coat, a white dress shirt, a trench coat, suspenders, and a gun holster (T 1183, 1233). This the witness had noticed while looking for the Highway Patrol from a distance of about 90 yards. The area around where the struggle took place was poorly lit (T 1404-1405). The description fit Green because Thompson had seen him only a few minutes earlier trying to get cigarettes from some members of a band who were taking a break outside the night club where they were playing (T 1176). That he recalled what the defendant wore based on seeing him then makes more sense because John Goolsby, another witness to the shooting, was

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[7]At the bail hearing, held about two months after the shooting, defense counsel asked Thompson what Green wore on December 8. His response, "I don't remember all them clothes now." (SR 26). Later, he said, "I described some, now, but I can't keep all that up with what he was wearing. . . . They got it all wrote down. I don't even remember." (SR 27).

closer to the scene than Thompson yet he could only say that he saw two people. He could not tell what sex or race they were, much less what the assailant wore.[8]

That Thompson may have imagined more than he saw becomes apparent from his description of the events of December 8.[9] As Green and Mrs. Miscally struggled, he had a gun in one hand, grabbed her purse with his other hand, and with yet a third hand had hold of her other hand (T 1241-42). All the while, Green pointed the gun at her "steady." (T 1242)

3. GREEN'S ACTIVITIES ON DECEMBER 8

Green's recounting of what he did at the crucial times on December 8 admittedly has some holes. There is some conflict whether he approached the band members for cigarettes at 9:45 or an hour later (T 957, Defense exhibit No. 4,). Yet, with that problem in mind, there is no disagreement about what the defendant was doing. He sauntered about town late at night with his girlfriend, trying to bum cigarettes and loose change from people he ran into. This markedly contrasts with what the victim and the eyewitnesses said: Immediately after the shooting the assailant fled (T 911, 1587-88)-the opposite of what Green was doing.

Sometime after nine p.m. Green and his girlfriend decided to get some fresh air, and the couple left their motel room (T 1523). They went to the back of a nightclub, and the

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[8]Goolsby wore prescription glasses, but he did not have them on that night (T 827). Nevertheless, he said his vision was good enough for him to drive at night (T 827-28).

[9]Thompson had had a piece of steel shrapnel imbed itself in one of Thompson's eyes when he worked at a local steel plant. A doctor "fixed it pretty good. I ain't had no problem out of it, I know that." (T 1196)

defendant asked the three men standing there (including Lonnie Thompson) if they had any cigarettes (T 1525-26, 1528). From there they wandered north, checking the rates at another motel and eventually ending up at a nearby Pizza Hut (T 1529).

While there Green tried to help a young man remove the muffler from his car. He briefly returned to his motel room to retrieve a saw to help accomplish that (T 1530-32, Perpetuated testimony of Donald Lavery at pp 3-9).[10] Eventually the muffler was removed, and Green asked the man for a couple of dollars but settled for some cigarettes when the latter said he did not have any money (Deposition at p. 12). The defendant and Coleman then moved off.

Even the next day, Green behaved normally. He went to work as usual (T 1534). When he learned the police suspected him of killing Mrs. Miscally, he voluntarily went to them, waived his right to remain silent, and answered all their questions (T 1443).

In Issue III Green argues that the court should have changed the venue of his case because the murder deeply and subtly affected the citizens of Starke. The jury here had an untenable position. Community concern with the rising violence in Bradford County, a senseless death of a well-liked woman, ostensibly linked to the drug epidemic creeping into Starke added pressure on the jurors to convict Green though the state had presented no convincing evidence that the man charged with the murder had committed it.

The fundamental injustice occurs because the state's case against Green hung

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[10]When the police talked with Gwen Coleman at the motel after the homicide, they observed the saw in the room (T 1436).

exclusively on Lonnie Thompson. He lied about what he saw on December 8, 1992. He lied about his drinking. He lied about his criminal record. What he claimed he saw defies belief since Green needed a third arm to have done what this witness claimed he saw.

Thompson probably identified Green because he had seen him earlier that evening as the latter tried to bum cigarettes from some band members. His beer soaked, low caliber misfiring brain had problems remembering and could become easily confused.

The police added to Thompson's confusion. Thompson disliked them and freely told them anything so they would leave him alone. In contrast Green went to the police station the day after the murder, waived his right to remain silent, and answered all questions put to him.

That he did so was predictable because the defendant's actions the previous night belie any criminal intent. He wandered about Starke with his girl friend trying to get what cigarettes and money he could beg. Disinterested witnesses not only confirmed his story, but saw something completely different than Lonnie Thompson. Finally, the state produced no physical evidence, no fingerprints, no hair samples, no blood, nothing linking Green with Mrs. Miscally.

As presented in Issue VI, Thompson was incompetent to testify. As presented here, the state presented an insubstantial amount of competent evidence to convict Green. In the interests of justice, this court should reverse the trial court's judgment and sentence and remand for a new trial

ISSUE II

THE COURT ERRED IN DENYING GREEN'S MOTION FOR NEW TRIAL THAT ALLEGED THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE, A VIOLATION OF THE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Green filed a Motion for New Trial or Arrest of Judgment alleging, among other points, that "The verdict is contrary to the weight of the evidence." (R 570) The court summarily denied it (T 1792). That was error.

In footnote 12 to this court's second opinion in Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), this court said

> One problem, of course, is whether an appellate court actually "reweighs" the evidence in reviewing a trial court's grant or denial of a motion for new trial based on the ground that the verdict is contrary to the weight of the evidence. See note 9 supra. Although Florida case law offers no clear answer, see Mancini v. State, 273 So. 2d 371 (Fla. 1973), this case does not require us to address this problem, and leave its resolution for another day.

Id. at 1123-24.

Another day has come.

The criminal rules shed no light on this issue, but since "the policy of the appellate rules is that criminal and civil appeals are to be treated alike, except for matters unique to criminal cases," State v. Williams, 444 So. 2d 434, 439 (Fla. 3d DCA 1983), the case of Smith v. Brown, 525 So. 2d 868 (Fla. 1988) provides some guidance. There, this court applied an

abuse of discretion standard when it reviewed a trial court's order granting a new trial because the evidence lacked weight: "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." Id. at 869-870.

Moreover, "the mere showing that there was evidence in the record to support the jury verdict does not demonstrate an abuse of discretion." Id. at 870. This last quotation suggests that the reviewing court must reweigh the evidence. If it were only deciding if the evidence supported the jury's decision, it would be conducting a sufficiency of the evidence review. Instead, this peculiar type of review requires the appellate court to look at the quantity and quality of the evidence supporting the verdict. That is, it must reweigh the evidence to determine if the trial court abused its discretion in granting or denying the motion for new trial.[11]

By reviewing the weight of the evidence, "the trial court acts as a safety valve by granting a new trial where 'the evidence is technically sufficient to prove the criminal charge but e weight of the evidence does not appear to support the jury verdict.'", Hart, cited above at p. 135. Here it abused that discretion by summarily denying Green's Motion for New Trial or Arrest of Judgment. Green relies on the argument presented in the previous issue to prove this point. The state's case against him was so weak that no reasonable person would have agreed

[11] "[A] stronger showing is required to overturn an order granting a new trial than to overturn an order denying a new trial." State v. Hart, 632 So. 2d 134, 135 (Fla. 4th DCA 1994).

with the trial court's ruling. Lonnie Thompson had no credibility, Green had an explanation for his actions on the night of the murder, and he did not act like a person who had just shot someone. His panhandling technique, moreover, was radically different from the violence used by the assailant. Additionally, the state presented no other evidence (other than Mrs. Miscally's statement that a skinny black man had shot her) to bolster or corroborate Thompson's latest tale. Finally, the jury came from a small county that had been deeply affected by the murder of the well-liked victim.

The weight of the evidence simply was too insubstantial to hold down a jury verdict of guilty. This court should find that the trial court abused its discretion in denying Green's motion for new trial. It should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THE STATE PRODUCED INSUFFICIENT EVIDENCE TO PROVE THAT GREEN PREMEDITATEDLY KILLED JUDITH MISCALLY AS IT HAD CHARGED AND ARGUED, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS.

The indictment charging Green with the murder of Judith Miscally alleged he did so "from a premeditated design." (R 1) During the state's closing argument, it told the jury it could find Green had the requisite mind set to be guilty of first degree murder under either a felony murder theory or because he had premeditated the homicide.

> Each of those alternatives are placed before you as a way of defining whether or not this bullet took Judith Miscally's life and in so doing represents the act of first degree murder. My suggestion to you is this: both are applicable in this case. Both.

(T 1637).

* * *

> So my suggestion to you is that by having made a conscious choice in the face of resistance to use the gun that was being carried beforehand merely for intimidation to see if the robbery could be carried off, the assailant of Judith Miscally had premeditation and decided just to kill her.

(T 1640).

The court instructed the jury on both ways the state can establish a defendant's mental state (R 549-50). It gave them, however,only a general verdict form (R 564).

To prove premeditation, the state had only two sources of evidence: Mrs. Miscally's

statement before she died, and Lonnie Thompson's testimony about what he saw. The victim told an attending medic that

> she [Mrs. Miscally] had driven to Mapco. She was going to use the telephone and she got out of her vehicle and when she got out of her vehicle, she said that she was approached by a black male from behind the dumpster near where the vehicle was parked.
>
> She said the individual produced a weapon and demanded money and she stated that she screamed and that he became angry with her, told her to shut up. She screamed again. He physically grabbed her at that point and shot her. . . . [A]fter that . . . he exited the same direction that he had came from behind the dumpster.

(T 911).

Lonnie Thompson, the retarded drunk who saw something, said on direct examination:

> Q. Did you see a person you recognized as Mrs. Miscally?
>
> A. Yes.
>
> Q. Where was she when you first saw her?
>
> A. She was in front of the truck by the phone.
>
> Q. Okay. Was there anybody else there?
>
> A. Yes.
>
> Q. Who else was there?
>
> A. Joseph Green.
>
> Q. All right. And where was he standing?

