

IN THE SUPREME COURT OF FLORIDA

RONALD KEITH WILLIAMS,)
)
 Appellant,)
)
 vs.) CASE NO. 89,668
)
 STATE OF FLORIDA,)
)
 Appellee.)
)
 _____)

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

ARGUMENT

POINT I

THE TRIAL COURT REVERSIBLY ERRED IN PLACING ALTERNATE JUROR CARIL ON THE JURY AFTER DELIBERATIONS HAD BEGUN. . . . 1

POINT II

IT WAS FUNDAMENTAL ERROR TO INTERFERE WITH THE JURY DELIBERATIONS BY REMOVING JUROR WALLACE WITHOUT CONDUCTING AN ADEQUATE INQUIRY THAT WOULD JUSTIFY SUCH A REMOVAL. 15

POINT III

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S PLACING UNDUE PROMINENCE ON THE JURY'S NOTES. 16

POINT IV

THE TRIAL COURT ERRED IN FAILING TO HOLD AN ADEQUATE INQUIRY INTO THE IMPACT OF DEFENSE COUNSEL'S BIPOLAR ILLNESS ON APPELLANT'S RIGHT TO A FAIR TRIAL. 17

POINT V

APPELLANT DID NOT WAIVE HIS RIGHT TO CONFLICT-FREE COUNSEL AND THUS HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED. 18

POINT VI

APPELLANT WAS UNREPRESENTED BY COUNSEL DURING A CRUCIAL PROCEEDING AND THUS HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED. 21

POINT VIII

THE TRIAL COURT ERRED BY NOT BEING PRESENT DURING THE TESTIMONY OF A STATE WITNESS. 24

POINT IX

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON FELONY MURDER WITH SEXUAL BATTERY AS THE UNDERLYING FELONY AND ON THE AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE OCCURRED DURING A SEXUAL BATTERY BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE SEXUAL BATTERY. 25

POINT X

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO PROVE THE ELEMENT OF PREMEDITATION. 26

POINT XI

THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL. 26

POINT XII

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE THE HEARSAY STATEMENTS MADE TO OFFICER GILLESPIE. 26

POINT XIII

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE HEARSAY STATEMENTS MADE BY LISA DYKE DURING A 911 CALL AND AT THE HOSPITAL. 27

POINT XIV

IT WAS FUNDAMENTAL ERROR TO CONSTRUCTIVELY AMEND THE INDICTMENT CONTRARY TO THE GRAND JURY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS. 27

POINT XV

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON A THEORY OF FELONY-MURDER WHEN THE INDICTMENT GAVE NO NOTICE OF THE THEORY. 29

POINT XVI

THE TRIAL COURT ERRED IN USING INDECENT ASSAULT AS THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE. 30

POINT XVII

THE SENTENCE OF DEATH MUST BE VACATED AND THE SENTENCE

REDUCED TO LIFE WHERE THE TRIAL COURT FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY. 30

POINT XVIII

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED. 30

POINT XIX

THE TRIAL COURT ERRED IN ALLOWING THE EVIDENCE CONCERNING THE PRIOR VIOLENT FELONY TO BECOME A FEATURE OF THE CASE. 31

POINT XX

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL. 31

CONCLUSION 33

CERTIFICATION OF FONT 33

CERTIFICATE OF SERVICE 33

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Barwick v. State</u> , 660 So. 2d 685 (Fla. 1995)	25
<u>Berry v. State</u> , 298 So. 2d 491 (Fla. 4 th DCA 1974)	3, 6
<u>Brown v. State</u> , 644 So. 2d 52 (Fla. 1994)	31
<u>Bryant v. State</u> , 656 So. 2d 426 (Fla. 1995)	24
<u>Bulls v. United States</u> , 490 A.2d 197 (D.C. App. 1985)	12
<u>Causey v. State</u> , 307 So. 2d 197 (Fla. 2d DCA 1975)	28
<u>Cole v. Arkansas</u> , 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948)	28
<u>Commonwealth v. Saunders</u> , 686 A.2d 25 (Penn. 1996)	12, 13
<u>Commonwealth v. Saunders</u> , 686 A.2d 25 (Penn. 1996)	11
<u>Cork v. State</u> , 433 So. 2d 959 (Ala. App. 1983)	7
<u>Cuyler v. Sullivan</u> , 446 U.S. 335 (1980)	21
<u>Dilorenzo v. State</u> , 711 So. 2d 1362 (Fla. 4 th DCA 1998)	6
<u>Florida Fertilizer & Mfg. Co. v. Boswell</u> , 45 Fla. 301, 34 So. 241 (Fla. 1903)	9
<u>Haley v. State</u> , 315 So. 2d 525 (Fla. 2d DCA 1975)	28
<u>Hardwick v. State</u> , 521 So. 2d 1071 (Fla. 1988)	18

<u>Holley v. State</u> , 484 So. 2d 634 (Fla. 1 st DCA 1986)	17
<u>Lamadrid v. State</u> , 437 So. 2d 208 (Fla. 3d DCA 1983)	5, 9
<u>Long v. State</u> , 92 So. 2d 259 (Fla. 1957)	28
<u>Ludaway v. State</u> , 632 So. 2d 723 (Fla. 5 th DCA 1994)	5, 9
<u>Markham v. United States</u> , 160 U.S. 319, 16 S.Ct. 288, 40 L.Ed. 441 (1895)	28
<u>Martin v. State</u> , 363 So. 2d 403 (Fla. 4 th DCA 1978)	17
<u>McCrane v. State</u> , 194 So. 632 (Fla. 1940)	26
<u>Minor v. State</u> , 329 So. 2d 30 (Fla. 2d DCA 1976)	28
<u>Myers v. State</u> , 499 So. 2d 895 (Fla. 1 st DCA 1986)	17
<u>Padgett v. State</u> , 743 So. 2d 70 (Fla. 4 th DCA 1999)	19, 21, 22
<u>People v. Bunette</u> , 775 P.2d 583 (Colo. 1987)	12
<u>People v. Ryan</u> , 224 N.E.2d 710 (N.Y. 1966)	7
<u>Perkins v. Mayo</u> , 92 So. 2d 641 (Fla. 1957)	28
<u>Plate v. State</u> , 925 P.2d 1057 (Alaska App. 1996)	8, 12
<u>Ray v. State</u> , 403 So. 2d 956 (Fla. 1981)	28
<u>Rhodes v. State</u> , 547 So. 2d 1201 (Fla. 1989)	31
<u>Ruiz v. State</u> , 24 Fla. L. Weekly S157 (Fla. April 1, 1999)	16

