IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC00-247

JEFFREY LEE WEAVER,

Appellant/Cross-Appellee,

VS.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

****

*** ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal Division)

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AMENDED ANSWER BRIEF OF APPELLEE
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PRELIMINARY STATEMENT

Appellant/Cross-Appellee, Jeffrey Lee Weaver, was the defendant below and will be referred to as "Weaver". Appellee/Cross-Appellant, the State of Florida, the prosecution below, will be referred to as the "State". References will be by the symbol "R" for the record on appeal, "T" for the transcript, "SR" and "ST" for any supplemental record or transcripts, followed by the volume number, and "IB" for Weaver's initial brief, followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Historical overview

Given the nature of this case and the inflammatory allegations against the trial court and prosecutor as well as the issues argued before this Court the State believes that a historical overview is warranted. The appellate brief before this Court as well as the trial record below, are replete with Weaver's attempts to manipulate the proceedings. The record will reflect that Weaver moved to recuse the court, Judge Mark Speiser, moved to disqualify State Attorney Michale Satz and the entire State Attorney's Office in and for Broward County, and moved to discharge his court-appointed counsel, Edward Salantrie

because of a disagreement over strategy. Even when warned of the consequences of his decision to discharge Mr. Salantrie and that he would not be granted a continuance of his scheduled April 12, 1999 trial date, Weaver persisted. When Weaver received what he requested, he moved for a continuance even though he was told he would not be getting one. Simply put, Weaver moved to have the judge, prosecutor, and defense counsel removed from the case. The lawyer he wanted was his second court-appointed counsel, Hilliard Moldof, who was appointed on February 27, 1996 and who told the court on February 19, 1998 it would take another "two years to get to trial" due in part to another case he had, State v. Penalver, 94-13062 CF10A ("Penalver") (T1 182). Given the result of the Penalver trial, it was likely the trial in this case would not have commenced until after July 2000, the date Penalver concluded as detailed below and in the record for State v. Penalver, case no. SC00-1602 before this Court.

Trial Proceedings

At approximately 8:00 p.m. on January 5, 1996, Weaver attempted an armed burglary of the car driven by Graciela Ortiz(T 30 5132-38, SR14 403-92). Unsuccessful in getting in the car as the doors were locked, Weaver made his way south and was spotted by Hinkey Wilcher lurking in the bushes and putting

a gun down his pants (T30 5138-39, 5223-32). Two hours later, King Irving spotted a man wearing a shirt that met the description of Weaver's shirt near a local vocational school on Federal Highway (SR14 596-629). Shortly thereafter, Officers Bryant Peney ("Peney") and Ray Myers ("Myers") saw Weaver at that same location (T29 4868-73, 4901-02, SR14 668). Appearing suspicious to Peney, he turned his lights on and stopped Weaver.

During their brief conversation, Weaver became concerned that Peney would search him and find the .357 revolver he had (T26 4404, T29 4873-78, SR14 665-82). Weaver bolted with Peney and Myers giving chase across the highway (T26 4404-05, T29 4879-80, SR14 665-82). When Weaver was on the east side of the road and Peney was near the median, Weaver, spun around, crouched in a shooting position and fired at Peney (T29 4880-84, SR14 665-82, T26 4409-19). As Meyers approached, Weaver aimed at him (T29 4885, SR14 665-82). Fearing he would be shot, Myers fired his 9mm weapon which was loaded with Golden Saber hollow point bullets, but missed Weaver (T29 4884-85, SR14 665-82). Again, Weaver took off running. When he heard the police response, he attempted to elude the officers and successfully made his way into Cliff Lake where he spent the night in the water hiding from the police and helicopter (T23 3899-3929, 3952-57, 4200-09, 4334-50, 4612-28, 4630-34).

Weaver testified he was stopped by Peney and Myers and ran when Peney appeared ready to search him and find his .357 magnum gun with ten extra rounds. As Weaver ran, he took out his gun, knowing he would have to fire it, looked back, waited until Peney would see the flash, a fired one shot, claiming he shot the ground. Peney took two steps, and fell (T34 5899-5905, 5939-59).

The paramedics arrived at the shooting scene within minutes. When they lifted Peney onto the gurney a bullet fell to the ground (T23 3802-06). This was tested and proved to be a .357 bullet which contained Peney's blood and DNA (T25 4174-90, 4240-74, 4302-12, 4275-97, 4325-34). At the hospital, Peney was treated for a single gunshot wound which went through his right arm and into his chest passing though his lungs and perforating both the arota and vena cava (T31 5516-225). He died the next morning on the operating table.

Weaver was indicted for the first-degree murder of Peney, along with counts of aggravated assault, armed resisting an officer with violence, carrying a concealed firearm, and attempted armed burglary of an occupied conveyance (Ortiz's car) (R 5-6). After discharge of his Public Defender based on conflict, Hilliard Moldof was appointed (T1 28-29, R 221). When Mr. Moldof's schedule prohibited a reasonable and fair trial

date, he was replaced by Edward Salantrie and Raag Singhal was appointed penalty phase counsel (R 396, 498). A few days before trial, in response to Weaver's motion to discharge Mr. Salantrie over a disagreement about the defense theory to pursue, the court held Nelson and Faretta hearings (T13 2039-2244). Mr. Salantrie was found to be rendering competent assistance of counsel and Weaver was permitted to discharge him with the understanding another counsel would not be appointed. Weaver, conducted the guilt phase pro se, but retained Mr. Singhal for the penalty phase.

The majority of the discovery and most of the pre-trail motions were handled by Mr. Salantrie. Weaver's indication that Mr. Moldof did much of the discovery (IB 3) is misleading as will be explained further in Point I. While represented by Mr. Salantrie pre-trial, the attempted armed burglary count was severed, the State was precluded from arguing the felony murder theory of guilt, but was permitted to introduce the evidence as inextricably intertwined (T6 782-90).[1] Mr. Salantrie successfully argued for suppression of much of the arsenal found

[1] Here, the written order does not comport with the written findings, therefore the state is relying on the oral findings of the trial court. Ashley v. State, 28 Fla. L. Weekly S18, (Fla. 2003) (finding that a court's oral pronouncement of sentence controls over the written document.).

in Weaver's car and for the suppression of the audio and video taped confession Weaver gave, however, the court did not suppress the oral statements Weaver gave to the police in the station interview room or during the walk through of the crime scene (T11 1565-1765). Also excluded was testimony of alleged malpractice by the treating surgeons, although the ruling came after Mr. Salantrie was discharged by Weaver.

Based upon the above evidence, Weaver was convicted as charged, with the exception of the attempted burglary count which had been severed (R 1250-51). During the ensuing penalty phase, Weaver presented family and friends to discuss his background (T37 6460-6628, T37 6429-6628, T38 6629-6718). The jury recommended life by a vote of eight to four (R 1301-02).