A. He was standing in front of her.

* * *

Q. What was the next thing that you saw happen?

A. I seen them scuffling.

Q. And then what happened?

A. And he shot Miscally.

* * *

A. And then I left and went in the back of the Lil' Champ.

(T 1181-82, 1183).

At the close of the state's case, Green moved for a Judgment of Acquittal arguing, among other things, that the prosecutor had never established "a prima facie case that would warrant this case to proceed further." (T 1369) The court denied the request, but it erred in doing so. The state never established Green had the requisite level of premeditation to have been found guilty of first degree pre-meditated murder.

Premeditation, as this court has defined it, is

> more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986).

Thus, while Green may have intended to kill Mrs. Miscally when he shot her, nothing

proves he had considered what he was doing for any period long enough to form the required premeditation. That distinction is important because it separates first degree murder from second degree murder. Rogers v. State, 20 Fla. L. Weekly S233 (May 11, 1995).

In Rogers, the defendant approached Rene Daniel and Mark Hastings in a nightclub parking lot and asked for a ride home. They agreed, and after he got a gun from his disabled car, they drove off with the Daniel and Hastings sitting in the front with Rogers in the back. Along the way, Rogers pointed the gun at Hastings' head and told Daniel to take off her clothes. She refused, and he later squeezed her breast. He stopped when she told him to "don't do that." When Hastings refused to follow Roger's directions, the defendant said he would pull the trigger if he did not "take the next right turn." He did not, and a scuffle followed during which Hastings grabbed Rogers' gun, the two men struggled over the gun, and it fired. Rogers at 20 Fla. L. Weekly S233. The defendant was convicted of first degree murder and sentenced to death, but on appeal, this court found insufficient evidence of premeditation.

> Although the evidence shows that Rogers took his gun from the car when he asked Daniel and Hastings for a ride, the circumstances of Hastings' fatal shooting do not support premeditation. The testimony reflected that Hastings grabbed Rogers' gun, the two men struggled over the gun,and the gun fired. This is not sufficient to prove that Rogers had, upon reflection and deliberation, formed a conscious purpose to kill Hastings.

Similarly, here, all we have is a demand for money, a scream, the defendant getting mad, perhaps a struggle, and a shot. Such skimpy evidence is insufficient to show a fully formed

conscious purpose to kill.

It is so because too little time passed for Green to have formed the required intent. While the definition quoted above says that the "purpose to kill may be formed a moment before the act" this court has required more time to show the defendant contemplated murder.

In Jackson v. State, 575 So. 2d 181 (Fla. 1991) the defendant and another person tried to rob a hardware store. The owner, however, resisted their efforts, and he was shot once. Finding insufficient evidence of premeditation, this court said, "there is no evidence to indicate an anticipated killing, and where all of the evidence is equally and reasonably consistent with the theory that [the owner] resisted the robbery, inducing the gunman to fire a single shot reflexively, not from close range, with an unidentified type of weapon and bullet."[12]

This contrasts with murders where the defendant took a much longer time to kill his victim, such as in Sochor v. State, 619 So. 2d 285 (Fla. 1993); reversed on other grounds, Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). There, the defendant beat a woman, but stopped for a short while to tell his brother to get back into their truck. Sochor then resumed his attack, killing the victim.

Here, Green suddenly confronted Mrs. Miscally and demanded money from her. When she screamed, a struggle followed, during which he reflexively shot her once. He did not fire the gun her several times, nor make any threats. Spencer v. State, 645 So. 2d 377, 381

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[12]This court distinguished Jackson from Griffin v. State, 474 So. 2d 777, 780 (Fla. 1985) where "the bullets were of a special type designed to have a 'high penetrating ability.'"

(Fla. 1994) (Defendant parked car away victim's house, wore plastic gloves during the attack, and carried a steak knife in his pocket); Provenzano v. State, 497 So. 2d 1177 (Fla. 1986)(defendant removes shotgun from his coat and screams "I'm going to kill you."); Waterman v. State, 121 Fla. 244, 163 So. 569 (1935) (victim shot six times).

Thus, this case is similar to Rogers, and particularly close to Jackson where sudden, apparently unexpected resistance from the victims, led to unthinking single shot killings. The prosecution presented insufficient evidence of premeditation. Of course, the state could concede that point and still claim the verdict should be upheld under a felony murder theory. Yet, it argued premeditation in closing, the court instructed the jury on it, and it could have based its verdict on that theory. The state never charged Green with robbery probably because nothing was taken, and the jury could have reasoned that a mere demand for money was insufficient evidence to show an attempted robbery. In any event, the evidence is far from clear that felony murder was the only theory the jury could have used to convict the defendant. This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN OVERRULING GREEN'S OBJECTION TO THE STATE'S QUESTIONS OF HIS WITNESS, A KATRINA KINTNER, THAT SHE WAS A RECOVERING ALCOHOLIC WHEN THERE WAS NO EVIDENCE SHE HAD DRUNK ANY ALCOHOL ON THE NIGHT OF THE MURDER, A VIOLATION OF THE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

When Green wanted to ask Lonnie Thompson, the state's star witness, about his cocaine use, the court, relying on this court's opinion in Edwards v. State, 548 So. 2d 656 (Fla. 1989) refused to let him do that unless the defendant could show he had used it the night of the murder (T 1158). Apparently, he could not, so the jury never learned that Thompson had used drugs.

This witness, of course, provided the only testimony linking Green with the murder of Judy Miscally. He had given a different version of what he had see when first questioned by the police from his eventual trial testimony. He first said a white man struggled with the victim and drove away in a white car (T 1258-59). He changed that story after the police talked with him all night (T 1260).

Significantly, a defense witness, Mrs. Katrina Kintner also saw the white car Thompson described, but otherwise her testimony contradicted what he claimed to have seen. Her husband worked at a convenience store on the other side of highway 301 from where Mrs. Miscally was shot. About 11 p.m. on December 8, she parked at the store and waited for him to get off work. One of her children in the back seat of the car acted up, and as she turned

around to attend to her she looked out the rear window and saw three black men "around a woman." (T 1582-83). A white car was parked "at an angle at the back end of the pickup." (T 1601). The situation looked suspicious to her. While her attention was momentarily diverted by her child, she heard a shot, like a car backfiring (T 1586). Looking out the back window again, she saw two of the men heading north, and the other simply disappeared (T 1588). The white car left, also heading north (T 1603).

Near the end of Mrs. Kintner's direct testimony, Green's lawyer asked if she had drunk any alcohol that night, obviously comparing her to Thompson.[13] "So you didn't drink six or eight or ten beers before the shooting?" "No." (T 1591-92)

On cross-examination, the state quickly seized on her answer to this question and expanded on it.

> Q. You have stated that you had not had anything to drink that night. Have you not previously to that night been somebody who drank alcoholic beverages?
>
> MR. REPLOGLE: Your Honor, I would object to the--in the sense that it's not proper impeachment of the witness to bring out any other prior activities that are not involved with that night.
>
> THE COURT: Overruled.
>
> BY MR. CERVONE: Have you not prior to that night been someone who drank alcoholic beverages?

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[13] Counsel had asked a similar question of John Goolsby, the man who had seen the struggle as he waited for a light to change (T 846),

A. I have been in recovery for over three years.

Q. In fact, you are an alcoholic?

A. Yes.

Q. In fact, on this night one of the things you had done before going to the Lil' Champ was go to an Alcoholics Anonymous meeting?

A. Correct.

(T 1592-93).

If the court had correctly ruled that Green could not ask Lonnie Thompson about his cocaine problems then iterred in allowing the state to ask Mrs. Kintner about her alcoholism. Edwards.

In Edwards, the defendant wanted to cross-examine the victim about her prior drug use. She had used drugs for twenty years, but had been "clean" for several years. The crucial fact, however, was that on the night she was beaten she had used no drugs. She also was free of their influence when she testified.

The trial court excluded that proffered testimony, and this court affirmed that ruling, adhering to what it had said in earlier cases:

> This view excludes the introduction of evidence of drug use for the purpose of impeachment unless: (a) it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony; (b) it can be shown that the witness is using drugs at or about the time of the testimony itself; or (c) it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember, and

recount.

Id. at 658.[14] Subsequent cases by other courts of this state have followed Edwards. Williams v. State, 617 So. 2d 398 (Fla. 3rd DCA 1993); Richardson v. State, 561 So. 2d 18 (Fla. 5th DCA 1990).

Here, the state presented none of the predicate facts necessary to introduce Mrs. Kintner's prior alcohol use to impeach her testimony. She had drunk no intoxicants on the night of the murder, no one ever suggested she was under their influence when she testified, and there was no other evidence that alcohol affected her ability to observe, remember, or recount what had occurred on December 8, 1992. The court should have, therefore, stopped any inquiry about her alcoholism.

Of course, defense counsel had asked Mrs. Kintner about her drinking on the night of the murder. Such questioning, however, does not open the door to a state inquiry about her alcoholice life.

If it did, Green could have asked Thompson about his use of cocaine before the day of the murder. Edwards correctly stopped defense counsel from probing that subject, and it should have similarly prevented the state's inquiry about Mrs. Kintner's history.

Had the state's case been stronger and Mrs. Kintner's testimony not so contradictory to the story Thompson finally settled on perhaps this impeachment would have been harmless. Yet, as argued above, the state's theory hung on Lonnie Thompson. The prosecution

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[14]Professor Ehrhardt makes no distinction regarding impeaching a witness who has use drugs or alcohols. Section 608.7, Ehrhardt, Florida Evidence (1994 Edition).

presented no physical evidence tying the defendant to the crime. He had an alibi, and simply did not act like a person who had just shot someone. He wandered about Starke with his girl friend, helping a man remove a muffler, and bumming cigarettes off others. Lonnie Thompson had a marginal intelligence, on the night of the murder he had drunk a gallon of beer, and when first questioned by the police he said a white male had accosted Ms. Miscally. His testimony was incredible, or rather, non credible, yet the jury had to have credited it to have convicted Green.