<u>Sheppard v. Rees</u> , 909 F.2d 1234 (9th Cir. 1990)	29
<u>Sloan v. State</u> , 438 So. 2d 888 (Fla. 2d DCA 1983)	6
<u>Sochor v. State</u> , 619 So. 2d 285 (Fla. 1993)	25
<u>Sotola v. State</u> , 436 So. 2d 1001 (Fla. 5 th DCA 1983)	4
<u>State v. Bobo</u> , 814 S.W.2d 353 (Tenn. 1991)	8, 9
<u>State v. Bunning</u> , 485 S.E.2d 290 (N.C. 1997)	8, 9
<u>State v. Gray</u> , 435 So. 2d 816 (Fla. 1983)	28
<u>State v. Lehman</u> , 321 N.W.2d 212 (Wis. 1982)	11, 12
<u>State v. Sykes</u> , 434 So. 2d 325 (Fla. 1983)	28
<u>Stirone v. United States</u> , 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)	28
<u>The Schooner Hoppet and Cargo v. United States</u> , 11 U.S. 389, 7 Cranch 388, 3 L.Ed. 380 (1813)	28
<u>Tucker v. Day</u> , 969 F.2d 155 (5 th Cir. 1992)	19, 21, 22
<u>United States v. Beasley</u> , 464 F.2d 468 (10 th Cir. 1972)	6
<u>United States v. Bosch</u> , 584 F.2d 1113 (1 st Cir. 1978)	18
<u>United States v. Maclean</u> , 578 F.2d 64 (Fla. 3d DCA 1978)	16
<u>United States v. McFarland</u> , 34 F.3d 1508 (9 th Cir. 1994)	10

<u>Waters v. State</u> , 486 So. 2d 614 (Fla. 5 th DCA 1986), <u>rev. den.</u> , 494 So. 2d 1153 (Fla. 1986)	24
<u>Whitton v. State</u> , 649 So. 2d 861 (Fla. 1994)	16
<u>Wike v. State</u> , 648 So. 2d 683 (Fla. 1994)	4
<u>Williams v. State</u> , 414 So. 2d 509 (Fla. 1982)	3
<u>Wood v. Georgia</u> , 450 U.S. 261 (1981)	21

ARGUMENT

POINT I

THE TRIAL COURT REVERSIBLY ERRED IN PLACING ALTERNATE JUROR CARIL ON THE JURY AFTER DELIBERATIONS HAD BEGUN.

Appellee claims that the propriety of permitting the alternate juror to serve on the jury after deliberations had begun was not preserved for appellate review. Such a claim is without merit. Defense counsel objected and moved for mistrial on the ground that it was improper to substitute with an alternate juror once deliberations had begun. The trial court was very much aware of the problem and complaint. For example:

THE COURT: The problem I have is once the jury begins to deliberate, the jury - the Judge is not supposed to question the juror, or the jury as a whole as to the thought processes, or what is happening in the jury room. That is an area solely in their purview. If they find they cannot arrive at a verdict, the only thing a court can do is declare mistrial and start all over again.

* * *

MR. RATICOFF: You can't bring in an alternate.

THE COURT: Once deliberations start, I don't see how you can bring in an alternate, otherwise you wouldn't have a hung jury.

T2173 (emphasis added).

* * *

MR. RATICOFF: I'm going to move at this point, however, for a mistrial.

MS. ZIMET: I don't think we have any choice.

THE COURT: All right, I would ask that this be done in front of your client.

MR. RATICOFF: Okay, I will definitely do that.

T2179.

* * *

MR. RATICOFF: Just for the record, and I'm strenuously objecting to any alternate, I'll make the motion in front of my client.

T2180-81.

* * *

THE COURT: All right, for the record, counsel for the defense is moving for a mistrial, is that correct?

MR. RATICOFF: I'm moving for a mistrial.

T2181-82.

After the state argued that it would be permissible to bring in an alternate juror, defense counsel specifically objected on the grounds that the jury was in the middle of deliberations at the time the alternate would be brought in and moved for a mistrial:

MR. RATICOFF: If I can respond?

Obviously, I strenuously object to any deliberations continuing with an alternate juror who has not been present. I would like the record to reflect any deliberations coming in, in the middle of deliberations ...

MS. ZIMET: When we bring in an alternate juror, the instruction to the jurors as a whole, recommence from the very start any, and all, deliberations. So the alternate juror can again fit from there.

MR. RATICOFF: I object to the entire procedure and I renew my motion for mistrial.

THE COURT: Your motion for mistrial is denied.

T2182-83 (emphasis added). After more discussions regarding substitution with an alternate juror, including the prosecutor's misuse of a misleading and inaccurate headnote by West Publishing that conveyed it was proper to substitute with an alternate juror once deliberations have begun, the trial court made it clear that the issue was not waived:

THE COURT: ... And so the record is clear, the defendant is not waving any objection to the Court's failure to grant a mistrial.

T2193. Thus, the present issue was preserved through Appellant's objection to the use of the alternate juror on the ground that it was improper to do so once deliberations had begun. The trial court, prosecutor, and defense attorney all recognized the issue. Thus, the issue is preserved for appellate purposes. See also Sloan v. State, 438 So. 2d 888, 890 (Fla. 2d DCA 1983) (defendant is entitled to mistrial due to alternate in jury room, "if he does not ask for a mistrial, he will be deemed to have waived the error").¹

Magic words are not required to preserve the issue as long as the trial court is apprised of the error and recognized the complaint. Williams v. State, 414 So. 2d 509, 511 (Fla. 1982) (even though "trial counsel did not specifically cite to prohibition against *ex post facto* laws as the basis for his legal argument" in context of case judge was apprised of complaint); Wike v. State, 648 So. 2d 683, 687 (Fla. 1994) (issue preserved for appellate review where trial court was aware of the nature of the complaint even though the rule (3.870) which controlled the issue was not brought to his attention).² In the present case the trial

¹ Assuming arguendo, that the trial court had not been informed of the issue, issues involving the integrity of jury deliberations have in the past been fundamental error. See Berry v. State, 298 So. 2d 491 (Fla. 4th DCA 1974). Whether or not Berry is still good law, at the very least, a draconian standard for preservation should not be imposed with an issue that is either fundamental error, or very close to fundamental error.