Following a Spencer v. State, 615 So.2d 688 (Fla. 1993) hearing and the denial of the motion for new trial, Weaver was sentenced to death with the court finding four aggravating factors: (1) contemporaneous violent felony convictions (contemporaneous conviction for aggravated assault and armed resisting of Myers), (2) victim was law enforcement officer engaged in his official duties, (3) avoiding lawful arrest, and (4) disrupt or hinder law enforcement officer. Aggravators two - four were merged into one. (R 1462-65). The court rejected as mitigation "contribution to society/charitable, humanitarian

deeds", "being a good parent", "religious devotion", "circumstance of the offense", "potential for rehabilitation", "sorrow over the victim's injury and death", "pretrial and trial conduct", "any other mitigating circumstance within the knowledge of the court" as not established by the greater weight of the evidence (R 1466-78). In mitigation, the court found one statutory mitigator, "no significant history of prior criminal activity" (little weight) and as non-statutory mitigators (1) "good employment record," (moderate weight), (2) "cooperation with the police" (moderate weight) and "adaptation to a life of incarceration/future value to society," (little weight). (R 1466-79). The court overrode the jury's recommendation, found that the aggravation outweighed the mitigation and sentenced Weaver to death. This appeal and cross-appeal followed.

SUMMARY OF THE ARGUMENT

ISSUES RAISED BY APPELLANT ON DIRECT APPEAL

Point I - Weaver's second counsel was removed properly based because he could not be prepared for due to prior commitments.

Point II - Third defense counsel, rendering competent assistance, was discharged at Weaver's based on a conflict over the desired defense. Appointment of new counsel was not required, and the record shows Weaver was competent to represent himself.

Point III - Requiring a stun belt for security purposes was correct as Weaver was moving about the courtroom with access to court personnel and evidence, including firearms and ammunition.

Point IV - No continuance was needed in spite of counsel's discharged a days before trial. Weaver was ready to go forward, and the court gave him time mid-trial to do further preparation.

Point V - The motion to disqualify the trial court was denied properly. The motion was legally insufficient.

Point VI - The request to disqualify the State Attorney's Office was denied properly as no actual prejudice was established.

Point VII - Excluded correctly was evidence of alleged medical malpractice as it does not alleviate a defendant of criminal responsibility for a resulting death.

Point VIII - A crime scene jury view, including an area adjacent to a cemetery, was proper as it assisted the jury in its assessment of the evidence and was the location of Weaver's arrest.

Point IX - Weaver's exculpatory comments to a booking deputy were hearsay and excluded properly.

Point X - The confession was entered properly. There was no misconduct. The waiver was knowing, intelligent, and voluntary.

Point XI - Peney's dying declaration is a hearsay exception and its admission via his twin brother was not unduly prejudicial.

Point XII - Evidence of an attempted armed burglary was admitted correctly as inextricably intertwined with the homicide.

Point XIII - The denial of a new trial was proper as there was sufficient evidence to support guilt and the rulings on a continuance, suppression, and inextricably intertwined felony evidence were proper.

Point XIV - The override death sentence is constitutional.

ISSUED RAISED BY APPELLEE ON CROSS-APPEAL

Issue I - It was error to severe Count V and preclude the felony murder argument. The earlier felony and confrontation

with Peney before Weaver had reached a point of safety were part of the criminal episode which resulted in a homicide. The incidents should have been prosecuted together under felony murder.

Issue II - The court erred in suppressing the confession tapes as Weaver had no expectation of privacy in the police car.

Issue III - It was error to preclude the State from introducing other firearm evidence found in Weaver's car as such was relevant the criminal episode.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DISCHARGING WEAVER'S FIRST COUNSEL, HILLIARD MOLDOF (restated).

Weaver argues his Fifth and Sixth Amendment rights, under the United States and Florida Constitutions, were violated when his second court-appointed counsel, Hilliard Moldof ("Moldof") was discharged. He boldly, and inaccurately argues that "[b]ecause the prosecutor's zealous quest for a swift resolution, he persuaded the court to discharge Jeffrey Weaver's conflict-free counsel of choice over the Defendant's vehement objections" (IB 39). Weaver's inflammatory characterizations of the facts, however, is not borne out by the record. Indeed, this Court will find Moldof's removal a proper exercise of discretion based upon Moldof's unavailability to try the case within a reasonable time.

A court's decision to remove appointed counsel and substitute with another is reviewed for abuse of discretion. See Finkelstein v. State, 574 So.2d 1164, 1167 (Fla. 4th DCA 1991).[2] Generally, "once counsel has been retained, the court

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[2] Weaver admits indigents do not have a right to a particular counsel's appointment (IB 39-40). Cantu-Tzin v. Johnson, 162 F.3d 295, 300 (5th Cir. 1998); Yohey v. Collins, 985 F.2d 222, 228 (5th Cir. 1993)(citing U.S. v. Magee, 741 F.2d 93 (5th Cir.

may not unreasonably interfere with the accused's choice of counsel." Harling v. U.S., 387 A.2d 1101, 1104 (D.C. App. 1978)(citation omitted). A judge may, in the interest of justice, substitute one counsel for another. Id., at 1105. For example, if retained counsel impedes or disrupts the orderly administration of justice, is grossly incompetent, physically incapacitated, or exhibits some other conduct which cannot be cured by contempt proceedings, he may be removed even over defense objection. Id.

In State, ex rel. Rose v. Garfield Heights Municipal Court, 385 N.E.2d 1314 (Ohio 1979), the Ohio Supreme Court upheld a court's removal of counsel on the ground counsel, who was unable to appear in his client's criminal case on several dates over a six-month period due to a conflicting schedule and had so many cases he was causing "undue delay." Also, in U.S. v. Whitaker, 1993 U.S. App. LEXIS 20507 (4th Cir. 1993) (unpublished opinion), the court upheld counsel's removal, over defense objection, as counsel had been appointed to represent another defendant whose trial was scheduled to last months, which meant a four month delay for Whitaker. U.S. v. Koblitz, 803 F.2d 1523 (11th Cir. 1986)(noting court could direct client engage other counsel where counsel could not appear for trial due to

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1984)).

conflicting schedules).

In the instant case, Moldof was removed because of his inability to be ready for trial within a reasonable time. This was a proper exercise of discretion.[3] To properly evaluate the decision, it is important to consider it in context. The crime was committed on 1/5/96 and on 2/27/96, Moldof was appointed after the Public Defender withdrew for conflict. At the time, trial was set for April, 1996, but Moldof didn't think he would be ready because there were 120 witnesses listed by the State, all of whom he intended to depose. He indicated he would be asking for a continuance (T1 28-29, 38-40). On 4/25/96, Moldof requested a continuance, advising he needed it to complete discovery. The State announced ready for trial (T1 57-58).

Ten more defense continuances were granted by Judge Taylor over the next 17 months (6/20/96 - 11/20/97), **for a total of 11 continuances** (T1 71-72, 76, 91, 121-24, 139, 143-44, 147-50).