That means they also must have discredited Mrs. Kintner's version of what had happened. The only evidence they could have rationally used to have done that was her history of alcoholism. Thus, the state's improper cross-examination of her could not have been harmless beyond all reasonable doubts. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT ERRED IN REFUSING TO SUPPRESS LONNIE THOMPSON'S IDENTIFICATION OF JOSEPH GREEN AS THE PERSON WHO KILLED JUDITH MISCALLY, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT.

The police questioned Lonnie Thompson about the murder of Judy Miscally on the evening of December 8 and into the morning hours of the 9th (T 1260). Thompson initially said he had seen a white man commit the murder (T 1258-59). Unsatisfied with that claim, the police interrogated him the rest of the night, eventually letting him go about six thirty the morning of December 9th. By then they had gotten a one paragraph statement from him that Joseph Green had killed the victim (T 1260).

Green voluntarily came to the police station that day, and talked to the police, never refusing to answer any of their questions (T 1443). He was arrested about 7 p.m. (T 2313).

Officer Wilkinson of the Bradford County Sheriff's Office picked Thompson up the evening of December 9th and returned him to the Sheriff's office so he could identify Green. He specifically told this witness they had Joseph Green at the station, and they needed him (Thompson) to identify the defendant (T 2356-57). They brought Thompson into a room that had a one way mirror, and as he looked through it, he saw Green and a police officer, Major Reno, in an adjacent room. They were the only ones there, and after watching them for 15-20 minutes, Lonnie told the police, "That's the man." (T 2352, 2345)

When he identified Green, he was vague about whether he was wearing the same

clothes then as when he saw the defendant shoot Mrs. Miscally (T 2359). At best, all he could definitely say was that he had on "the same white shirt." (T 2359) "The only thing I identify is his body and his Afro. I wasn't paying too much attention to the clothes, you understand." (T 2360)

Green sought to suppress Thompson's identification of him as the one who had shot Miscally (R 136). The court, after hearing evidence and argument on the matter, denied his request (T 2371). That was error.

The law in this area is well developed, and this court can resolve this issue by applying the principles and factors developed by the United States Supreme Court. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) and Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) articulated the appropriate standards and listed several considerations relevant to the reliability of eye witness identification. "The primary evil to be avoided in the introduction of an out-of-court identification is a very substantial likelihood of misidentification." Grant v. State, 390 So. 2d 341 (Fla. 1980)(relying on Neil v. Biggers). Suggestive identifications increase the possibility of a misidentification, and unnecessarily suggestive ones gratuitously raise that possibility to a probability. Neil at 198. One man show-ups, like the one used in this case, exacerbate the problem even more. "A show-up is inherently suggestive in that a witness is presented with only one suspect for identification . . . " Blanco v. State, 452 So. 2d 520 (Fla. 1984).

Yet, the United States Supreme Court rejected a per-se exclusion of such identifications, opting instead for a totality of the circumstances analytical approach. Manson,

at 113. Based on it, "the [identification] procedure is not invalid if it did not give rise to a substantial likelihood of irreparable misidentification under the totality of the circumstances." Blanco at 524. To aid the analysis, the Neil court identified several factors relevant in deciding the likelihood of misidentification:

> 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,
>
> 4. the level of certainty demonstrated by the witness at the confrontation,
>
> 5. and the length of time between the crime and the confrontation.

Neil at 198.

Applying the factors to this case reveals the following:

1. The opportunity to view. Lonnie Thompson was 287 feet away from the shooting. Traffic from Highway 301 occasionally obstructed his view (T 1240, 1244). The crime occurred at night and the lighting where the assault occurred was poor (T 1403-1405). Thompson also had drunk about a gallon of beer during the evening (T 1204-1205, 1212). The attack and shooting occurred quickly, so that Thompson would have had only a brief glimpse of the assailant. This is in contrast to the sexual assault victim in Neil, who saw the defendant "directly and intimately" in a well-lit house and under a full moon. She also was with him for at least a half hour. Neil at 200.

Also, unlike the witness in Neil, Thompson had seen Green about an hour earlier and

had known him for three or four years (T 2337). His long acquaintance with Green probably tainted his identification.

2. The degree of attention. There is no evidence Thompson paid much attention to what was going on because, as he admitted, he was looking for the highway patrol (T 1181). Undoubtedly, he had little, if any special training in gathering details. Manson, at 115. He saw the struggle, but he could not identify the clothes Green wore, except the white shirt. All he noticed was "his body and his Afro." (T 2360). His description at the suppression hearing omitted entirely what the assailant wore, his age, height, weight, complexion, skin texture, and build, facts the victim in Neil described. Id.

3. The accuracy of the witness' prior description. Thompson initially said a tall, slender, white male with blond hair had accosted Mrs. Miscally (T 1258-59).[15] See, Manson at 115 ("No claim has been made that respondent did not possess the physical characteristics so described.") That version may have changed when he learned she had died (T 1356, but see SR 20), and the police questioned him from about 3:00 a.m. until 5:30 a.m. when he gave a one paragraph statement implicating Green (T 1354, 1357, 1363). Obviously Thompson did not like the police and wanted to get away from them as quickly as possible (T 2347). So, he gave them one story, hoping they would leave him alone. When that failed, and the police brought him to the station, he may have implicated Green (whom he had seen earlier that evening) for the same reason. Moreover, persons like Thompson, who have borderline

[15]Thompson also said the man and Mrs. Miscally were boy friend and girl friend (T 1259).

intelligence tend to be easily led by the police. Ellis and Luckason, "Mentally Retarded Defendants: An Eighth Amendment Analysis, 53 Geo. Wash. L. Rev, 414 (1985).

4. The witness' level of certainty. Again, Thompson changed his initial story that said some white man had shot Mrs. Miscally. With time his certainty that he had seen the defendant shoot the victim changed to certitude. Of course, when the police brought Thompson to the station to identify Greeh, they had already talked with him for several hours. To make sure Thompson identified the right man, they told him they had Green in custody and wanted him to identify the defendant(T 2357). Moreover, that he could identify Green is predictable since he had seen him earlier that night, and had known him for several years.

5. The time between the crime and the confrontation. About a day separated Thompson's view of the murder and the show up. While not the seven month lapse in Neil, it was much longer than the few minutes in Manson. Thompson had given other descriptions of Miscally's assailant radically different than the one he eventually settled on. Neil at 201. On the other hand, unlike in Manson, that description was not volunteered. It was the product of a lengthy police interrogation, in which the witness identified Green 24 hours after the crime.

In short, we have an inherently suggestive showup that the police made worse by telling a very suggestible witness that the person they wanted him to identify was the murder suspect. Applying the Neil only confirms the obvious. A substantial likelihood exists that Lonnie Thompson irreparably misidentified Green as the person who shot Judith Miscally.[16]

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[16]The in-court identification is included because the state never asked Thompson at trial if his in-court identification was based solely on his observations of the

This court should reverse the trial court's judgment and sentence and remand for a new trial.

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defendant at the time of the crime and not the show-up (T 1172-73).

ISSUE VI

THE COURT ERRED IN DENYING GREEN'S MOTION FOR A CHANGE OF VENUE BASED ON THE LARGE NUMBER OF PROSPECTIVE MEMBERS OF THE VENIRE WHO HAD PRIOR KNOWLEDGE OF THE FACTS OF THE CASE AND WHO WOULD HAVE A DIFFICULT TIME PUTTING THAT INFORMATION ASIDE, A VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

Green was arrested on December 9, 1992, and he went to trial the next September. Starke is the largest town in a small, rural county, and Judith Miscally was a well-liked employee of the local newspaper, The Bradford Telegraph (R 528, T 137, 1387, T 2422). Her murder generated a lot of local news (E.g. R 528), and most of the people called to judge Green had heard of the homicide.

Anticipating this exposure, Green filed a Third Amended Motion for a Change of Venue (R 509-532). During jury selection, he renewed his motion:

> MR. LEUKEL: Judge, at this point in time, we would make our motion for change of venue pursuant to Rule 3.240, arguing that at this point in time it's been demonstrated and that we feel like we may be able to go forward with sufficient evidence based on the various newspaper articles that are attached to the motion and have been attached to prior motions as exhibits as well as evidence contained in the voir dire that has occurred as we proceeded.
>
> Judge, in going back and reviewing the three panels that we have brought in here and questioned, a total of forty-two, there have been fourteen challenges for cause granted. Well over

> a third of the jurors have been excused for cause.
>
> I think that probably less than three of the jurors, three or four of the jurors, that have been asked if they know anything about this case have said that they do not.

(T 629).

Counsel voiced his concerns that the local newspaper's repetitive "going over Mr. Green's criminal record was an intentional attempt . . . to prejudice this community against our client." (T 630) Additionally, he noted, that the murder had shaken the community.

The court ignored this last reason for moving the trial and denied the motion, noting:

> I've learned . . . that people who live in the outlying sections of the county have very little knowledge of what actually occurs in Starke and the last tow panels that we selected had a substantial number of people who were from Brooker or Melrose or Keystone Heights or other outlying areas of the country who evidence virtually no knowledge of the case at all.

(T 632-33).

The court erred in denying Green's request to change the venue of his case. The impact the murder had on those chosen to try the case could only have affected their deliberations and perceptions of Green's guilt.

At the outset Green acknowledges that winning this issue will be difficult. Appellate courts have given the trial judges considerable discretion in granting or denying a motion for change of venue. Only if the court manifestly or clearly abused that power considering the evidence before it will this court order a new trial. Gaskin v. State, 591 So. 2d 917 (Fla.

1991) (No new trial unless the trial court palpably abused its discretion.)