² Wike is contrary to Appellee's claim that Appellant had to specifically mention Rule 3.280 and other specific cases rather than objecting to the use of the alternate on the grounds that it was improper once deliberations had begun. The cases cited by Appellee are merely objection cases requiring that the trial court

court fully understood the nature of Appellant's complaint about substituting on the ground that it was improper once deliberations have begun.³ The prosecutor responded by misusing a headnote from a case to present its argument on the issue. Appellant's objection and motion for mistrial were sufficient to preserve the issue for appellate review.⁴

Appellee's argument regarding the error of juror substitution once deliberations have begun ignores the principles and foundation of our jury system. For example, Appellee claims on page 10 of its brief that the right to a jury of 12 is not infringed, regardless

be on notice of the complaint and do not require bringing specific cases or rules to the trial court's attention to preserve the issue. In addition, Wike was decided after the other cited cases.

³ The error was substituting an alternate juror once deliberations have begun. The error itself can be harmless or harmful depending on whether sufficient procedural safeguards were taken prior to the alternate juror joining deliberations. Discussion of the safeguards goes to whether the error was harmless and not whether an error occurred. While counsel must object to preserve an issue, he need not argue to the trial court whether the error was harmless. Such an action would be futile where the trial court already disagreed with counsel on the merits (that error occurred).

⁴ It should be noted that Appellee's reliance on Sotola v. State, 436 So. 2d 1001 (Fla. 5th DCA 1983) is misplaced. Sotola is totally distinguishable from the present case. In Sotola, the issue of using the alternate was discussed, but during the discussions defense counsel never complained or objected in any form or manner. In other words, the trial court was never placed on notice about its proposed action. In fact, defense counsel only mimicked a motion for mistrial ("My client insisted that I move for mistrial") after the trial court had reached its decision. In reality, there was no true motion for mistrial. The concurring decision noted that if there had been a bona fide motion for mistrial, reversal was warranted. The instant case is different. Defense counsel "strenuously" objected to the use of the alternate specifically due to the fact deliberations had begun. T2182. Unlike Sotola, here there was an objection and a bona fide motion for mistrial rather than a general mimicking that the client wanted a mistrial. Unlike Sotola, here the trial court was aware of the nature of the defense complaint. A motion for mistrial has been recognized as preserving the issue. Sloan, supra, at 890.

of other circumstances, where 12 jurors ultimately render a verdict. Such a claim totally ignores certain longstanding jury principles. Under Appellee's view of the right to a jury of 12, one could have alternates, interpreters, bailiffs, lawyers, the press, etc., inside the jury room during deliberations, influencing the jury, and everything would be proper as long as the 12 jurors ultimately rendered a verdict. This, of course, is not reality. The reason alternates, interpreters, etc., are not allowed to be present during deliberations is because the 12 jurors are not to be influenced by any other person or material outside of the 12 jurors.⁵

Appellee also overlooks the fact that a jury of 12 is a constitutional right in Florida. See page 18 of the Initial Brief.

In interpreting rules and cases, the importance and constitutional magnitude of the right to a jury of 12 must be paramount to any analysis. Appellee claims that Rule 3.280 allows for substitution of a juror after deliberations have begun because the alternate jurors are not discharged from the penalty phase of a capital case. However, such an interpretation of Rule 3.280 contravenes the right to a jury of 12 and is contrary to a common sense reading of the rule. Rule 3.280(b) provides that the alternate shall be excused after the guilt phase with instruction that the alternate may have to return for an additional hearing

⁵ See Ludaway v. State, 632 So. 2d at 732, 733 (Fla. 5th DCA 1994) (presence of 13 jurors (which included an excused and alternate juror) required mistrial due to the constitutional right to a jury trial); Lamadrid v. State, 437 So. 2d 208 (Fla. 3d DCA 1983) (error to deny mistrial where alternate was present during deliberations); Dilorenzo v. State, 711 So. 2d 1362 (Fla. 4th DCA 1998) (presence of interpreter required reversal); Berry v. State, 298 So. 2d 491, 493 (Fla. 4th DCA 1974); Sloan v. State, 438 So. 2d 888, 890 (Fla. 2d DCA 1983) (entitled to mistrial).

"should the defendant be convicted." This wording indicates the intent that the alternate (as in other cases) no longer serve in deciding guilt or innocence.⁶ The rule does not provide an exception for substitution during guilt deliberations in a capital case.⁷ The only exception the rule provides for is that the capital alternate return for the penalty phase, if there is one.

Appellee first cites other jurisdictions that have a statute or rule that provides for a substitution after deliberations have begun. Obviously, those jurisdictions are not relevant to this issue because Florida's Rule 3.280 does not authorize such substitution.⁸ However, it should be noted that in one state which has a statute permitting substitution after deliberations have begun, the appellate court held that automatic reversal is required when the deliberative process of the jury is disturbed by substitution after deliberations have begun - because it violated the right to a jury of twelve and reversal would be automatic because the extent of prejudice would be too difficult to evaluate. People v. Ryan, 224 N.E.2d 710, 713 (N.Y. 1966).

On page 12 of its brief, Appellee cites to a number of cases from other jurisdictions to claim that there is no consensus as to whether it is error to substitute once deliberations have begun.

⁶ The key is that once deliberations have begun, an alternate is no longer qualified to serve on the jury "whether or not she was discharged." United States v. Beasley, 464 F.2d 468, 469 (10th Cir. 1972).

⁷ As explained in the Initial Brief at page 18, a defendant in a capital case in Florida is entitled to a twelve-person jury. It would be odd indeed if Rule 3.280 were interpreted to afford an exception to a constitutional protection in a case where the ultimate penalty might be imposed while providing more protection in less serious cases.

⁸ In fact, Rule 3.280 at least impliedly prohibits substitution after deliberations have begun.

However, all the cases Appellee cites to recognize that it is error to substitute after deliberations have begun.⁹ Even among the cases cited by Appellee there is a consensus that it is error to substitute after deliberations have begun in a state such as Florida that has no rule or statute specifically authorizing substitution. It cannot be legitimately contended that it was not error to substitute after deliberations had begun. A vast majority of jurisdictions would reverse under the facts of this case.