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[3] The ethical rules regulating attorneys support the decision. Rule 4-1.3. of the Florida Rules Regulating the Florida Bar, mandates "[a] lawyer shall act with reasonable diligence and promptness in representing a client." A four or five year delay between indictment and trial can give rise to an argument a defendant's constitutional speedy trial rights were violated. See Barker v. Wingo, 407 U.S. 514 (1972); U.S. v. Hayes, 40 F.3d 362 (11th Cir. 1994)(discussing four-part test for determining whether person's right to speedy trial has been violated; holding five year delay between indictment and trial not violation of speedy trial).

By the seventh continuance, February 13, 1997, the State objected, noting it was in a precarious position and needed a "date certain" or realistic date as to when Moldof would be ready for trial. Moldof responded he was "still a good ways away" from ready and had numerous depositions to take, including those of the experts (T1 88-89). When Moldof commented the State had listed 200 witnesses, the State explained many of the officers listed had nothing to do with the crime, but had to be listed because they had responded to set up crime scene perimeters. The court granted the continuance and asked for agreeable trial dates (T1 89-91).

On 5/1/97, Moldof requested a eighth continuance, stating he was deposing DNA experts and needed time. The State replied it was ready for trial and again inquired about the special set trial. Granting the continuance, the court questioned Moldof regarding how many witnesses he had left to depose. He stated he had 10 depositions set for the day of the DNA experts and he still needed to depose the medical people involved with Peney's surgery. The Court told Moldof it needed a "realistic date" agreeable to the parties as it did not want to keep setting status conferences if Moldof was not close to ready (T1 121-22). Moldof responded he was starting Penalver, estimated as five to six week homicide trial, and could have a motion to suppress

ready by summer's end, but estimated they could "try for July." Noting Moldof had just said he would not be ready in July, the State again asked for a trial "date certain", even if it were later, so the victim's family would not be getting prepared for "ghost trial dates." Moldof answered it would be "fruitless" because they had not yet had any pre-trial hearings. The court agreed it was premature to set a "date certain" because discovery was ongoing and there had not been pre-trial hearings (T1 123-25).

At the 7/10/97 status, Moldof requested his ninth continuance, informing the court he had been with Penalver since 5/5/97, and it "seems like it will never end." Because of Penalver, Moldof explained, he hadn't been able to "accomplish much on this case" and had to cancel depositions. Moldof estimated Penalver would finish by the end of July. The court granted the continuance, setting the case for the September trial docket (T1 139-40). However, Penalver, had not ended by 9/18/97; therefore, Moldof requested and was granted a seventh continuance. The State again announced ready for trial and needed a "date certain." The court set a trial date and advised it would set a "date certain" as soon as Penalver finished (T1 143-44).

When Penalver had not ended by 11/20/97, Moldof requested

an eleventh continuance. He advised the State had rested in Penalver, the defense case should take a week, and jury should get the case near mid-December. Because Penalver was not in session in the mornings, Moldof had taken some depositions here (T1 147-48). Granting the continuance, Judge Taylor stated she was leaving the criminal division and Judge Speiser would be taking over the case. She agreed to ask him to set a December hearing so the parties could discuss scheduling hearings and trial (T1 149-50).

On 12/16/97, Judge Speiser held a status hearing at which the State advised the case was two years old. Moldof noted he had been at a dead stop for the last seven months because of Penalver. While he thought Penalver would end in January, it was unrealistic for him to get this case to trial in five months, especially when he had not deposed half of the 280 witnesses. The State responded its case was getting weaker by the delay (SR13 238-39, 242). When the court inquired how much time Moldof would need if Penalver finished in January, he replied it was hard to gauge because lots of judges were waiting for him to finish to try other cases. **Moldof remarked that if he was ordered off the case "it would be a relief in [his] life."** He noted it was a "selfish", but he would "thank goodness" as Weaver "needs a lawyer to work on this case non-

stop for a while yet." Moldof estimated, in a perfect world, the earliest he could be ready was the summer (SR13 254-55).

When asked whether having another lawyer take over would expedite the matter, the State responded it "just want to get this case tried" as it was frustrating to watch the case getting weaker (SR13 255). A week later, at the December 23, 1997 status, the court set a trial date for March, 1998, but acknowledged Moldof might not be ready. Moldof stated there was "no way" he would be ready as he still had to take 140 depositions and made it clear March was not a "firm" date (T1 159). Moldof did not want the State to tell the victim's family a date was set. When the court commented the delay was not due to inattention or laziness on Moldof's part, but rather, because of Penalver, the State responded that if Moldof could not control his caseload, he needed to get off the case. The State did not want to sit by and let its case dissipate until it was convenient for Moldof to try it (T1 160-61).

Considering Moldof's backlog once Penalver ended, the judge asked whether he wanted to keep the case. Moldof responded Weaver wanted him to remain, so he would, but noted the nine-month Penalver trial was unanticipated. Weaver agreed he was satisfied with Moldof and wanted him. The judge empathized with the victim's family, but could not force Weaver to trial

unprepared (T1 161-63).

Thereafter, on 2/6/98, Moldof filed "Motion for Special Status and Determination of Continuous Circumstances," asking for a special hearing "so counsel can confer with the Court regarding a proposed trial date along with the extenuating circumstances and need for additional counsel to assist in the preparation of the defense." The motion stated Penalver ended in a **hung jury** and re-trial would start 4/27/98. Consequently, Moldof would be unable to continue discovery or work on Weaver's case until Penalver ended and he needed **additional guilt phase counsel** to conduct discovery (R 392-95). On 2/19/98, Moldof admitted "everyone was interested in moving this case" while he was in Penalver and he had "held things up" because he "fully intended" to finish the depositions once Penalver ended. However, with the mistrial and re-trial in April, he anticipated another nine months for Penalver, which would put him that much behind here, where less than half the discovery was done (T1 174). This amounted to Moldof's twelfth continuance.

Although Moldof agreed the case should go to trial, "[b]ut ... if everyone is satisfied that I will do this as quickly as I can, I'll be glad to go forward." Moldof asked for **a second guilt phase lawyer** to complete the discovery. The State reminded the court Weaver's case was more than two years-old and

Moldof had already been granted **nine continuances, five of which were before Penalver started**. The State noted it had the right to a fair trial, its case was weakening as it could no longer locate several witnesses, others had faded memories, and the majority with direct knowledge of the case had yet to be deposed. Hence, the State suggested if Moldof could not be ready by August, he either relegate himself to penalty phase counsel or be removed. Moldof replied he would resign if forced to be penalty phase counsel (T1 175-77).

Counsel for Broward County, Bob Hone, **opposed** appointing a second guilt phase attorney as the law allows for **one guilt** and **one penalty** phase counsel. The contract prohibits a lawyer from farming out work to other counsel. Mr. Hone offered that if Moldof was overwhelmed by his case load, and could not continue on his own, he should withdraw and allow other counsel be appointed. The court asked Moldof whether he would consider becoming penalty phase counsel and Moldof refused (T1 178, 180-81).