While exposure to news accounts of a crime may not prejudice a jury, such bias will presumptively arise when the publicity pervades the community where the trial is to be held. Noe v. State, 586 So. 2d 371 (Fla. 1st DCA 1991). For example, in Rideau v. Louisiana, 373 U.S. 723, 88 S.Ct. 1417, 10 L.Ed.2d 663 (1963) the defendant's confession to a bank robbery and murder were seen by thousands of people in the community where these crimes occurred. While only three jurors who served at Rideau's trial saw the televised statements, "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." Id. at 726. On the other hand, when the publicity occurred years before the trial occurred, prejudice is not presumed, Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (Retrial occurred four years after murder). Nor is it assumed if the nature of the defendant's crimes are not inherently inflammatory. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) (burglary and robbery).

Here, of the twelve jurors selected to judge Green, only two had no knowledge of it (T 537, 559). The remaining ten had heard of the facts from the Bradford County Telegraph, The Gainesville Sun, local TV, or street talk (T 130, 199, 264, 355, 375, 395, 434, 447, 523, 593). Of course, they said they could set aside whatever information and opinions they had already developed, but a couple of candid comments exhibit the problems Green's lawyers had defending their client in this small north Florida community. During voir dire, juror Register, responded as follows to the question about what he recalled reading about the case:

> JUROR REGISTER: Thinking about it, really nothing. It's a small town. You ride by the

> location and I always look at the phone booth
> now.

(T 133-34).

When asked about what facts he had heard, he said,

> Nothing of facts. I think it's more just small
> town, people knowing people involved, of
> knowing the lady that was killed. I knew her, not
> closely or socially, just knew her. It's a little
> town and that concerned the family. Those are
> the things we all talk about when something like
> that happens here.

(T 135).

Regarding Mrs. Miscally, Register knew her "to call her by name from her work" (T 135). He also described her as "A nice person, I just knew her and always spoke to her." But Ms. Miscally was real, and her murder had affected Mr. Register more than he realized.

> From my own business and my own situation where I work sometimes
> at night, I have those concerns over not--any of being someplace not
> bothering anybody. (T 136) . . . I just--knowing her, such a nice person
> and such a waste. Why? Where can we go and be left alone? (T 137) .
> . . I find myself being a lot more careful and being more protective of
> myself, where I'm at and I have a concealed weapon permit and I utilize
> that ability because of my work, just where I'm at then. I get
> concerned, I guess, with the violence and why people do whatever they
> do. (T 137)

Juror Rosinski echoed some of Register's small town concerns:

> When a violent crime occurs near where you live
> and this is, after all, near where we live and near
> where we conduct our lives, you often want to
> know where it happened. If it happened, let's say,
> in the parking lot of Bobby's Hideaway, it's
> someplace where my wife or my children
> wouldn't go. And when it happened, if it

> happened at three o'clock in the morning, well, we're at home at three in the morning.
> So this was remarkable in the sense that it occurred at a place where we might have been at a time we might have been there and that was really the reason why my wife and I discussed it. (T 380)

Jurors Register and Rosinski, like the rest of the jurors, said they could set aside whatever they had recalled from the newspapers they had read. They would base their verdict on the evidence that he heard in the courtroom. (T 131, 377) It is obvious, though, that Ms. Miscally's murder had had an impact on both jurors beyond just being aware of the facts of the case that they could not set aside. They knew the victim, they lived near where the murder had occurred, and they had gone to the store where the victim had died (T 380). They realized that what had happened to Ms. Miscally could have easily occurred to them, and they had changed the way they lived their lives because of the events of December 8, 1992.

Thus, the prejudice that arose here came not simply from the juror's knowledge of the case. The greater danger in holding Green's trial in Bradford County arose from the effect the homicide of Judith Miscally, a "nice person," had on those chosen to judge Green. The murder deeply affected them, and the court should have moved the trial to another venue where the people in the venire would not have been so personally and deeply affected by this killing.

In Manning v. State, 378 So. 2d 274 (Fla. 1980) this court said the trial court should have granted the defendant's motion for a change of venue. There, Manning, a black man from outside the community, allegedly killed two well-liked policemen, who were white. The

homicides occurred in rural Columbia County, and the publicity surrounding them was more intense than if they had occurred in an urban area. Mills v. State, 462 So. 2d 1075, 1078 (Fla. 1985). All the prospective jurors had heard about the case, and they would have been hard pressed to face the community hostility against the defendant.

This case has many similarities with Manning. Green, a black drifter and career criminal from Miami (R 532, 522-23) allegedly killed a white woman who was well liked and "a nice person." The murder was front page stuff in this small, rural county. The local press contrasted the defendant's criminal history and ne'er do well life with the mother's "enthusiastic personality[,] infectious laugh and a sense of humor that made her a pleasure to be around. . . . Nothing was more important to Judy than her family. Her being and all of her activities were centered around them." (T 520, 522)

The State Attorney, reacting to the community's fear, promised "to set a precedent with the prosecution of the Judy Miscally murder case." (T 526) Others linked her death with the rising incidence of drug use, although there was no evidence of such a connection. "He [a local citizen] listed the murders of . . . Judy Miscally among several senseless deaths that may have occurred because of someone's need to buy drugs." (T 528) At least one candidate for the Starke Police Chief's office used the death in his campaign literature (R 530). The Bradford County Telegraph printed in bold front page headlines Green's "innocuous plea of not guilty." (T 630, R 526)[17]

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[17]In one article, the Telegraph described Green as having "arrived in Starke after living most of his adult life in an endless cycle of odd jobs and prison sentences. . . Green has

Ten of the twelve jurors who sat in this case had "ex parte" knowledge of the evidence against Green. All but three or four of the members of the venire had heard of the killing. The court excused a third of the panel because of what they knew (T 629). Miscally's death, when set in the context of the "recent rash of violent crimes in Bradford County" (R 526), created a pervasive fear that this small community was being infected by big city problems. The jurors who actually sat on Green's jury knew the victim, had been to the Mapco Store where she was killed, and worried that what happened to Mrs. Miscally could have occurred to them or their children. "Those are the things we all talk about when something like that happens here." (T 135)

Unlike Manning, the state's case against Green was not "quite strong." Id. at 278. (See Issue I.) Instead, it hung solely on the testimony of Lonnie Thompson, a drunk, retarded vagrant who gave wildly conflicting stories of what he had seen on December 8, 1992. Countering that testimony, Green presented Mrs. Kintner who had witnessed something completely different. Green also called several people he had encountered shortly before and after the killing. None of them testified the defendant acted like a man who had just committed a serious crime. He sauntered about town with his girl friend, offered to help saw off a muffler, and bummed cigarettes from others.

With a weak case against Green, a community alarmed at the rapid rise in violent

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been in nearly every prison institution in the state." (R 522-23) Another article cited the Miscally murder as another reason the City Commission should join a drug trafficking task force. (R 528)

crime, and jurors who expressly said their lives had changed because of the Miscally murder, the court should have granted the defendant's Motion to Change Venue. That it tried the case in Bradford County was error.

This court should correct that mistake by reversing the trial court's judgment and sentence and remanding for a new trial.

ISSUE VII

THE COURT ERRED IN DENYING GREEN'S MOTION IN ALLOWING THE STATE TO ADMIT, AS EXCITED UTTERANCES, STATEMENTS OF MRS. MISCALLY MADE AFTER SHE HAD BEEN SHOT AND BEFORE SHE DIED, IN VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT HIS ACCUSERS AND TO A FAIR TRIAL.

Sometime before trial started, Green filed a motion in limine requesting the court suppress statements that Mrs. Miscally had made shortly after she had been shot (T 462). Once the jury had been selected and immediately before opening statements, the court held a hearing on the motion.

After the shooting and the arrival of the medical personnel, Mrs. Miscally told Dwayne Hardee, a medic she had known for some years,

> . . . Dwayne, Dwayne, and then she said, "He shot me."
>
> * * *
>
> She stated to me that she had gone to the Mapco to use the telephone and when she got out of her vehicle, she was approached by a black male from around the dumpster, which is located on the north end of the building.
>
> She stated the individual produced a weapon and wanted money and she started screaming. He told her to shut up. She screamed again. He physically grabbed her and shot her and then he left from - - going back in the same direction from which he'd come.
>
> * * *

> She stated it was a thin black male in the mid-twenties. . . . She described [the gun] as being a shiny auto. At first she really couldn't and she said, "You know what a Glock looks like?" . . . And she said, "Well, it was small and shiny" and described as a semi-auto pistol.

(T 677-78).

The court made two rulings regarding this testimony:

> 1. It admitted the hearsay testimony describing the assailant as an excited utterance (T 682).
>
> 2. It admitted the hearsay regarding her medical condition (but not that describing her assailant) as information regarding a medical diagnosis. (T 681)

Additionally, the court conditionally admitted a statement Mrs. Miscally made to her husband that the bullet had not come out. It would be relevant only if Green attack the credibility of Mrs. Miscally to show "her awareness of her condition at the time, but is not relevant to any other issue in the case and it will not be produced on the state's case in chief." (T 695)

The court erred in admitting the hearsay describing the incident that resulted in her being shot.

An excited utterance is admissible as an exception to the hearsay rule if it is a statement "relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition." Section 90.803(2) Fla. Stat. (1992) Presumably persons under the sway of the event lack the reflective capacity to fabricate, and what they say has an aura of truthfulness that justifies admitting it at trial. Rogers v. State, 20

Fla. L. Weekly S233 (Fla. May 11, 1995). The relevant factors in deciding the admissibility of Mrs. Miscally's statements as excited utterances are:

> 1. the time gap between the incident and the statement,
>
> 2. the voluntariness of the statement,
>
> 3. whether the statement is self-serving,
>
> 4. the declarant's mental and physical state at the time the statement was made.

Sunn v. Colonial Penn Ins. 556 So. 2d 1156, 1157 (Fla. 3d DCA 1990).

Here, probably only a few minutes elapsed between the shooting and the statement to Dwayne Hardee, and that is an important factor in determining voluntariness of the statement. Id. What she said also was not obviously self-serving, and, except for Mrs. Miscally's statement that "Dwayne, Dwayne, he shot me." she made no other "voluntary statements." What she said were, instead, considered responses to specific questions asked by Hardee about what had happened.