On pages 21-34 of the Initial Brief, Appellant has supplied this Court with the cases that give the most thoughtful and in-depth analysis of this issue. Appellee has not challenged the logical analysis that they put forth nor has she distinguished them. These cases all provide analysis on why substitution after deliberations have begun is error. The real lack of consensus is whether the error calls for *per se* reversal or a harmless error analysis. In pages 21-23 of the Initial Brief, Appellant has discussed cases from a number of jurisdictions which require *per se* reversal. Among these cases include: State v. Bunning, 485 S.E.2d 290 (N.C. 1997); State v. Bobo, 814 S.W.2d 353 (Tenn. 1991); People v. Ryan, 224 N.E.2d 710 (NY 1966) and Plate v. State, 925 P.2d 1057 (Alaska App. 1996)¹⁰ which all have thoughtful analyses as to why the error requires reversal. One of the reasons for *per se* reversal is due to the sanctity, confidentiality, and privacy of the jury's deliberations and such error should be *per se* reversible rather than invading the privacy of the deliberations to determine

⁹ Appellee cites to Cork v. State, 433 So. 2d 959 (Ala. App. 1983) and then indicates in parentheses that deliberations had not yet begun in that case. Thus, Cork is not contrary to finding error to substitute once deliberations have begun.

¹⁰ There are at least four other jurisdictions that require *per se* reversal.

the impact of the improper substitution. Bunning, 485 S.E.2d at 292. Florida has also adopted *per se* reversal rules rather than invading the privacy of jury deliberations to determine the impact of certain errors.¹¹ Another reason for *per se* reversal is that error of this type affects the constitutional right to a jury trial (which must be preserved inviolate) and results in such prejudice to the judicial process that automatic reversal is required. State v. Bobo, 814 S.W.2d at 358. Likewise, the right to a jury trial must "remain inviolate" in Florida [Art. I, § 22] and common law required not less or more than 12 jurors¹² and violation of that right is prejudicial to the judicial process.

A number of jurisdictions using a harmless error test have also been mentioned. Neither Appellee nor any of these cases from those jurisdictions refute the reasoning of Florida cases or the cases of Bunning, Bobo, Ryan, or Plate for *per se* reversal. Florida cases have already set the standard of *per se* reversal where the integrity of the jury function is in question and the privacy of the jury deliberations would be invaded to determine whether there was prejudice. Lamadrid v. State, 437 So. 2d 208 (Fla. 3d DCA 1983); Ludaway v. State, 632 So. 2d 732 (Fla. 1st DCA 1994). Due to the sanctity of the jury deliberations this Court should utilize a *per se* reversal standard rather than invading the privacy of the jury deliberations to determine the harm.

¹¹ Lamadrid v. State, 437 So. 2d 208 (Fla. 3d DCA 1983) (unauthorized presence of alternate was *per se* reversible error); Dilorenzo v. State, 711 So. 2d 1362 (Fla. 4th DCA 1998) ("sanctity of the jury room has been so zealously protected" intrusion of interpreter required reversal).

¹² Florida Fertilizer & Mfg. Co. v. Boswell, 45 Fla. 301, 34 So. 241 (Fla. 1903).

On page 13 of its brief, Appellee has cited to federal cases to claim that the error in this case is not per se reversible. While claiming that the federal and Florida rule are similar, Appellee points out two important differences. Appellee argues that the Federal rule is not constitutionally grounded. There is a good case to believe that Florida's rule is a product of the Florida Constitution. See pages 18-19, 22 of Appellant's Initial Brief. Appellee also emphasizes that under the Federal Rule there is no error if the defendant is tried by 11 jurors and he waives his right to a jury of 12. Florida Rule 3.280 does not authorize a jury of 11. In Florida, Appellant has a constitutional right to 12 jurors and did not waive that right. Thus, even using the federal standard there was error.¹³

Even if one uses a harmless error test, it cannot be said that the error was harmless. Of course, one does not look at the nature of the evidence in conducting a harmless error test. E.g. State v. Lehman, 321 N.W.2d 212, 223 (Wis. 1982) (rejecting state's claim). Rather, the inquiry is whether the substitution impacted the integrity of a 12-person jury. The key inquiry includes whether the alternate had formed an opinion or had been exposed to outside

¹³ Appellee mentions United States v. McFarland, 34 F.3d 1508 (9th Cir. 1994). McFarland is not helpful to Appellee. McFarland is reviewed as plain error case (fundamental in Florida) due to a total lack of objection. It was agreed by all (even the government) that it was error to substitute once deliberations had begun. Because of no objection, a higher standard of review for reversal was used (substantial rights of accused). It was clear that but for the lack of an objection prejudice would be presumed and the conviction would be reversed. Ultimately, two members of the panel decided to affirm primarily because the harm alleged by the defendant, that the removed juror was a hold out for not guilty, was eliminate by Rule 24(c) which allows for the remaining jurors to continue and 11-0 vote would have occurred even if the improper substitution had not occurred. It should be noted that the vote in McFarland was 2-1 with a strong dissent.

information, and whether the original 11 jurors were capable of disregarding their prior deliberations with the removed juror.

Even among the states that utilize a harmless error test, generally prejudice is presumed. Commonwealth v. Saunders, 686 A.2d 25, 28 (Penn. 1996) (noting that state courts have established presumption of prejudice which prosecutor must rebut). It is only after ensuring there were sufficient procedural safeguards to ensure that the substitution after deliberations could not impact the nature of the deliberations process that the error can be deemed harmless.

Appellee primarily relies on one alleged fact to claim the error was harmless - that jurors were told to begin deliberations anew. However, Appellee totally ignores other facts that would be important to a harmless error analysis: the original jury deliberated 4½ hours versus less than 2½ hours by the reconstituted jury; the 11 remaining jurors were never told to disregard prior deliberations, nor was there any determination that they could or would do so; the alternate was never asked a single question before joining the deliberations including - whether she had formed an opinion or deliberated; whether she had been able to avoid media reports about the case, etc.

Appellee cites to no cases including similar facts that conclude the error was harmless. On the other hand, cases with careful analyses and comparable facts conclude that such error could not be harmless. See Initial Brief at 26-34. Appellee has not disputed the analyses of these cases. These cases analyze the total facts and conclude that the interference with the integrity of the jury was prejudicial - even where the trial court instructs the jury to begin deliberations anew. People v. Bunette, 775 P.2d 583 (Colo. 1987) (error not harmless where instruction to begin

anew, initial jury deliberated longer than reconstituted jury, there was no instruction to disregard prior deliberations, the alternate was not questioned about his activities - even though he was earlier instructed not to discuss the case with others); Plate v. State, 925 P.2d 1057 (Alaska App. 1996) (error not harmless despite instruction to begin anew, judge did not receive assurances that jurors could disregard prior deliberations, alternate was not questioned about whether he had formed an opinion - despite fact that he had been instructed not to discuss the case with others); Commonwealth v. Saunders, 686 A.2d 25 (Penn. 1996) (error not harmless, emphasizing failure to question the alternate as to whether he had been influenced by outside influences and failure to determine whether remaining jurors were capable of disregarding prior deliberations which is required to insure the integrity of the jury function); State v. Lehman, 321 N.W.2d 212 (Wis. 1982) (original jury deliberated 1 hour 35 minutes vs. 1 hour 21 minutes for reconstituted jury, no evaluation of alternate to determine if he could still be impartial); Bulls v. United States, 490 A.2d 197 (D.C. App. 1985) (initial deliberation 40 minutes and second deliberation 68 minutes showed that alternate missed a large percentage of discussions and thus it would not be said that jury truly began deliberations anew).