Moldof agreed if Penalver, starting April 26th, took the same time as the first trial, it would take **two years** to get Weaver's case to trial.[4] Noting "both sides are entitled to a

[4] The Penalver nine-month re-trial and preparation time for

fair trial", one conducted within a reasonable time, the court indicated it was inclined to remove Moldof if the Penalver re-trial was going to last nine months (T1 180-82). The court left the door open for Moldof to remain as penalty phase counsel. Before making its decision, the court wanted to know whether Penalver was going to be re-tried in full-days or half-days, and thus, taking nine months. The court asked the parties to provide case law (T1 184-90).

On 2/23/98, the State apprised the only case found was Finkelstein, 574 So.2d at 1164, which was distinguishable. **Moldof took no position** on his removal, but Weaver objected, stating he had a "bond" with Moldof and Moldof was not "afraid" of Mr. Satz. The State replied it did not care what attorney was on the case so long as it could get a trial within six months. The court explained Moldof's removal was based on "the anticipated length of [Penalver] and the preparation that will have to go into that case and the additional amount of preparation that would have to go into this particular case." (T1 195-98).

Moldof's removal was a reasonable exercise of the court's discretion. At the time, he had been on the case for two years

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Weaver including taking the more important, lengthier depositions.

but admitted doing very little work. Despite 11 continuances, he had deposed less than half the witnesses and had not deposed the significant ones, i.e., those with direct knowledge of the crime. Moldof admitted he had been at a "dead stop" due to the unanticipated nine-month Penalver trial. It was understood, once Penalver ended, Moldof would "speed up" on Weaver's case. Because Penalver ended in a "hung jury", necessitating a re-trial, Moldof would again delay this case. By his estimate on 2/19/98, it would take another **two years** to get to trial (T1 181-82). Clearly, it was Moldof's own actions, or lack thereof, that got him removed from the case, and not the prosecutor's zealous quest for a swift resolution as Weaver suggests.

Weaver ignores Moldof's **two year** estimate and instead cites the court's concern, at the same 2/19/98 hearing, that Moldof would not be able to try the case for another year (until 1999) (IB 39). Weaver implies the court's concern was disingenuous as trial did not even begin until April 14, 1999 (IB 39 n. 22). This argument lacks merit as it ignores the fact Moldof stated he would need **two years, not one**, to get ready for trial. Moreover, considering how long it actually took for Penalver to be tried, it is clear even Moldof's **two year** estimate was short. The re-trial in Penalver ended in a mistrial and the third trial started 5/24/99 approximately a month after Weaver's

trial. See Penalver v. State, case no. SC00-1602 (pending capital direct appeal) This Court may take judicial notice of its records. Penalver was convicted on 11/12/99, penalty phase verdict was returned 12/6/99, and on 7/27/00, he was sentenced. Thus, Moldof would have been in trial with Penalver until 2000 and given his need to complete discovery, would not have been ready for Weaver's trial for at least **three years.** The State's right to a fair trial would surely have been impugned needlessly if it had to wait five years from the January 1996 murder to try this case.

Weaver's brief misleadingly suggests the State had Moldof thrown off the case (IB 39-41, 43). The record shows it was Moldof who first remarked, at the December 16, 1997 status conference, that **"it would be a relief in [his] life" if he was ordered off the case**. Moldof noted it was a "selfish", but he would "thank goodness" as Weaver "needs a lawyer to work on this case non-stop for a while yet." (SR13 254). Although Judge Speiser remarked he would not do that,[5] Moldof's comment prompted the court to inquire of the State whether it thought having

[5] Weaver argues the court failed to honor this assurance by removing Moldof (IB 39-40). Yet, the statement must be viewed in context. It was made before the Penalver hung jury which changed all as it meant Moldof needed another two years to try this case.

another lawyer would expedite the matter, to which Mr. Satz responded "I just want to get this case tried." (SR13 255). A week later, the court asked whether Moldof wanted to remain, considering the backlog from Penalver (T1 161-63). Moldof responded Weaver wanted him to remain so he would. Weaver agreed he wanted Moldof (T1 162).

Thereafter, on February 6, 1998, Moldof filed a "Motion for Special Status and Determination of Continuous Circumstances," stating Penalver had ended in a **hung jury** and the re-trial would begin April 27, 1998. The motion alleged he would be unable to continue discovery or work on Weaver's case until after the Penalver re-trial (R 392-93). Moldof was removed after that. Consequently, it was Moldof, not the State, who filed the motion advising the court of his unavailability which ultimately caused his removal. It is incorrect for Weaver to suggest it was the State that spear-headed Moldof's removal. In fact, his record cite (R 1113), is to the order discharging Mr. Salantrie, third appointed counsel, at Weaver's request.

Finally, the cases relied upon by Weaver are clearly inapposite and do not support reversal. Weaver cites to Justice Brennan's concurring opinion in Morris v. Slappy, 461 U.S. 1 (1983), however, the majority opinion held the Sixth Amendment does not guarantee a defendant, indigent or otherwise, "a

meaningful attorney-client relationship." Slappy, 461 U.S. at 13-14. Neither the state nor the court ever asserted Moldof had a conflict of interest; thus, Weaver's citation to cases guaranteeing the right to conflict-free counsel are inapplicable (IB 41). Finkelstein v. State, 574 So.2d 1164 (Fla. 4th DCA 1991), relied upon by Weaver, is inapplicable. In that case, the appellate court held the judge departed from the essential requirements of the law by removing counsel after he refused to go forward with a suppression motion and "Williams Rule" hearing until the issue of his client's competency was determined. Citing rule 3.210(b), Florida Rules of Criminal Procedure, the appellate court reasoned counsel's position was correct as, once a motion to determine competency has been filed, a case may not proceed until competency is determined.

Finkelstein is distinguishable as Moldof was properly removed because he could not meet his ethical obligation to be ready for trial within a reasonable time. Likewise, the cases cited in Finkelstein, and relied upon by Weaver, are inapposite. For example, in Smith v. Superior Court of Los Angeles County, 440 P.2d 65 (1968), the decision to remove counsel, over defense objections, was reversed because it was based solely upon the judge's subjective opinion counsel was not "competent" to try a death penalty case as he had not tried one previously.

Similarly, in McKinnon v. State, 526 P.2d 18 (Alaska 1974) and Kvasnikoff v. State, 535 P.2d 464 (Alaska 1975), the decisions to remove the Public Defender, over objections, based upon counsel's lack of preparation was reversed. See Harling v. U.S., 387 A.2d 1101 (D.C. App. 1978)(reversing order removing counsel over defense objection after counsel took position she would be rendering ineffective assistance if forced to trial without discovery).