Also, there is no evidence about her mental and physical condition. Of course, she had just been shot, but the state produced no evidence she was in shock, was hysterical, or even very shaken. Edmond v. State, 559 So. 2d 85, 86 (Fla. 3d DCA 1990)("[T]he evidence shows that the child was excited, perhaps even hysterical at the time his statements were made."); Power v. State, 605 So. 2d 856, 962 (Fla. 1992) ("When Mr. Miller flagged [the policeman] down, '[h]e appeared to be a person that had just witnessed an unusual or serious crime, and was very shaken.'"); Young v. State, 637 So. 2d 31, 32 (Fla. 2d DCA 1994)(victim was

"hysterical and crying" when she made her excited utterances.) Yet, when she tried to describe the gun, she evidently had problems at first. She finally asked Hardee if he knew "what a Glock looks like?" (T 678) Obviously she had enough presence of mind to realize she could not describe the gun, but she recalled another make that looked like the one used against her. Such considered responses showed that despite her injury her mind was free of having just been shot. She had a clear mind and sufficient reflective capacity to have realized her problem and to have come up with another description of the gun her assailant had used. Also, her description of the assailant belies any notion that her mind was under the sway of events.

Thus, the time between the shooting and the statements, while short, and an important factor, nevertheless did not automatically justify admitting the statements. The crucial requirement, that the statement have been made before Mrs. Miscally had regained her reflective capacity, was never established.

The court, therefore, erred in admitting the hearsay. Because her statement provided the only evidence to support the robbery murder theory and during the course of a robbery aggravator, the trial judge's error in admitting it became reversible error. This court should reverse the judgment and sentence and remand for a new trial.

ISSUE VIII

THE COURT ERRED IN DENYING GREEN'S MOTION TO SUPPRESS EVIDENCE SEIZED BY AUTHORITY OF A SEARCH WARRANT BECAUSE IT LACKED SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE TO SEARCH THE MOTEL ROOM HE WAS STAYING IN, A VIOLATION OF HIS FOURTH AND FOURTEENTH AMENDMENT RIGHTS.

As part of its case, the state introduced the clothes Green ostensibly wore the night Judy Miscally was killed (T 1121-26). Lonnie Thompson, after he settled on his story, claimed to have seen Green wear a "black coat and the black striped pants with the suspenders on them. You see the suspenders on them." (T 1183) The police saw the pants, shirt, and coat when they went to the motel room the day after the murder and talked with Gwen Coleman, Green's girlfriend. She pointed to them and said they were the clothes he had worn (T 2240). Armed with that information, the police applied for and obtained a warrant to search Green's room. They seized ,among other things, the just mentioned items (R 387).

Green filed an Amended Motion to Suppress Evidence, alleging that the affidavit supporting the warrant lacked sufficient probable cause to justify the search, and the items to be seized were only generally described (T 122-23). At the hearing on the motion, he pursued these claims, specifically arguing, "there's nothing in there that gives the Court the ability to judge your accuracy in your statement that the clothing matched the description given by the eyewitness." (T 2263) Even Major Reno, the officer who signed the affidavit and conducted the search, agreed that "nothing in the warrant described what clothing was meant." (T 2273)

The court, nevertheless, denied the motion, finding, among other things, that 1) "the court declines the invitation to determine the credibility of eyewitnesses to the crime with which the Defendant is charged, and upon whose information the Affiant, Major William Reno, based his affidavit in support of the search warrant. Such [eye witness] information is sufficient to lead a finding of probable cause." 2) The clothing description is sufficient to support a finding of probable cause (R 501-502). The court erred in denying the motion to suppress because nothing in the warrant supported any conclusion that the "eyewitness" was believable, the crucial inquiry.

Because the police obtained a search warrant,[18] the inquiry focusses on whether "given all the circumstances set forth in the affidavit before [the magistrate], including the 'veracity and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that . . . evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Thus, the court was wrong from the start when it "decline[d] the invitation to determine the credibility of eyewitnesses to the crime for which the Defendant is charged." (R 501) While the United States Supreme Court has rejected the "two prong test" established in Augilar v. Texas, 367 U. S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 583, 21 L.Ed.2d 637 (1969) in favor of a "totality of the circumstances" approach to decide the sufficiency of the

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[18]The state admitted at the suppression hearing that because Major Reno left Green's motel room he needed to get a warrant to search it even though he saw the clothes the defendant ostensibly wore on the night of the murder (SR 124).

affidavit supporting the issuance of a search warrant, that court never said that evidence of the informant's reliability and the circumstances in which he obtained the evidence were therefore irrelevant. Rather than being the key inquiry, as it was under Aguilar and Spinelli, questions of informant reliability and the veracity of his tip became factors for the court to use in deciding if the police had probable cause to search.

> We agree . . . that an informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report. . . . [T]hey should be understood simply as closely intertwined issues that may usefully illuminate the common sense, practical question whether there is 'probable cause to believe that . . . evidence is located in a particular place.

Gates, at 230.

Thus, the trial court in this case could "decline the invitation to determine the credibility of eyewitnesses to the crime" (R 501), but it was wrong in doing so. Roper v. State, 588 So. 2d 330 (Fla. 5th DCA 1991) (Veracity or reliability of the informants and their information is still an integral part of the totality of the circumstances that must be considered.)

In Smith v. State, 637 So. 2d 351 (Fla. 1st DCA 1994) the police seized some cocaine found in the defendant's home during a search for stolen guns. The warrant authorizing the intrusion was based on the statements of two confidential informants who had been inside Smith's house and had seen or bought the stolen weapons. The affidavit said, regarding the reliability of the informants, that they were "citizens and residents of Bay County" and had proved reliable in the past. Id. at 351. The First District Court of Appeals reversed the trial

court's denial of Smith's motion to suppress, reasoning that the affidavit supporting the search warrant "neither alleges nor shows the affiant's personal knowledge of the informant's reliability." Id. at 353. Similarly, that an informant had given the police a stolen weapon was insufficient because "it does not allege that the informant obtained the firearm from the subject residence. Therefore, the 'fact' that a stolen firearm was produced for police does not corroborate the informants' reliability." Id.

Other cases cited in Smith supported the First District's ruling. In Brown v. State, 561 So. 2d 1248 (Fla. 2d DCA 1990), the police obtained a search warrant that relied exclusively on a confidential informant's report that he had used the money given him to buy drugs at a particular house. The affidavit supporting the warrant said, regarding the informant's reliability, only that he had proven reliable in the past. The Second District reversed because the officers never alleged their personal knowledge of the informant's reliability and they did not personally observe the informant; instead they depended on the information he had relayed to them.

Similarly, in St. Angelo v. State, 532 So. 2d 1346 (Fla. 1st DCA 1988), the fatal flaw in the affidavit came from the use of an informant that had proven reliable to other policemen who were not the affiants in that case.

Green cites those decisions because they provide closer questions than that presented here. Major Reno never made any statement regarding the reliability of his eyewitness. All he said was "An eyewitness to the crime described the clothing worn by the perpetrator and was able to identify Joseph Nahum Green, Jr. as the perpetrator." (R 6) Like the affiants in

Smith, Roper, and St. Angelo, Major Reno made no effort to establish the veracity, reliability, and basis of knowledge of his key witness. That was a crucial failing because the "totality of the circumstances" was the eyewitness' account. The officer provided no other information that would have led a reviewing magistrate to make a common sense conclusion that Green had killed Mrs. Miscally.

That the police saw the clothes Green allegedly wore the night before does not bolster the eyewitness' credibility. The affidavit said they "matched the clothing description given by the eyewitness to the shooting." (R 7) But, the key link, that the clothes matched the description given by the eyewitness, breaks down because, as before, his veracity and reliability had not been established. Thus, the information the police used to provide probable cause fails to do so because the affidavit never established the eyewitness' credibility and reliability, and the police provided no other information from which the reviewing court could have concluded from the "totality of the circumstances" that Green had murdered Mrs. Miscally and his clothes were at the motel room.

The State, of course, argued that the good faith exception to the exclusionary rule saved this obviously defective affidavit (SR 113 and subsequent pages). In Smith, St. Angelo, and other cases less egregious than this one, the appellate courts refused to apply it. "Here, the affidavit is based entirely on hearsay information obtained from informants whose reliability is supported neither by the affiant's personal knowledge, nor by independent corroborating facts." Smith, at 353. This court, for similar reasons, should reject any application of this savings rule because the affidavit obviously lacked reliable evidence

establishing probable cause and describing the clothes to be seized. Leon, cited above at 923.

A second problem crops up in this warrant: it provided no particular description of what the police could seize. It permitted them to take the clothing Joseph Nahume Green, Jr. wore the evening of the 8th of December, 1992 (R 385), but nowhere did the police describe that clothing with any limiting particularity, a requirement of the Fourth Amendment. Winters v. State, 615 So. 2d 262 (Fla. 4th DCA 1983). The affidavit could have saved the defective warrant if it had adequately described the clothing, but it did not. Moreover, it could do so only if the warrant specifically incorporated the affidavit and the two were physically connected. State v. Kingston, 617 So. 2d 414 (Fla. 2d DCA 1993). As to the latter requirement, at the suppression hearing the court never had the original warrant to decide if Major Reno's statement was attached to it. More significant, however, the warrant never explicitly said the former was considered part of the warrant, as the trial court recognized in its order denying the Motion to Suppress: "A second and more difficult problem presents itself in that the affidavit is not incorporated into the search warrant." (R 503) There is, therefore, nothing that would enable "the searchers to reasonably ascertain and identify the items authorized to be seized." Winters, at 263. The police could have searched for anything they believed had some connection to the case. Nothing limited their discretion of where they could search or what they could seize. Carlton v. State, 449 So. 2d 250 (Fla. 1984).

> [W]here the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other.

State v. Nejin, 140 La. 793, 74 So. 103, 106 (1917), Quoted with approval in Carlton.