Moreover, the trial court's instruction as to what the jurors were to do upon the arrival of the alternate was, at best, ambiguous. The trial court told the jury both to "restart" deliberations and to begin anew. These terms have different connotations.¹⁴ More importantly, the trial court instructed the original jurors that the alternate's input "may change how you feel

¹⁴ See page 25, note 7 of Appellant's Initial Brief.

about certain matters" T2189. This informs the jury not to disregard their prior deliberations and tells them that their opinions from the prior deliberation possibly could be changed by the alternate. The trial court's instruction not only failed to insure the integrity of the jury function, it served to compromise the integrity of the jury function. Commonwealth v. Saunders, 686 A.2d 25 (Penn. 1996) (an instruction that could allow jury not to disregard their prior deliberations serves to compromise integrity of the jury function).

Finally, Appellee claims that from a public policy standpoint there should be no need to declare a mistrial in a capital case and Rule 3.280 should be amended with added procedural safeguards to ensure that no harm is done to the integrity of the jury function. Appellee's Brief 16-17, note 3. Specifically, Appellee argues a new rule should be promulgated and it should have certain requirements (including questioning of the alternate and determining that the remaining jurors are capable of beginning deliberations anew - i.e. disregard prior deliberations) to ensure no prejudice:

Alternately, should the Court find Rule 3.280 applies and requires reversal, the State submits a rule amendment is warranted for capital cases where an original juror becomes incapacitated during deliberations. To require a mistrial under these circumstances is unnecessary, especially where alternates are not discharged, and are admonished not to discuss the case. Basic procedural safeguards may be employed to ensure a fair and impartial jury after such substitution. Should the Court promulgate a new rule, it could require inquiry of the alternates and original jurors to ensure there has been no prejudice generated due to the delay in substitution and that the newly created jury would be capable of beginning deliberations anew.

The inquiries that Appellee proposes to ensure no prejudice were not done in this case. Appellee's own proposed rule change

clearly demonstrates why the error cannot be deemed harmless in this case.

As for public policy, interference with the deliberations and the integrity of the jury function should not be permitted on policy grounds. If there is a rule to allow substitution after deliberations have begun, then an opening is potentially created for getting rid of a juror who is not in agreement with the other 11 or who, because of the pressure of the other 11, feigns illness in order to be relieved of the pressure. This is a potential danger no matter how well crafted and written a new rule is. Public policy should be against anything that potentially endangers the integrity of the jury function. Appellant relies on his Initial Brief for further argument on this point.

POINT II

IT WAS FUNDAMENTAL ERROR TO INTERFERE WITH THE JURY DELIBERATIONS BY REMOVING JUROR WALLACE WITHOUT CONDUCTING AN ADEQUATE INQUIRY THAT WOULD JUSTIFY SUCH A REMOVAL.

Appellee first notes that the instant issue was not preserved by an objection. This is true. However, as can be seen from the heading above, Appellant takes the position that interfering with jury deliberations by removing a juror without an adequate inquiry constitutes a serious structural error - i.e. fundamental error.

Appellee next claims that the decision to remove a juror is within a trial court's discretion. That is not the issue in this case. The issue is whether the trial court can remove a juror without conducting an adequate inquiry. Obviously, a trial court is not exercising its discretion where it does not conduct an adequate inquiry in order to have sufficient information to exercise its discretion.

Finally, Appellee claims Wallace's problem was not ambiguous and removal was warranted. However, when asked what was wrong, Wallace said, "This is a long story," T2176, and explained that her son had been on trial for a crime he did not commit, T2177-78, and she could not bring herself to do this T2178. It appears that Wallace's problems were due to the facts of this case and the pressure of convicting someone that she felt might be innocent. Certainly, the record is not unambiguous that Wallace's problem was not related to the facts of the case or the pressures of deliberations. Wallace explained that she did not have the emotional problems during the jury selection process T2178. The resulting conclusion is that it was the facts of the case that caused her problems. As explained by the cases in the Initial Brief, the trial court should not have interfered with deliberations by removing Wallace without conducting a more adequate inquiry which eliminated the facts of the case or relations with other jurors as the cause of the problem. Appellee has totally failed to discuss any of the cases cited in Appellant's brief on this point. Appellant relies on his Initial Brief for further argument on this point.

POINT III

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S PLACING UNDUE PROMINENCE ON THE JURY'S NOTES.

First, Appellee claims the error cannot be reviewed due to the lack of objection. However, this issue is ripe for appellate review because of other objections relating to jury deliberations (Point I). Cf. Ruiz v. State, 24 Fla. L. Weekly S157, 159 (Fla. April 1, 1999) (because of objections to a related matter issue would be reviewed even though no objection); Whitton v. State, 649 So. 2d 861, 864-65 (Fla. 1994).

Appellee claims that the trial court's instruction giving undue prominence to the notes was proper because Appellant consented to the notetaking. However, consent to take notes is far different from consenting to giving the notes undue prominence. Appellee has not disputed that jurors must be admonished that notes are only to be used to refresh recollection and not to be used as evidence or to resolve conflicts in memory. United States v. Maclean, 578 F.2d 64, 66 (Fla. 3d DCA 1978); Myers v. State, 499 So. 2d 895, 897 (Fla. 1st DCA 1986) (error for trial court not to instruct jury on the proper use of notes).

In this case the trial court did not instruct the jury on the limits of notes. It did the opposite and placed undue emphasis on the use of notes by informing the jury to use notes to discern the facts without any admonition that notes were merely a tool to aid their memory. Thus, as in Points I and II, the trial court took an action which impacts on the structure of the jury deliberations. Appellant relies on his Initial Brief for further argument on this point.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO HOLD AN ADEQUATE INQUIRY INTO THE IMPACT OF DEFENSE COUNSEL'S BIPOLAR ILLNESS ON APPELLANT'S RIGHT TO A FAIR TRIAL.