Unlike the cases cited in Finkelstein, the decision to remove Moldof was based on objective facts apparent from the record. The State and Weaver have equal rights to a fair trial and that right would surely have been violated by waiting five years, while the case dissipated, to try it. Moldof had been on the case for two years, taken eight continuances and yet, had done very little work. Due to the nine-month Penalver re-trial, Moldof needed at least two more years to be ready. In fact, we know Moldof would have needed much longer since Penalver had to be tried three times.[6] It is therefore no surprise that Weaver, who had moved to throw the judge, prosecutor, and Salantrie off the case, was happy with Moldof, who had requested numerous continuances during his two tenure on the case. In any event,

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[6] The State relies on its Point III with respect to the stun belt issue Weaver raised in his footnote 23.

it is clear that the crimes occurred on January 5, 1996 and Weaver did not begin his trial begin April 14, 1999, some three and a half years later. Thus, the court exercised its discretion properly. This Court must affirm.

POINT II

THE COURT'S INQUIRY UNDER NELSON AND FARETTA WAS PROPER (restated).

Weaver next argues the court reversibly erred by conducting a Faretta v. California, 422 U.S. 806 (1975) inquiry because Weaver never made a clear and unequivocal request to represent himself.[7] Also, he argues he was not competent to represent himself. This Court will find the court did not abuse its discretion by conducting both a Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973) and Faretta inquiry, based upon Weaver's motion to discharge counsel, and properly found Weaver competent

[7] Incredibly, Weaver also argues that "[u]ltimately, as Mr. Satz pushed for the April 1999 trial date, Jeffrey Weaver and Mr. Salantrie had a breakbown over Jeffrey Weaver's defense strategy." This argument is not based upon historical fact. The crimes for which Weaver was charged occurred January 5, 1996. Mr. Salantrie was appointed March 3, 1998. On November 2, 1998, Judge Speiser set the trial date for April after consulting with Mr. Salantrie (T3 411-12). Weaver's motion to discharge Mr. Salantrie was filed on March 2, 1999. This was almost three years after the crime occurred, one year after Mr. Salantrie's appointment, and four months after the trial date had been set. Clearly, Weaver's allegation regarding the "push" by Mr. Satz for an April 1999 trial date coinciding with the breakdown of relations between Weaver and Mr. Salantrie is historically incorrect and belied by the record before this Court.

to represent himself. See Kearse v. State, 605 So.2d 534, 536 (Fla. 1st DCA 1992).

On March 2, 1999, Weaver filed a "Motion for the Removal of, and Replacement of My Appointed Counsel Edward G. Salantrie", because Salantrie, who replaced Moldof, was unwilling to argue the defense Weaver wished to present. A few weeks later, Salantrie filed a "Motion to Withdraw" advising he and Weaver were in serious dispute over the defense to use. The motion stated Salantrie hired experts and performed extensive work to develop support for Weaver's defense theory, but had been unable to develop any credible evidence. Salantrie did not want to pursue Weaver's theory and believed a conflict existed (R 396, 921-24, 970-72).

On April 6-7, 1999, a hearing was held on the motions (T13 2039-2244). At the outset, **Salantrie withdrew his "Motion to Withdraw."** (T13 2039-40). Thus, contrary to Weaver's assertions (IB 57), the hearing proceeded solely on Weaver's motion to remove and replace Salantrie. When a defendant seeks discharge of court-appointed counsel, the court must conduct a Nelson inquiry into the nature of the defendant's complaint, i.e., whether the complaint is about counsel's competency or another issue. If the defendant makes a clear allegation challenging counsel's **competency**, the court is obligated to

determine whether adequate grounds exist for discharge. Hardwick v. State, 521 So.2d 1071, 1074-75 (Fla. 1988); Nelson, 274 So.2d at 256. An inquiry into a defendant's complaints of incompetence can be only as specific and meaningful as the complaint. Lowe v. State, 650 So.2d 969, 975 (Fla. 1994).

If the court finds counsel's representation effective, it must advise the defendant he is not entitled to substitute counsel upon the discharge of current counsel and that, if he cannot afford to hire his own attorney, he will be exercising his right to represent himself. Hardwick, 521 So.2d at 1074. Jones v. State, 449 So.2d 253, 258 (Fla. 1984). If the defendant still wants to discharge counsel, the court must decide whether his waiver is knowing and intelligent. Faretta, 422 U.S. at 806.

At the *ex parte* Nelson inquiry, Weaver explained he and Salantrie were in conflict over what theory of defense to present (T13 2075-77). Salantrie's defense theory was that Weaver did not intend to shoot Peney, i.e., second-degree murder (T13 2074-77, 2104-05). Weaver wanted to argue it was not his bullet that killed Peney, rather it was Officer Myers's bullet (T13 2077-78, 2104-05). He believed that a physicist would support this theory. Weaver also asserted a neuropsychologist was necessary to hypnotize him so he could remember the details

(T13 2060-67).

Salantrie explained there was a great deal of evidence showing the bullet which fell off Peney's gurney, and had his blood on it, matched Weaver's gun, not Myers' and that it was the same caliber, make and model as the other bullets in Weaver's gun. Salantrie's ballistics expert linked the recovered bullet to Weaver's gun. Salantrie noted the real issue was not whether Weaver fired into the ground or at what angle, but rather, whether the bullet, which witnesses saw fall from Peney, came from Weaver's gun. Weaver's answer was to argue the police "switched" bullets. The court asked Weaver whether the "conspiracy" theory was a good defense, one the jury would believe (T13 2075-76, 2078-81, 2106).

The court summarized the conflict as: Weaver wanted to argue his bullet could not have hit Peney, while Salantrie wanted to argue it hit the officer unintentionally (T14 2104). In response to the court's question whether a jury would "buy" a conspiracy theory, Weaver stated he had a 65% shot if he could present a physicist and learn what two missing witnesses saw. Salantrie noted he had not been bashful about asking for experts, but would not request a neuropsychologist or physicist because they would be frivolous. He spent a lot of time and money on experts, including a ballistics expert, who had

"traveled down every single avenue" of any appropriate defense and could find nothing to support Weaver's theory. According to Salantrie, a physicist could not negate the ballistics data and a hypnotist was unnecessary as there was nothing Weaver could not recall. Salantrie was aware of each inconsistency in the eyewitness testimony and would bring it out on cross-examination (T14 2106-10).

There was no dispute, only two shots were fired, one from Weaver's .357 with .357 bullets and casings, the other from Myers' .9 millimeter with Golden Saber hollow point bullets (T14 2113-14). All five experts agreed the bullet which hit Peney was a .357, not a Golden Saber (T14 2115-16). Regarding eyewitness Steven Pinter, Salantrie questioned what he saw because he claimed there were two .25 shell casings on the ground, but no one had a .25. Salantrie was not going to advance a "mystery shooter" defense (T14 2119-20).

The court found "beyond any doubt" Salantrie, who had done more than 20 first-degree murder cases, was providing effective assistance and has "an impeccable reputation" respecting "his legal effectiveness" and "competence." The court found Salantrie had expended numerous hours preparing a defense and his theory was reasonable and consistent with the evidence. It was not unreasonable to refuse to call a physicist considering

the ballistics expert's opinion and there was absolutely no indication a hypnotist was needed. Salantrie was found competent, rendering effective assistance under Nelson, thus, Weaver was not entitled to substitute counsel if he discharged Salantrie (T14 2138-44).