What is more, that Major Reno saw the clothes Gwen Coleman said Green wore that night cannot save the warrant, even if he had included that observation in the affidavit. The validity of the warrant must be found within the "four corners" of the warrant. Carlton, at 251. Here, the executing officer would have had to rely on facts outside the warrant (and even the affidavit) to find out what clothes to seize. That is, without a description of the clothes, such as a dark blue or black pin stripe suit, a brown trenchcoat, black suspenders, or a white shirt, whoever conducted the search would have had to talk with Major Reno (who would have in turn had to talk with Ms. Coleman) about what clothes' Green had worn on December 8, 1993 "to prevent the seizure of one thing under a warrant describing another. Yet, as to what is to be taken, "nothing is left to the discretion of the officer executing the warrant." Carlton, at 251, quoting with approval, Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed.2d 231 (1927).

In its order, the trial court relied on the Second District's Case, State v. Carson, 482 So. 2d 405 (Fla. 2d DCA 1985) for the proposition that since the file contains the affidavit and it is shown to the trial court as part of the "total package" the necessity for physical attachment of the affidavit to the warrant is waived (R 504). That appellate court, however, clarified its holding by noting:

> In Carson, we did not require physical attachment of the affidavit where the affidavit was contained in a file folder along with the warrant by reference. There, however, the affidavit was specifically incorporated into the warrant by reference.

Kingston, cited above at 415.

Carson, which the lower court here heavily relied on provides little help. Judge Cates expressly ruled that the affidavit was neither incorporated into the search warrant (R 503), nor was it attached to it (R 504). Thus, while he may have believed the affidavit limited him, there was nothing in the search warrant that inherently controlled the discretion of the officer who executed it. As the United States Supreme Court in Marron, quoted above, held, however, that is the reason for the particularity requirement for the search warrant: to leave nothing to the discretion of the officer executing the warrant.

The trial court, therefore, erred in denying the motion to suppress, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IX

THE COURT FAILED TO CONDUCT AN ADEQUATE HEARING TO DETERMINE IF LONNIE THOMPSON WAS COMPETENT TO TESTIFY, AND IT COMPOUNDED THAT MISTAKE BY FINDING HIM SO QUALIFIED, A VIOLATION OF GREEN'S FOURTEENTH AMENDMENT RIGHTS.

By way of a pre-trial motion, Green alleged that Lonnie Thompson, the state's key and sole witness against him was incompetent to testify at his trial, and he was so at the time he allegedly saw Green shoot Ms. Miscally (R 113). The court held a hearing on the matter at trial and immediately before he testified (T 1131-1158).

The state only established his ability to tell the difference between blue suits and red suits:

> Q. Would you tell the judge your name, please.
>
> A. Lonnie Thompson.
>
> Q. Lonnie, you have just taken an oath to tell the truth. What does that mean to you?
>
> A. Tell the truth.
>
> Q. All right. If you told something that was not the truth would that be wrong in your opinion?
>
> A. Yes, it would
>
> Q. Okay. If I said to you this suit is red, would that be the truth?
>
> A. No.
>
> Q. What color is it?

A. Blue.

(T 1137-38).

After a brief inquiry into some medication he had been taking plus his use of alcohol (or rather his nonuse) the morning of the hearing, the state concluded, saying "All right. I believe that's sufficient." (T 1138)

On cross examination, Green probed the medication problem this witness had mentioned. He also admitted to having dizzy spells, "headaches sometimes," and memory problems (T 1141, 1144). He said he had been beaten in the head with a stick (T 1142), and a piece of steel shrapnel had hit his eye when he had worked at a steel plant (T 1143). He denied then admitted using cocaine (T 1144), and to not having drunk recently. On the night of the murder he "had a few beers." (T 1146) Actually, it was 4 sixteen-ounce bottles or maybe it was 12 "tall Boys" or a gallon of beer (T 1212, 1147). It did not matter, anyway because "I don't get drunk." (T 1179, 1211)

Green concluded by asking the court to admit as evidence, a competency evaluation done of Thompson for another judge in another case. Specifically, an HRS Diagnostic and Evaluation Team had found that he had an IQ of 67, which placed his intellectual functioning in the mentally retarded range. He was not so classified, however, because his "day to day living skills" were such that he could function somewhat in modern society. (Defendant's Exhibit 1)

Based on Thompson's testimony and portions of the mental evaluation report done on him, the court found this witness competent to testify (T 1158). That was error. It was error

because the hearing never established Thompson's competency that, in any event, proved this witness was incompetent to testify.

The law in this area is simple. A witness is presumed competent to testify. Section 90.601 Fla. Stats. (1995). That presumption is rebuttable, however. Whenever a particular witness' ability and capacity to testify is challenged, the trial court must decide if the "witness has sufficient intelligence to receive a just impression of the facts about which he or she is to testify and has sufficient capacity to relate them correctly, and appreciates the need to tell the truth." Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988).[19]

In Griffin v. State, 526 So. 2d 752 (Fla. 1st DCA 1988), the First District found a more extensive competency hearing than the one conducted here inadequate to determine the ability of a four-year old child to testify truthfully. It reached that conclusion because the prosecution had not "unequivocally established" the child was capable of separating fact from fantasy. Id. at 755. Asking questions remarkably similar to the ones put to Thompson, the prosecutor inquired:

> Q. Okay. Look at your shoes there. If I told you your shows were red, it that true or is that a lie?
>
> A. A lie.
>
> Q. What color are your shoes?
>
> A. Black.
>
> Q. Good girl. What happens when you tell a lie

[19]Competency is within the trial court's discretion to determine. Lloyd at. 400.

to your mommy?

A. She will put me in my room.

Id. at 755.

In this case, after the state had asked about the color of the suit, it questioned Thompson about any medication or alcohol he had taken (T 1138). Its inquiry into this witness' competency was, if possible, even more abbreviated than the "de minimis competency examination" the trial court supervised and the appellate court disapproved in Griffin. More fatal, the state directed none of its questions to finding outThompson's current capacity to recollect facts on the night of the murder, a significant deficiency. Griffin; Wade v. State, 586 So. 2d 1200, 1203 (Fla. 1st DCA 1991). In Wade, the child victim's competency was challenged, and the state provided far more detail of the child witness' ability to recall and tell the truth than done here. That extensive inquiry, however, was inadequate because the prosecutor asked no questions that would have established the child witness' current competency.

> The child was asked a few questions about Santa Claus and the Easter Bunny; but otherwise there was no attempt to demonstrate during voir dire that the child was capable of recollecting events which occurred between eight months and two years prior.

Id.

Similarly here, after the state's brief inquiry, the prosecutor said, "I believe that's sufficient." (T 1138) It was not. Based on the meager facts presented, the court simply could not have reliably determined Thompson's ability to recall the events that had happened over

eighteen months earlier. As shown in Issue I, he had problems recalling facts accurately.

Even if this short examination satisfied some Mongolian sense of justice, there simply was insufficient evidence for the court to have found Thompson competent to testify. Besides this witness' testimony, the court relied on the Evaluation Report's finding that concluded the state could use him in another case (T 1157).[20] More significant for the court, however, the "evaluator says, 'Mr. Thompson impressed this writer as being realistic in his assessment of various skills and weaknesses. Mr. Thompson scored an age equivalent sixteen years, social quotient eighty-eight. These scores represent the lower end of normal adaptive behavior.'" (T 1157-58)

The Diagnostic and Evaluation Team Report had decided that Thompson had an IQ of 67 that was well within the mentally retarded range, but because he could cope with the demands of daily life, he was not mentally retarded as defined by Section 393.063 Fla. Stats (1993).[21] This latter point needs emphasizing because his ability to "prepare simple meals on

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[20]Competency is a legal decision for the court, not some administrative agency to make. See, Muhamad v. State, 494 So. 2d 969, 973 (Fla. 1986).

[21]That section has a two prong definition of mental retardation: First the person must have a significantly subaverage general intellectual functioning. This means the person's IQ must be less than 70. Second, the persons must also have "deficits in adaptive behavior. That is, the person must be unable or have great difficult functioning in modern society. Third, these characteristics must have been evident before the person was 18. See generally, Davis, "Executing the Mentally Retarded in Florida," Fla. Bar Journal February 1991, at 13.

the stove and [make] snacks, sandwiches and beverages" (Defense Exhibit 1, page 4), while showing he was not statutorily retarded, had little to do with his ability to tell the truth or testify accurately. His IQ, on the other hand,

showed his lack of intelligence, a key factor in determining his competency to testify.

That Thompson could make a sandwich had nothing to do with his ability to recall the events that had happened over 18 months earlier and then testify truthfully. Lloyd at 400. As Green showed in the competency hearing, this witness, when he perceived his personal interests at stake, could lie and slip slide around the truth. When asked if he had ever used cocaine, he lied then admitted, yes, he use some, "but I ain't using none now." (T 1144) He revealed he was a "drinking man," but he was also "cutting it aloose, you know." (T 1145) He was not drinking these days, well at least not since Tuesday or Wednesday of the week of the hearing (T 1145).

Even in matters not so personally threatening, Thompson had difficulty telling the truth. He told the police wildly varying versions of what he had seen on December 8. When first questioned, he said a white male had attacked Ms. Miscally. He lied to this Officer Johnson that because he did not like the officer, and wanted to get away from him (T 1188, 1259). Why he should have believed he could have avoided seeing the police by telling them that story is a mystery. Only later, when he learned the victim had died, did he change his story.[22] Two months later, in February, Thompson told Lieutenant Wilkinson that he did not

[22]Even then, it took the police several hours to get a paragraph narrative of what he had seen (T 1363).

remember what the assailant's clothing looked like (T 1152). Yet, at trial he claimed Green wore a dark suit, a white shirt, a trenchcoat, and a gun holster (T 1133, 1245).[23]

Thompson, thus, had a demonstrated inability to get his story straight, meaning that he had no real perception of what it meant to tell the truth. His low intelligence may have contributed to this deficiency, but whatever the source, this witness simply lacked the capacity to have recalled what he saw on December 8, 1992, to accurately testify about those facts, and to appreciate the need to tell the truth about what he had seen.