Appellee claims that defense counsel's competency and its impact on Appellant's right to fair trial was adequately inquired into through the medical testimony alleging that there should be no more problems with Mr. Raticoff's ability to proceed. Appellee apparently believes that a counsel's mere presence at trial is sufficient and that preparation is not part of counsel's function. As explained at page 44 of the Initial Brief, such an idea is false. See Holley v. State, 484 So. 2d 634, 636 (Fla. 1st DCA 1986); Martin v. State, 363 So. 2d 403, 404 (Fla. 4th DCA 1978).

Appellee also claims that, despite the trial court's error in failing to inquire into the impact of the bipolar disorder on trial preparation, the present issue is a post-conviction claim rather than an appellate claim. However, this is not a post-conviction claim. The issue is whether the trial court performed its duty by conducting a proper inquiry into counsel's ability to prepare. United States v. Bosch, 584 F.2d 1113, 1124 (1st Cir. 1978). Thus, the issue involves the trial court's actions and is an appellate issue rather than a post-conviction issue. See Hardwick v. State, 521 So. 2d 1071 (Fla. 1988). Appellee has not disputed that Mr. Raticoff's bipolar disorder was serious, was brought to the trial court's attention, and that the trial court did not inquire into whether the illness had impacted preparation. As explained in the Initial Brief, the trial court erred in not making a proper inquiry.

POINT V

APPELLANT DID NOT WAIVE HIS RIGHT TO CONFLICT-FREE COUNSEL AND THUS HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED.

Appellee claims that since no evidence was presented demonstrating that Raticoff was incompetent,¹⁵ Appellant was not entitled to conflict free counsel. Such a claims stands logic on its head. If Appellant ever needed conflict-free counsel it was when Raticoff presented his doctor in court and testified that Raticoff was now mentally competent to proceed in this case. Conflict-free counsel

¹⁵ Appellee makes such a claim while at the same time claiming that defense counsel failed to recognize and object to issue after issue. If defense counsel did not have the bipolar disorder, Appellant posits that the state's evidence would have come under much closer scrutiny and that additional preparation of a defense might have created a different result.

would have been able to question the bipolar disorder's impact on Raticoff's ability to prepare for trial. Contrary to Appellee's claim otherwise, Raticoff had absolutely no interest in exposing his flawed preparation of Appellant's case. Conflict-free counsel for Appellant would work to expose the impact of the bipolar illness on preparation. There was an actual, as opposed to hypothetical, conflict of interest between Appellant and Raticoff. Appellee cannot legitimately claim that Appellant was not entitled to conflict-free counsel because the impact of Raticoff's disorder on preparation was not exposed where Appellant did not have conflict-free counsel to expose such evidence. In addition, as noted in pages 45-47 of Appellant's Initial Brief, there were indications that the illness had adversely affected Raticoff.

In addition, Appellee also claims that there was no prejudice to Appellant. However, this was an actual, real conflict and not a hypothetical situation. Raticoff had absolutely no interest in having the disorder's impact on his preparation brought to light. See Initial Brief at 48-49. Appellant had an interest in exposing such information. Thus, there was an actual, real conflict of interest which deprived Appellant of representation and no showing of prejudice was required for reversal. See Padgett v. State, 743 So. 2d 70, 73 (Fla. 4th DCA 1999) (defendant "for all intense purposes was unrepresented" where counsel took position that was adversarial to client's interest - client was entitled to conflict-free counsel); Tucker v. Day, 969 F.2d 155 (5th Cir. 1992) (defense counsel's failure to provide assistance constituted deprivation of counsel so that no showing of prejudice was required).

Appellee also claims Appellant waived his right to conflict-free counsel and to appellate review of that issue by personally failing to object. That is not how it works. As explained on

pages 50-51 of the Initial Brief, there is a waiver only if the defendant does so affirmatively, and not by his silence. It is the trial judge's duty to initiate an inquiry if he reasonably should know of a conflict. After all, the defendant has an appointed attorney that he relies on to speak for him and should not be penalized when the attorney has a conflict which causes him to advocate for himself and not for the defendant. The trial court should act on this type of conflict without objection.

Appellee claims the trial court had no reason to know of any conflict. Such a claim is nonsense. The judge would have to be an ostrich with his head in the sand to believe that Raticoff, who was interested in protecting his reputation that he was competent despite his bipolar illness did not have a conflict of interest with Appellant who would want the full extent of Raticoff's illness and its impact on his competency to be investigated before being represented by him in a capital case.

Finally, Appellee argues that the issue as to Raticoff's competence is a matter for post-conviction rather than direct appeal. Appellee misstates and misunderstands the issue. The issue on direct appeal involves Appellant not having conflict-free counsel at a vital proceeding and not a post-conviction issue. It is the trial court's error that is being reviewed. It was error for Appellant not to have conflict-free counsel at the hearing and the trial court failed to make the required inquiry into waiver of the conflict. Wood v. Georgia, 450 U.S. 261 (1981) at 272 n.18 ("Sullivan mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists'" citing Cuyler v. Sullivan, 446 U.S. 335 (1980)). In addition, where the conflict essentially causes the defendant to be "unrepresented" at the hearing - it is

an appellate issue which is reversed without showing of prejudice. See Padgett v. State, 743 So. 2d 70, 74 (Fla. 4th DCA 1999) (denial of right to counsel is not subject to harmless error analysis); Tucker v. Day, 969 F.2d 155 (5th Cir. 1992). Appellant relies on his Initial Brief for further argument on this point.

POINT VI

APPELLANT WAS UNREPRESENTED BY COUNSEL DURING A CRUCIAL PROCEEDING AND THUS HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED.

There is no dispute that the hearing on defense counsel's competency constituted a critical stage in this case. However, Appellee claims that this case is like those cases where a defendant initiates a claim of ineffective assistance of counsel and a Nelson inquiry is required. Such a claim is without merit. Where a defendant initiates a claim that he was not effectively represented by counsel he does not have a constitutional right to be represented on such a claim. In such claims, a defendant naturally represents himself. In the present case, Appellant did not initiate the hearing on defense counsel's competency. He was supposed to rely on his counsel at this hearing, but counsel did nothing to fulfill his role as advocate for his client. Appellant was unrepresented by counsel. See Padgett v. State, 743 So. 2d 70 (Fla. 4th DCA 1999). Complete failure of defense counsel to provide any assistance at the hearing constitutes "constructive" deprivation of counsel so that no showing of prejudice is required for reversal. Tucker v. Day, 969 F.2d 155 (5th Cir. 1992). Reversal is required. Appellant relies on his Initial Brief for further argument on this point.