Weaver does not challenge the adequacy of the Nelson inquiry or the finding of effective assistance. Rather, he argues a Faretta inquiry should not have been done as he never made an unequivocal request to represent himself and claims he was not competent to do so (IB 45-48). A defendant who persists in discharging competent counsel is not entitled to substitute counsel and is presumed to be exercising his right of self-representation. See Jones, 449 So.2d at 258; Hardwick, 521 So.2d at 1074. That is precisely what happened here. Consequently, Weaver's argument a Faretta inquiry was not warranted lacks merit. Also, "'the competence that is required of a defendant seeking to waive his right to counsel is the competence to ***waive the right***, **not the competence to represent himself**.'" Hill v. State, 688 So.2d 901, 905 (Fla. 1996), citing Godinez v. Moran, 509 U.S. 389 (1993). Contrary to Weaver's position, the inquiry's focus is on the competence to waive counsel, not competence to represent oneself. "[A] defendant does not need to possess the technical legal knowledge of an attorney before

being permitted to proceed pro se." Hill, 688 So.2d at 905.

Upon determining Salantrie was providing effective assistance, the court asked whether Weaver wanted to continue with Salantrie or discharge him (T14 2147). The court advised:

> Because if you do not want Mr. Salantrie to represent you, this Court would not be in a position to appoint you another attorney. ... If you can afford an attorney of your own, you have that right to retain private counsel, if you decide not to have Mr. Salantrie represent you, then you will need to determine whether or not you are competent yourself to represent yourself in this matter.

(T14 2147). Weaver responded he could not proceed with Salantrie's defense; he did not want Salantrie's counsel with that defense (T14 2148). After deciding Weaver could not afford a private attorney, the court explained it would be conducting a Faretta inquiry to determine whether Weaver was knowingly and intelligently waiving his right to court-appointed counsel. Before doing so, the court reexplained Weaver would not be getting a court-appointed attorney if he discharged Salantrie, rather, the question would be whether Salantrie represented him or he represented himself (T14 2150).

The court conducted an exhaustive Faretta inquiry, following the rule 3.111(d), Florida Rules of Criminal Procedure model colloquy, during which it outlined the benefits of a lawyer, the disadvantages Weaver faced by going pro se, and advised it was unwise to represent himself (T14 2151-76). Weaver noted he had

read the Indictment, understood the charges, and that the armed burglary count had been severed. He was advised about the maximum penalties he faced (T14 2190-91, 2194-98). Weaver had plenty of contact with his lawyers and did not have any questions to ask them (T14 2194-98). The court made inquiry to determine whether Weaver's waiver of court-appointed counsel was knowing and intelligent including that Weaver read and wrote English, was not under the influence of drugs/alcohol, had never been diagnosed or treated for mental illness, did not have a physical impairment, and had not been threatened to forego counsel (T14 2198-99).

Significantly, Weaver had filed several pro se motions to discharge the judge, prosecutor prior to his request to discharge Salantrie. In deed, Weaver told the court that he had successfully represented himself before on two speeding tickets, one which he "won hands down" (T14 2201-03). Weaver reiterated he did not want Salantrie, even after the court advised him he was making a grave mistake and asked him to reconsider (T14 2201, 2203-05). After a final plea for Weaver to rethink his decision, the court found Weaver's waiver knowing and intelligent concluding:

> I find ... that you are quite familiar with the facts of this case as evidenced by the copious notes you have, your familiarity with the testimony of various witnesses, so I find that you have the

> capability, the familiarity with the facts of this case to proceed.
>
> I find that you have the factual insight of the substance of this case. I find that you possess the ability to express yourself, to articulate yourself. You have the intelligence and intellect, despite the fact that you don't have the college or legal education, that you have a high school equivalent.
>
> That you're . . . thirty-seven years-old, that you have the experiences of life to generate common sense.

(T14 2214-19). Guilt phase stand-by counsel was appointed and Weaver kept Mr. Singhal for the penalty phase (T14 2219, 2170-75).

Finding Weaver competent to waive court-appointed counsel is supported by the record. Potts v. State, 718 So.2d 757, 759 (Fla. 1998). The inquiry was thorough and exhaustive. The record shows Weaver knew what he was doing, as well as the ramifications. The court was totally familiar with Weaver's capacity to understand and make this decision and had held a thorough colloquy in this regard. The record evinces Weaver was extremely involved in his defense, so much so he was discharging Salantrie because he would not present the defense theory Weaver wished. The Nelson hearing shows Weaver was well versed with most of the depositions and familiar enough with the case to request Salantrie bring certain depositions to court (T13 2040-41). Weaver's interactions with the court demonstrated his knowledge of the case and intelligence.

In light of the record, the court did not abuse its discretion in finding Weaver's waiver of counsel both knowing and voluntary. Again, the focus of the inquiry **is not on Weaver's competency to represent himself, but rather, on his competency to waive counsel**. See Porter v. State, 788 So.2d 917, 927 (Fla. 2001).

POINT III

THERE WAS NO ABUSE OF DISCRETION IN REQUIRING WEAVER TO WEAR A STUN BELT (restated).

Weaver contends he was denied a fair trial because he was required to wear a stun belt and was no longer a zealous advocate for himself when the belt was activated erroneously (IB 53-55). The State submits there was no abuse of discretion as the court considered its need and announced the basis for the belt. The belt's accidental activation had no impact on the trial.

A decision to require a defendant to wear restrains is reviewed for abuse of discretion. Bryant v. State, 785 So. 2d 422, 428 (Fla. 2001); Derrick v. State, 581 So. 2d 31, 35 (Fla. 1991); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Harrell v. Israel, 672 F.2d 632, 635-36 (7th Cir. 1992). Under this standard, substantial deference is paid to the ruling and it will affirmed unless it is arbitrary or unreasonable. Trease v.

State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000).

Noting the security issue created by Weaver's pro se status and need to move about the courtroom accessing the judge, jury, participants, and evidence, the court broached the subject of restraints. Recommendations were sought and a stun belt was suggested. The belt's size, visibility, operation, and mobility allowance were described as well as under what condition it would be activated. Weaver did not object until the State Attorney modeled the belt, but the court found it neither visible or suggestive and ordered a jacket be made available for Weaver. Handcuffs, leg irons, and leg braces were rejected due to their visibility and mobility limitations (T15 2251-53, 2256, 2280-84).

While awaiting voir dire, and outside the jury's presence, the belt was activated in error when Deputy Tessitore bumped the remote while helping move a computer. She explained the remote did not have a protection the new remotes had and to avoid other errors, she would keep it in an accessible drawer. The court asked Weaver if he were "okay" and he replied: "Just shaken a little bit, that's all." Also, he advised "as far as pain or anything like that, there is no pain....", but he needed 15 minutes to calm. A new belt could not be used as Weaver was able to escape it. Before recommencing after Weaver's requested

recess, he reported ready. Over the lunch-hour he was seen by a nurse and he was fine (T17 2717-21, 2723, 2798-99, T18 2803).