The court's error was particularly egregious because Thompson provided the only evidence linking Green with the murder. No one else did so, and to the contrary, the defense put on a witness who gave a different version of what happened. Mrs. Kintner significantly contradicted his testimony, and other defense evidence showed that on the night of the murder, Green merely sauntered about down town Starke, acting as if nothing was the matter. This was hardly the way someone who had just shot a woman would have acted. See, Griffin, at 755. ("Where, as in the instant case, the critical facts are totally dependent on the child's observations and ability to recall and to recount those observations accurately, the competency

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[23]When counsel tried to demonstrate Thompson's poor memory and willingness to fill in its gaps with a made up story, the state objected, and the court noted, "I don't think it does reflect on the witness' competency." (T 1153). Counsel objected noting that the competency issue involved "an underlying investigation or inquiry as to whether the witness had the requisite ability to perceive the events at issue and to recall them at a later date, being whenever he's called as a witness, and then to relate that facto to a jury or fact finder." (T 1153)

determination of the child as a witness is of increased significance.")

This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE X

THE COURT ERRED IN REFUSING TO LET GREEN ARGUE RESIDUAL DOUBT AS TO HIS GUILT IN THE PENALTY PHASE OF THE TRIAL AS A LEGITIMATE REASON FOR THE JURY TO RECOMMEND LIFE AND FOR THE COURT TO HAVE IMPOSED THAT SENTENCE.

During his penalty phase opening statement, Green tried to discuss the possibility that innocent defendants have occasionally been exonerated years after their convictions, but the court sustained a state objection to it (T 1840-41). Later, defense counsel proffered the testimony of one Johnny Martin and Lisa Hutchinson to show that someone other than Green could have committed the murder (T 1858-72). The state objected, saying "what this lady [Hutchinson] says in nothing but an attempt to relitigate guilt or innocence." (T 1873) Defense Counsel essentially agreed, noting "there's no evidence been presented to the jury, other than Lonnie Thompson's testimony, that this defendant committed the homicide; that is, pulled the trigger." (T 1875) The court refused to let those witnesses testify because what they had to say "really isn't a mitigating factor. It just goes to the issue of whether Mr. Green is guilty or not. We've already litigated that issue and the jury has made its determination and we cannot revisit it." (T 1876) Responding, Green's lawyer said "it would be my contention that if there is some doubt, if there is some evidence that perhaps Joseph Green was not the trigger man, the man with the gun, the man that fired the shots, it was one of the other persons, that would be of significance to a jury in deciding whether this particular person deserves or warrants the death penalty for whatever his part was in this robbery/homicide." (T 1876-77) Unmoved, the

court excluded Green's proffered evidence (T 1877-78). That was error.

Appellate Counsel is well aware that this court has ruled that residual doubt as to a defendant's guilt does not mitigate a death sentence. Ten years ago he argued that point and lost. Burr v. State, 466 So. 2d 1051 (Fla. 1985). This court has reiterated that holding several times since then. Preston v. State, 607 So. 2d 404, 411 (Fla. 1992); White v. Dugger, 523 So. 2d 140 (Fla. 1988); Tafero v. Dugger, 520 So. 2d 287, 289 (Fla. 1988). He also knows that the United States Supreme Court has decided that a state can prevent a defendant from so arguing. Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988). This case, however, shows why those rulings are wrong, and why this court should allow defendants facing a death sentence to argue that the legitimate, residual doubt can mitigate a death sentence.

In Burr this court said, in rejecting residual doubt as a mitigator,

> [A] convicted defendant cannot be a 'little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Id. at 1054.

Yet, others have not seen the problem that way. They have focussed instead on the uncertainty inherent in any verdict in a criminal case and the conclusive finality of a death sentence.

Justice Marshall, in two dissents from denials of certiorari, considered that doubt as to guilt could validly mitigate a death sentence.

> [T]he 'reasonable doubt' foundation of the adversary method attains neither certainty on the part of the fact finders nor infallibility , and accommodations to that failing are well established in our society. . . . In the capital sentencing context, the consideration of possible innocence as a mitigation factor is just such an essential accommodation.

Burr v. Florida, U.S. 106 S.Ct. 201, 203, 88 L.Ed.2d 170 (1985).

> There is certainly nothing irrational-indeed, there is nothing novel-about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. there is simply no possibility of correcting a mistake. the horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice.

Heiney v. Florida, 469 U.S. 920, 921-22, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984).

Residual doubt is so strong a mitigator that the framers of the Model Penal Code's death penalty statute absolutely precluded a death sentence where there was some lingering question that the defendant may not have committed the charged murder.[24]

> Death Sentence Precluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [i.e. a non

[24]Florida's death statute tracks, in many respects, the Model Penal Code's capital sentencing statute.

capital felony offense] if it is satisfied that:

* * *

> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

ALI Model Penal Code Section 210.6(1) p. 107 (Official Draft, 1980).

Even one member of this court has dissented from following the holding and reasoning of Burr and its progeny. Melendez v. State, 498 So. 2d 1259, 1263 (Fla. 1986)(Barkett, dissenting.)

Finally, as a practical matter, jurors are going to consider the strength of their conviction of the defendant's guilt in the penalty phase, much as they probably realize in the guilt phase portion that if they return a verdict of guilt they will have to consider whether a death sentence should be imposed. Obviously, the jury in Burr, based its life recommendation on their persistent, residual doubt that he had committed the charged murder. It was the only thing that could have mitigated a death sentence in his case. Similarly, three jurors in Wike v. State, 596 So. 2d 1020 (Fla. 1992) had enough doubt that Wike had kidnapped two young girls, raped one of them, and had brutally slashed both of their throats, killing one to have voted for life. At a subsequent resentencing, where the evidence showing he did not commit the murders was excluded, none of the jurors recommended life. Wike v. State, 648 So. 2d 683 (Fla. 1994). Jurors will include their doubt as to the defendant's guilt in their sentencing deliberations, despite rulings in cases like Burr that said to do so was unreasonable. Human beings cannot compartmentalize their decisions with the logic expounded by this court in

Burr. Life is too uncertain, the consequences of decisions too far reaching for anyone but those too blind to see that mistakes are made even under the best of circumstances. It is supremely reasonable to allow jurors the comfort of knowing that when they seriously consider a defendant's fate, any lingering doubt they may have about his guilt can mitigate a death sentence. To wrap the guilt and sentencing phase issues into neat, separate, logical packages defies human experience and practical realities.

As argued in Issue I the case against Green was extraordinarily weak. Green never confessed, nor did the state present any physical evidence, such as hairs, blood, or fingerprints, to link him with the murder. The crime scene was poorly lit, and one of the persons who saw the shooting could only tell that one person was about six inches taller than the other (T 817). He could not identify the sex or race of either person though he was closer to the incident than Lonnie Thompson who not only saw the incident but identified Green as the assailant.

Yet this state witness was mentally retarded and drunk on the night of the murder. When the police asked people at the scene if anyone had seen anything, he remained silent (T 1253). When questioned by the police later that night, he claimed a white male had shot Ms. Miscally (T 1259). Only after an all night session could the police get anything from him, and that amounted to a short paragraph identifying Green as the killer.[25] Initially, he could not identify any clothing the assailant wore, yet at trial he testified about seeing Green's dark suit,

[25]Perhaps the police kept Thompson so long because they considered him a suspect.

trenchcoat, dress shirt, suspenders, and a gun holster (T 1133, 1233, 1245, 1248). The man must have had sharp eyesight to have seen all that. He must have had more to have seen the impossible struggle between Mrs. Miscally and the defendant. As the two fought, Green had a gun in one hand, his other grabbed the purse, and yet a third had hold of her other hand (T 1241-42). All the while, Green pointed the gun at her, "steady." (T 1242)

On the other hand, and this distinguishes this case from Burr and other cases in which residual doubt has been raised, Green presented a wealth of other evidence showing that either the crime occurred differently than Thompson described, or the defendant did not act like a person who had just shot someone.

Mrs. Kintner saw several men accost Mrs. Miscally and then flee after the shot (T 1587-88). Green himself was sauntering about town with his girlfriend, panhandling for money and cigarettes. About the time of the shooting, he was at a nearby Pizza Hut helping a man saw off the muffler from his car (T 1563-64, 1570). What he did that evening did not jive with the way a person normally behaves who has just shot someone.

Finally, in Windom v. State, 20 Fla. L. Weekly S200 (Fla. April 27, 1995) this court recently approved admitting Victim Impact Evidence, not because it had any relevance to the aggravating or mitigating factors, but simply so the jury could be aware of the victim's uniqueness and the resultant loss to the community. Rejecting the defendant's attack on the constitutionality of admitting such evidence, this court said, "We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators." Id. at S202.

If victim impact evidence has no constitutionally cognizable impact on jury deliberations then it is difficult to understand how doubt as to the defendant's guilt can, in anyway, unfairly tip the "playing field." If anything, such evidence and argument should be admitted under the rationale of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) that any aspect of the case that could rationally support mitigation is relevant for the jury to consider. Such evidence has greater logical relevancy than victim impact evidence, which has no bearing on the defendant's character or the nature of the crime, the measure of relevancy in a capital sentencing. Lockett, at 601; Section 921.142(2) Fla. Stat. 1995.

Thus, given the specific weaknesses of the state's case against Green, he respectfully asks this honorable court to reverse the trial court's sentence of death and remand for a new sentencing hearing so he can present evidence and argue that any lingering doubt the jury may have of his guilt can mitigate a death sentence.