POINT VII

THE TRIAL COURT ERRED IN ALLOWING IN EVIDENCE THAT LISA DYKE WAS PREGNANT WHERE THE PROBATIVE VALUE OF SUCH TESTIMONY WAS SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE.

First Appellee claims that Appellant cannot attack the lack of relevancy or probative value of the evidence of pregnancy in arguing the probative value was substantially outweighed by unfair prejudice. Such a claim is specious. The low probative value is an important factor to be considered in such an issue.

On pages 35-36 of its brief, Appellee argues that the evidence of pregnancy must be admitted because the accused must take the victim as he finds him. Appellee's novel concept would eliminate the rule of law that the probative value must not be substantially outweighed by unfair prejudice. It should not be adopted.

Appellee makes no argument that the evidence of pregnancy was not extremely prejudicial. Of course it is. The real issue is whether the evidence of pregnancy had a strong enough probative force to outweigh its substantial prejudice. Appellee claims that the pregnancy was highly probative of the lack of consent to sexual battery and to show that deadly force was used. Appellee's claim is totally without merit. While there was an issue as to whether any sexual battery occurred,¹⁶ there was absolutely no issue as to whether the acts against Lisa Dyke were consensual - they were not. There was no issue or claim that Dyke gave consent to her attacker. Thus, the probative value of the pregnancy toward consent is virtually nil.¹⁷ Also, the stab wounds, and not the pregnancy itself, reflect that deadly force was used. The pregnancy had no probative value toward that end. The trial court even recognized

¹⁶ Appellant was never charged with sexual battery.

¹⁷ Also, merely because a woman is pregnant does not mean that she would not consent to have sex.

that the pregnancy has no relevancy toward the elements of the crime T341. The probative value of this evidence was substantially outweighed by the undue prejudice. It was error to allow the pregnancy into evidence.

Appellee next claims that the error was harmless based on the strength of the case. However, Appellee merely looks at the evidence in a light most favorable to the state and totally ignores the weak aspects of the state's case. If one looks at the weaknesses of the state's case, the error cannot be deemed harmless beyond a reasonable doubt. As explained at page 57 of the Initial Brief, the state's lead and first witness (Pauline Healy) testified to facts that were not possible. The jury would have a hard time with the state's case based on this witness. Appellee cites to Lisa Dyke's statement; the bite marks; and all the DNA blood evidence to claim that the error was harmless. Lisa Dyke's statements identify the attacker as "Rodney" and "Ronnie" and as Ruth's sister's boyfriend. This is hardly concrete proof. The bite mark evidence could not identify Appellant as the attacker, the evidence could only eliminate someone from being a suspect T1843-44. The DNA evidence was hardly overwhelming when one considers that the laboratory involved in this case had no proficiency testing and made mistakes. See Initial Brief at 57-60 for a full discussion. It cannot legitimately said that the prejudicial evidence did not impact the jury. This case must be remanded for a new trial. Appellant relies on his Initial Brief for further argument on this point.

POINT VIII

THE TRIAL COURT ERRED BY NOT BEING PRESENT DURING THE TESTIMONY OF A STATE WITNESS.

Appellee argues that because the trial court could hear but not see the evidence, he was present. This is incorrect. Waters v. State, 486 So. 2d 614 (Fla. 5th DCA 1986), rev. den., 494 So. 2d 1153 (Fla. 1986). The trial court's absence is fundamental *per se* reversible error. Bryant v. State, 656 So. 2d 426 (Fla. 1995). Appellant relies on his Initial Brief for further argument on this point.

POINT IX

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON FELONY MURDER WITH SEXUAL BATTERY AS THE UNDERLYING FELONY AND ON THE AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE OCCURRED DURING A SEXUAL BATTERY BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE SEXUAL BATTERY.

Appellee claims that the fact that the hearsay statements saying Dyke was "raped" proves that a sexual battery occurred. However, as explained on pages 64-66 of the Initial Brief, that evidence was not sufficient.

Appellee cites to a number of cases to claim the evidence was sufficient to prove sexual battery in this case. However, either the facts are totally different from the present situation,¹⁸ or the facts which were sufficient for conviction are not set forth in the

¹⁸ For example, in Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995), among other things, a semen stain was found in an item that had been wrapped around the body. No semen stain was present in this case.

opinion. For example, Appellee cites Sochor v. State, 619 So. 2d 285 (Fla. 1993) and uses a parenthetical which portrays that kissing is sufficient evidence to prove the crime of sexual battery. If this is true, prisons in Florida will need to be greatly expanded to welcome the millions of people in Florida that kiss each year. As fully explained in the Initial Brief at pages 63-67, the evidence was not sufficient to prove a sexual battery occurred.

POINT X

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO PROVE THE ELEMENT OF PREMEDITATION.

Appellee claims that the number of stab wounds, movement and bite marks prove premeditation. However, as explained in the Initial Brief, the evidence was consistent with a killing done in an emotional frenzy without a premeditated design to kill. Appellant relies on his Initial brief for further argument on this point.

POINT XI

THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL.

Appellant relies on his Initial Brief for argument on this point.

POINT XII

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE THE HEARSAY STATEMENTS MADE TO OFFICER GILLESPIE.

The state failed to meet its burden to prove the hearsay statements were dying declarations. McCrane v. State, 194 So. 632,

636 (Fla. 1940); pages 75-77 of the Initial Brief. In addition, Dyke's statements were shown to be the product of reflective thought. See page 78 of the Initial Brief. Appellee has not addressed or disputed this aspect of Dyke's statements. Thus, the statements do not qualify as excited utterances. Appellant relies on his Initial Brief for further argument on this point.

POINT XIII

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE HEARSAY STATEMENTS MADE BY LISA DYKE DURING A 911 CALL AND AT THE HOSPITAL.

Appellee claims that the hearsay statements would be admissible as a dying declaration. As explained in the Initial Brief on this point at pages 80-81, none of the evidence would qualify under the dying declaration exception to the hearsay rule. Also, as explained in the Initial Brief, none of these statements qualified as excited utterances. See Initial Brief, pages 79-82.