Courtroom dignity, order, and decorum are essential to the proper administration of justice. Illinois v. Allen, 397 U.S. 337, 343 (1970). However:

> ... a criminal defendant's right to be free of physical restraints is not absolute: "[U]nder some circumstances, shackling 'is necessary for the safe, reasonable and orderly progress of trial.'" ... "Courtroom security is a competing interest that may, at times, 'outweigh[ ] a defendant's right to stand before the jury untainted by physical reminders of his status as an accused.'"

Bryant, 785 So. 2d at 428 (citations omitted). See Diaz v. State, 513 So. 2d 1045, 1047 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988). A court may order restraints where it reasons them necessary for security. Harrell v. Israel, 672 F.2d at 635-36.

Requiring restraints was proper as Weaver, acting pro se and on trial for the murder and attempted murder of two officers as well as his intimate knowledge of firearms as established by the cache of weapons found in his car, would be moving about the courtroom, approaching the jury, witnesses, and court personnel with access to firearms and ammunition evidence. The court was informed of the belt’s workings, concealability, saw it modeled, and rejected other more visible and restrictive devices. The belt was selected as the least visible/cumbersome restraint. While it was activated once, such was not in the jury’s

presence, Weaver was unharmed, and after a short recess, was ready to proceed.[8] He now claims he became subdued, but points to no record evidence. In fact, the record refutes the claim. It shows he was a zealous advocate, competently arguing legal points and questioning police and lay witnesses with equal vigor, even taking the stand to face the prosecutor.

Weaver's reliance on United State v. Durham, 287 F.3d 1297 (11th Cir. 2002) does not further his position. In Durham, 287 F.3d at 1306-07, the conviction was reversed because the court failed to make findings regarding the belt's operation, the interest it served, whether a less restrictive method was available, and the rationale for requiring a stun belt.

Conversely, here the judge heard of the belt's operation, size, visibility, and utility in permitting Weaver to remain mobile, yet under a deputy's control. Other options were considered and the court announced its rationale. The concern in Durham that the belt would interfere with the defendant's ability to confer with counsel is not present here as Weaver was pro se. Moreover, while the belt was activated accidentally, it did not cause Weaver pain or loss of control of his bowls as suggested in Durham. Weaver reported he was fine after his

[8] It is irrelevant penalty phase counsel claimed he was not fine as Weaver report no ill side effects (T17 2719-21).

unintentional shocking. He cogently argued legal issues, examined witnesses, and testified. The judge investigated the error and authorized steps be taken to avoid another accident. Any unvoiced concern Weaver may have had was assuaged. The decision to utilize a belt was a proper exercise of discretion given Weaver's ability to walk around the courtroom, approach the judge and jury, and access the firearm evidence. The conviction must be affirmed.

POINT IV

THE COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO GRANT A CONTINUANCE. (Restated).

Weaver argues it was error to deny a continuance after Salantrie's motion to withdraw was granted and Weaver was pro se (IB 57). The State notes **Salantrie withdrew his motion** before a hearing commenced (T13 2039-40), thus, Weaver's assertion otherwise is wrong. The record is clear, Salantrie **was discharged by Weaver**, pursuant to Weaver's motion (R 921-24, See Point II). This Court will find the denial of a continuance does not constitute a gross or palpable abuse of discretion entitling Weaver to a reversal.

It is well-established, the decision to grant a continuance lies within the sound discretion of the judge and will not be disturbed unless there has been a **palpable abuse of discretion**.

Sliney v. State, 699 So.2d 662 (Fla. 1997).

Weaver's request for a continuance was made on the heels of his decision to discharge Salantrie and represent himself. The court conducted a thorough and extensive Faretta inquiry before determining Weaver competent to waive his right to counsel. During the inquiry, the court advised Weaver about the advantages of having counsel and disadvantages of proceeding pro se. Twice the court expressly advised Weaver he would not be entitled to an automatic continuance just because he was pro se (T14 2178, 2184-85). After the court determined Weaver competent, Weaver discharged counsel and exercised his right to self-representation.

Immediately thereafter, Weaver asked for a continuance, advising the court he had not looked through most of the discovery and he did not know how long he would need (T14 2221-22). While the court denied the continuance, he **delayed the trial by two days, giving Weaver a week to prepare**. The court noted the case's age and Weaver's intimate involvement with it for the entire three years (T14 2221). Weaver was notified the final deposition was scheduled for the next day, 4/8/99, and all remaining motions would be heard April 9th. Contrary to Weaver's assertions (IB 59), he had the witness' statement, all he needed to take was her deposition. Also that day, he was

given the State's responses to the motions and was provided copies of the motions on April 8th (T15 2225-66).

On April 9, 1999, with penalty phase and stand-by counsel present (T15 2254-61), the court asked Weaver if he wanted Salantrie re-appointed. Weaver declined, but requested new counsel (T15 2257). When the court declined, Weaver said he was unprepared to argue the motions. The court reminded him he had been informed, before Salantrie's discharge two days earlier, that the motions would be heard that day and he would not be entitled to a continuance on an old case. Weaver asked whether Salantrie could be re-appointed just to argue the motions, which the court considered to be a "mockery of the system and abuse of process." The court inquired why Weaver had not filed the motion to discharge until three weeks before trial. (T15 2266-69). The court permitted a courier to bring the discovery boxes to the jail and Weaver received them at 9:00 p.m. April, 9, 1999 (T14 2240, T16 2404-05).

Before voir dire on April 14, 1999, Weaver again moved for a continuance, arguing there was an enormous amount of discovery which he had not had an opportunity to review. The State objected, stating: the case was three years, four months old; Weaver had been at every hearing; the court had explained, during the thorough Faretta inquiry the difficulties of

preparing a case in jail; yet Weaver knowingly chose to represent himself despite those difficulties. The court denied the continuance, reasoning it had a "tough" time believing Weaver was not familiar with the facts because he had been at every hearing and actively participated in his defense with his attorneys. The court also noted Weaver had been advised Salantrie's discharge would not be a basis for getting a continuance and had decided to represent himself with full awareness of that fact (T16 2404-05, 2408-10).

Jury selection was held April 14, 1999 through the morning of 4/19/99 (T16-22). Penalty phase counsel was present and questioned the jury. Stand-by counsel was also present, as was a jury expert to advise Weaver. Thus, Weaver had almost two weeks to prepare before any witness examination (4/7/99-4/19/99). Weaver reserved his opening and after the State's direct of its first witness, Weaver indicted he had not read the witness' deposition, and the court recessed until the next day to allow Weaver time to read that deposition. The court required the State tell Weaver the next four or five witnesses it would call (T21 3464-73).