ISSUE XI

THE COURT ERRED IN REFUSING TO CONSIDER EVIDENCE THAT GREEN HAD TAKEN A POLYGRAPH EXAMINATION AND HAD SHOWN NO DECEPTION WHEN ASKED ABOUT HIS INVOLVEMENT IN THE MURDER OF JUDITH MISCALLY, A VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

In the previous issue, Green asked this court to reverse the law on residual doubt as a mitigating factor. In this issue, he asks it to continue its tradition breaking pattern and rule that the trial court should have let him present evidence that he had taken a polygraph examination and his answers showed no deception when he denied any involvement in the murder of Judith Miscally (T 1816). Green wanted this evidence admitted to bolster his residual doubt argument, so if this court rules that lingering doubt has no relevance in the penalty phase portion of a guilt phase, this court can summarily affirm the trial court on this issue. If, however, the notion that people of good conscience can be convinced of a defendant's guilt, yet because they do not have the blind confidence of the true believer they may harbor some lingering doubt of the correctness of their verdict, a safety valve in the form of lingering doubt may be allowed. If so, then what evidence can a defendant present to bolster that doubt?

Traditionally, this court has refused to allow evidence the defendant took and passed a polygraph examination into evidence at the guilt phase of a trial. Davis v. State, 520 So. 2d 572, 574 (Fla. 1988); Delap v. State, 440 So. 2d 1242 (Fla. 1983); Kamininski v. State, 63 So. 2d 339 (Fla. 1952). Recently, however, some federal cases have questioned whether lie

detector evidence should be excluded, and they have given approval to its admissibility. At least one District Court of Appeal has faced the issue, but refused to recognize the changes in polygraphy reliability since 1923. McKenzie v. State, 653 So. 2d 395 (Fla. 4th DCA 1995).

Here, Green wanted the evidence that he had shown no deception when he had taken the polygraph test admitted to bolster his residual doubt argument (T 1754-60). Supporting the admissibility of this proof, he presented the testimony of Clarence Kirkland, a polygrapher accepted by the state as an expert in polygraphy (T 1812). He offered evidence that polygraphy had advanced so that it met the test of general acceptance in the scientific community announced in Frye v. United States, 293 F 1013, 1014 (D.C. Cir. 1923) or the more relaxed test of relevancy adopted by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals Inc, 509 U.S. ___, 113 S.Ct. ___, 125 L.Ed.2d 469 (1993). Specifically, he said the following:

1. The machine used in Frye was an "antique instrument," probably among the first built and unsophisticated by modern standards (T 1809).

2. The Stotling polygraph, the machine he used, was invented in the 1970s (T 1809). The scientific community gave it a reliability rating of 87-100 percent (T 1810).

3. Regarding the questions asked, none were "sprung" on the person being examined. "No surprise questions, none at all." (T 1809) They were rehearsed with the subject (T 1812), and the examination was usually run two or three times, preferably three as in this case (T 1813, 1816). The crucial questions, such as "Did you at any time fire a pistol in [Mrs. Miscally's] direction?" were interwoven with other non significant or control questions (T

1818-19).

4. A person cannot defeat a polygraph test by controlling his physiological responses (T 1814).

5. The techniques and machine Kirkland used are accepted by those in his profession, and the polygraphy test has a reasonable degree of accuracy (T 1815).

When Kirkland administered his test to Green, he found "no discernible indicator of deception." (T 1816, 1820) Specifically, Green was telling the truth when he denied being in Mrs. Miscally's presence when she was shot (T 1818-19). Similarly, he never fired a gun at the victim (T 1819).

Such testimony would obviously have had relevance to Green's residual doubt argument, and should have been admitted. If this court follows the Frye test of admissibility, Kirkland's testimony established without serious contradiction that those "who have made a study of the polygraph, but not necessarily polygraph examiners" have accepted the reliability of that device (T 1821). The Fifth and Eleventh Circuit Courts of Appeal have recognized "that tremendous advances have been made in polygraph instrumentation and technique in the years since Frye." If the results of a polygraph examination are not admitted outright, a trial court should at least consider them reliable enough to further consider their admissibility. U. S. v. Posado, (5th Cir. April 20, 1995); United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989). Thus, because of "the increased reliability and acceptance in the scientific community" of polygraphy, McKenzie, cited above, at D183, the court in this case should have admitted Kirkland's proffer as meeting the Frye test of enhanced reliability.

Similarly, if this court follows the United States Supreme Court's lead in Daubert, the polygraphy results should have been admitted. The nation's high court reasoned that the federal rules of evidence had largely superseded the Frye test. Relevancy, the touchstone of admissibility in all other areas of proof, now encompassed scientific evidence. Also, Rule 702 of the federal rules, on which section 90.702 Fla. Stat. (1995) is modeled, governs the admissibility generally of scientific evidence, and it, like our rule, has no "general acceptance" prerequisite to allowing the factfinder consider technical evidence. Id. at 125 L.Ed.2d 480.[26]

As the United States Supreme Court reasoned in Daubert, there is no reason that court should continue to follow the Frye test. The Florida Rules of Evidence were adopted well after this court rejected the admissibility of polygraphy evidence under Frye. Nothing in that guidance establishes "general acceptance" as an absolute prerequisite to admitting scientific evidence. The framers of the rule, if they had believed that such a preliminary requirement was necessary, could have written the rule to require that some previously unheard of scientific principle, technique, or device to have "gained general acceptance in the particular field to which it belongs." Frye, at 1014. If relevancy is the guiding light for admissibility of evidence in Florida, Ruffin v. State, 397 So. 2d 277 (Fla. 1981), all relevant evidence should be admitted if its probative value outweighs any unfair prejudicial burden it may also carry.

There is, moreover, a clear constitutional mandate that the polygraph evidence should have been admitted. In Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37

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[26] "The Evidence Code is patterned after the Federal Rules of Evidence." Ehrhardt, Florida Evidence, 1994 edition, p. 2.

(1987), the court held that a defendant has a right, under the Fifth and Sixth Amendments to present his testimony that had been hypnotically refreshed. This court in Bundy v. State, 471 So. 2d 9 (Fla. 1985) had earlier categorically declared as inadmissible any hypnotically refreshed evidence, but in Morgan v. State, 537 So. 2d 973 (Fla. 1989) it had to recognize Rock and allow such proof at least as far as the defendant was concerned. Its ruling did not include other witnesses.

Similarly, here, in order for Green to have the full benefit of his Fifth Amendment right to testify in his own behalf, and his Sixth Amendment right to conduct his own defense, this court should recognize that in this limited instance, the court should have admitted the polygraph results.

This court should relegate the Frye test in Florida to the history books, and adopt the relevancy test found more appropriate in Daubert. It should reverse the trial court's sentence and remand so that Green can present his evidence that he passed the lie detector test given to him.

ISSUE XII

THE COURT ERRED IN FINDING THAT GREEN COMMITTED THE MURDER OF JUDITH MISCALLY DURING THE COURSE OF AN ATTEMPTED ROBBERY, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Green to death, the court find that he had murdered Judy Miscally during the course of an attempted robbery.

> The capital felony was committed while the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a robbery. The State produced a witness, Dwayne Hardee, an employee of the City of Stake Fire Department who knew the victim prior to the shooting. On direct examination witness Hardee testified that the victim talked to him when he first approaced her to render assistance to her. Witness Hardee testified "she said the individual produced a weapon and demanded money and she stated that she screamed and that he became angry with her, told her to shut up. She screamed again. He physcially grabbed her a that point and shot her. The capital felony was committed, therefore, while the Defendant was engaged in the commission of, or attempt to commit, or escape after committing, or attempting to comit a robbery. This aggravating circumstance was approved beyond a reasonable doubt.

(R 644).

The court in finding this aggravating factor because the state never charged Green with committing an attempted robbery, and the court relied solely on hearsay to support this aggravating factor.

Green, of course, recognizes that this court has approved findings of this aggravator where the state never charged the defendant with committing the violent felony. Ruffin v. State, 397 So. 2d 277 (Fla. 1981); Delap v. State v. State, 440 So. 2d 1242 (Fla. 1983). He also recognizes this court has said the state can rely on hearsay in the penalty phase of the trial Section 921.141(1) Fla. Stats. (1995). Nevertheless, he argues that where hearsay provides the only evidence Green committed the murder during an attempted robbery, the sentencing court cannot find that aggravator. This is particularly true where, as here, the state never charged the defendant with the offense the court found the hearsay had established beyond a reasonable doubt.

That is, if a defendant's probation cannot be revoked solely on the basis of hearsay, Reeves v. State, 366 So. 2d 1229 (Fla. 1979), a death sentence should not be justified using the same type of evidence.

Also, if the court wants to find this aggravator, the state should at least have charged and proved it during the guilt phase of the trial. There is an element of unfairness for the court to find Green committed a crime for which he had no opportunity to defend himself against. The state never charged this defendant with committing an attempted robbery, so he had no reason to defend himself against it. He had no opportunity to deny he had committed it because he would have been contesting his guilt during the penalty phase, something this court has refused to recognize a defendant can do. See ISSUE X. Moreover, the jury would have been confused by him doing so because he would have certainly relitigated issues and facts the jury had just resolved. Why, they would think, are we rehashing the same stuff? The

better, more lgoical and fair course would require the state, if it wanted to use the aggravator that the defendant committed the murder during the course of an attempted robbery, to have charged and proven that offense during the guilt phase portion of the trial.

Moreover, to justify finding this aggravator, the hearsay had to show that attempted robbery was the dominant motive for the murder. Clark v. State, 609 So. 2d 513 (Fla. 1992). That evidence failed to do that, and to the contrary, it raised the equally plausible possibility that Green shot Miscally because "he became angry with her" when she screamed. Anger, not attempted robbery was the dominant motive for the killing.

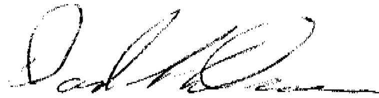
This court should reverse the trial court's sentence and remand for a new sentencing hearing.

CONCLUSION

Based on the arguments presented here, Joseph Green respectfully asks this honorable court to either reverse the trial court's judgment and sentence and remand for a new trial, or reverse the trial court's sentence and remand for a new sentencing hearing before a jury.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, JOSEPH NAHUME GREEN, JR., #091882, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 30th day of October, 1995.

DAVID A. DAVIS