POINT XIV

IT WAS FUNDAMENTAL ERROR TO CONSTRUCTIVELY AMEND THE INDICTMENT CONTRARY TO THE GRAND JURY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

On page 72 of its brief, Appellee claims that in prior cases this Court has rejected the Grand Jury Clause issue raised in this point. Such a claim is without merit. All the cases cited by Appellee involve the Notice Clause and none deal with the Grand Jury Clause.¹⁹ The lesson to be gathered from those cases is that defendants are theoretically on notice of two types of first degree

¹⁹ Appellee's confusion regarding the Notice Clause and the Grand Jury Clause is demonstrated by the fact that its argument on this point of its brief combines Points XIV and XV which involve separate concepts and principles.

murder.²⁰ The present issue has nothing to do with notice. Instead, this issue deals with an indictment being constructively amended to bring forth an allegation that was either rejected or not reviewed by the Grand Jury. Appellee has not presented any caselaw that permits bringing forth a theory or charge different from that which was presented to the Grand Jury. As explained in the Initial Brief, which Appellee has not contradicted, there is no justification to do so.

It is a basic violation of due process and a fundamental error to convict on a theory not brought by the Grand Jury. See Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948); Markham v. United States, 160 U.S. 319, 16 S.Ct. 288, 40 L.Ed. 441 (1895); The Schooner Hoppet and Cargo v. United States, 11 U.S. 389, 394, 7 Cranch 388, 382, 3 L.Ed. 380 (1813) (Chief Justice John Marshall stated, "But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offense ... The rule that a man shall not be charged with one crime and convicted of another, may sometime cover real guilt, but its observance is essential to the preservation of innocence."); State v. Gray, 435 So. 2d 816 (Fla. 1983); State v. Sykes, 434 So. 2d 325 (Fla. 1983); Ray v. State, 403 So. 2d 956 (Fla. 1981); Perkins v. Mayo, 92 So. 2d 641 (Fla. 1957); Minor v. State, 329 So. 2d 30 (Fla. 2d DCA 1976); Haley v. State, 315 So. 2d 525 (Fla. 2d DCA 1975); Causey v. State, 307 So. 2d 197 (Fla. 2d DCA 1975); Long v. State, 92 So. 2d 259, 260 (Fla. 1957) ("where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment").

²⁰ But see Point XV of the Initial Brief.

There is only jurisdiction to try a defendant on the charge that is brought by the Grand Jury. Jurisdiction cannot be expanded through either consent or waiver.

POINT XV

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON A THEORY OF FELONY-MURDER WHEN THE INDICTMENT GAVE NO NOTICE OF THE THEORY.

Appellee claims that this issue was not preserved for appellate review. However, the indictment in this case only charged premeditated murder R2. Defense counsel filed a motion to prohibit the use of a felony-murder theory due to lack of notice R111-113. The trial court denied this motion R375. The jury was instructed on the theory of felony-murder (sexual battery).

Appellee fails to discuss this issue and totally sidesteps the fact that it was the prosecution's strategy to not reveal to Appellant that he would be defending against a charge of felony murder. Nor would Appellant be aware of such a charge where the Grand Jury did not charge felony murder. The prosecutor's deliberate strategy of ambushing the defense by not noticing him of the charge against him requires reversal. Sheppard v. Rees, 909 F.2d 1234 (9th Cir. 1990) (reversing where charging document did not charge felony murder and prosecutor hid the fact felony murder was a theory of the case until the charge conference). The prosecution's intentional strategy to provide Appellant notice of the specific charge against him also constitutes fundamental error. Appellant relies on his Initial Brief for further argument on this point.

POINT XVI

THE TRIAL COURT ERRED IN USING INDECENT ASSAULT AS THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE.

Appellant relies on his Initial Brief for further argument on this point.

POINT XVII

THE SENTENCE OF DEATH MUST BE VACATED AND THE SENTENCE REDUCED TO LIFE WHERE THE TRIAL COURT FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY.

While Appellee points out that the trial court made most of the findings required for the death penalty, Appellee fails to address the fact that the trial court never made a finding that "sufficient aggravating circumstances exist" to justify the death sentence. This requirement is clear and unequivocal. It is simple: as pointed out in the Initial Brief the death sentence must be vacated for the trial court's failure to set forth this required finding in writing. Appellant relies on his Initial Brief for further argument on this point.

POINT XVIII

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED.

Appellant relies on his Initial brief for the argument on this Point except to point out that Appellee's portrayal of Appellant's prior crime as essentially identical to the present one is an extreme misuse of the evidence as it was in the court below. Appellant's prior offense was not premeditated nor was it felony murder. The jury determined that it was a second degree murder involving reckless indifference to life. Yet, Appellee utilizes the elements for which Appellant was acquitted to make its claim that the offense was amazingly similar to the present one. By doing so, Appellee by its actions has demonstrated how the details of the prior felony can be misused and why reversal is warranted based on the argument in Point XIX.

POINT XIX

THE TRIAL COURT ERRED IN ALLOWING THE EVIDENCE CONCERNING THE PRIOR VIOLENT FELONY TO BECOME A FEATURE OF THE CASE.

Appellee argues that it was proper to present the details of the prior felony to prove the aggravating circumstance. However, such is not needed. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989) (copy of conviction is sufficient). Moreover, the details become extremely prejudicial when one considers that they presented this version of the facts of a first degree murder - for which Appellant had been acquitted.²¹ Appellant relies on his Initial Brief for further argument on this point.

POINT XX

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Appellee essential claims that all multiple stabbings are HAC due to the pain involved. This is not true. Brown v. State, 644 So. 2d 52 (Fla. 1994). As pointed out in the Initial Brief, the defendant must intend to cause unnecessary and prolonged suffering. There was no such evidence presented. Inferences and speculation are not sufficient; especially where there appeared to be a frenzied attack and there is evidence that Appellant was under the influence of narcotics. Appellant relies on his Initial Brief for further argument on this point.

POINT XXI

THE JURY INSTRUCTION STATING THAT THE JURY IS TO ONLY CONSIDER MITIGATION AFTER IT IS REASONABLY CONVINCED OF ITS EXISTENCE IS IMPROPER.

Appellant relies on his Initial Brief for argument on this point.

²¹ Being found guilty of the lesser offense acts as an acquittal of the greater offense.

CONCLUSION

For the foregoing reasons, Mr. Williams' convictions and sentences must be reversed.

Respectfully submitted,

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CERTIFICATION OF FONT

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to LESLIE T. CAMPBELL, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of March, 2000.

Attorney for Ronald Keith Williams