The same thing happened at the end of the next day when the State attempted to call Officer Magnanti. Thus, the court recessed for the day and gave Weaver time to prepare. The court

again required the State to list the witnesses it intended to call the next day (T22 3662, 3664, 3671). On April 21, 1999, Weaver informed the court he had spoken with the expert physicist, and would not be calling him. Weaver stated he was unprepared, could not represent himself, and requested an attorney, even Salantrie (T22 3694-97). The State responded it was being "whipsawed by [Weaver's] indecision," and he was talking out of both sides of his mouth (T22 3713-14). The court decided to keep Weaver pro se, but elevated stand-by counsel's status to "active" stand-by, meaning he was to do more than just answer questions (T22 3725). The court ordered the State to list its next several witnesses and recessed until 4/27/99, giving Weaver another **six days** to read and prepare.

Thereafter, the judge gave Weaver a **four day** (T25 4352), a **five day** (T33 5659-60, and numerous half-day recesses to give Weaver the opportunity to read depositions before cross-examination. Given the foregoing, the court's denial of the continuance does not constitute a palpable abuse of discretion. The courts of this state have upheld denials of motions for continuances where a defendant has argued lack of an adequate and reasonable opportunity to prepare for trial. See, Langon v. State, 791 So.2d 1105 (Fla. 4th DCA 1999) (upholding denial of a continuance for defendant who chose a month before trial to

discharge counsel proceed pro se); Miller v. State, 764 So.2d 640 (Fla. 1st DCA 2000) (holding defendant, who discharged counsel close to trial, was not entitled to continuance to allow replacement counsel time to prepare); Berriel v. State, 233 So.2d 163, 165 (Fla. 4th DCA 1970)(upholding denial of continuance where new counsel had five days to prepare); Smith v. Hamilton, 428 So.2d 382 (Fla. 4th DCA 1983)(upholding denial of continuance where counsel waited until trial to move for continuance and raised for first time he was unable to locate clients to tell them of trial; trial date had been set for six months; counsel provided no excuse for failure to move earlier).

A judge is charged with the responsibility of running his docket and seeing cases get an early trial consistent with a fair and orderly disposition. Fuller v. Wainwright, 268 So.2d 431 (Fla. 4th DCA 1972). Particularly in criminal cases, where the defendant has a constitutional right to speedy trial, it is incumbent upon the court to try cases in a timely fashion. Here, Weaver's discharge of Salantrie on the eve of trial was nothing more than a delay tactic. The sole reason Weaver discharged Salantrie was because he refused to pursue Weaver's outrageous "conspiracy" defense which was not supported by any evidence. Proof this defense was not viable legally is shown by Weaver's later abandonment of it. Twice before Salantrie's

discharge, Weaver was advised he would not be entitled to an automatic continuance. Further, this case was over three years-old and had been continued many times. The court questioned why Weaver waited until three weeks before trial to move for counsel's discharge as the dispute over the defense theory existed from day one. Moreover, there was no undue prejudice to Weaver from the denial of the continuance. As the court noted, from the beginning, Weaver was involved actively in his defense and intimately aware of his case and knew what witnesses would be called by the State ahead of time. Most important, the court took numerous recesses throughout the trial, even four to five days at a time, in order to give Weaver time to read depositions and prepare for cross-examination. Weaver was given all forms of assistance including a jury selection expert, investigator, and well as others. The record demonstrates he was able to present a cogent defense. Based upon these facts, it cannot be said the judge committed a flagrant or palpable abuse of discretion by denying a continuance.

The cases relied upon by Weaver are distinguishable. In Fasig v. Fasig, 830 So.2d 839 (Fla. 2d DCA 2002), the court found the denial of a continuance to the wife in a divorce proceeding, denied her due process. In the instant case, Weaver was not in any way prohibited from presenting his defense; he

was afforded every expert or other assistance requested. Silverman v. Millner, 514 So.2d 77 (Fla. 3d DCA 1987), is also distinguishable as the defendant had a stroke the day before trial and his testimony was required for a fair and adequate presentation. Based upon the foregoing, the State submits that this decision should be affirmed.

POINT V

WEAVER'S REQUEST FOR DISQUALIFICATION OF THE TRIAL COURT WAS DENIED CORRECTLY (restated)

Weaver argues his case was treated differently and he feared bias as Judge Speiser: (1) unilaterally kept the case after leaving the division, (2) leaked attorney/client information, (3) had ex parte communications with the State, (4) had been a prosecutor, (5) was the subject of In Re: Inquiry Concerning a Judge-Mark A. Speiser, 445 So. 2d 343 (Fla. 1984), and (6) made an erroneous evidentiary ruling. (IB 60-64). The record shows the motion was denied properly as legally insufficient.

The denial of a motion to recuse is reviewed for abuse of discretion. Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000). The reviewing court is to determine the motion's legal sufficiency based on whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial...proceeding." Hayes v. State, 686 So. 2d 694, 695 (Fla. 4th DCA 1996), rev. dismissed, 691 So. 2d 1081 (Fla.

1997). "[S]ubjective fears...are not 'reasonably sufficient' to justify a 'well-founded fear' of prejudice." Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986).

Initially, the State would point out the motion to recuse Judge Speiser, like the motion to disqualify the prosecutor, was filed pro se. Certain grounds Weaver argues here were not presented below. These include: (2) leaked attorney/client information during 4/9/99 hearing,[9] (4) judge had been an Assistant State Attorney, (5) In Re: Inquiry Concerning a Judge-Mark A. Speiser, (2/84 opinion),[10] and (6) 12/3/98 rulings regarding the attempted burglary evidence. The State submits the inclusion of the "leaked" attorney/client information on appeal by current appellate counsel amounts to an utter fabrication of the events which transpired below. The argument, along with the citation to a 1984 opinion by this Court regarding the conduct of Judge Speiser before he was a judge to suggest a proclivity to divulge confidential information, is yet

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[9] Weaver challenged the court regarding a mid-trial required disclosure of defense experts (T21 3496-3500), but such is not relied upon by Weaver and is waived.

[10] Weaver attempts to cloud the issue with a nearly 20 year old case merely in hopes of disparaging the court without any proof of impropriety. There is no basis for connecting the prior inquiry to the present situation. Such tactics should be decried.

another example of Weaver's-and appellate counsel's - unwarranted personal attacks which have no place in these proceedings. See Nassetta v. Kaplan, 557 So.2d 919, 921 (Fla. 4th DCA 1990). In any event, the four arguments newly raised here are unpreserved as they were not presented below. In fact, the motion and supplemental motion for recusal were filed on 4/30/98 and 11/2/98 respectively, with the court ruling on 11/2/98 (R4 409-14; R5 528-32; T3 329-32). As such, the 12/398 and 4/9/99 events occurred after the ruling, were not part of the motion to recuse, and no further action was taken. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

As this Court is well aware, Rule 2.160 (c) -(f) Florida Rules of Judicial Administration governs the resolution of this issue. While the purpose of the rule is "to ensure public confidence in the integrity of the judicial system," caution must be taken "to prevent the disqualification process from being abused for the purpose of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983).

To support his claim here, Weaver points to events which became known on 2/2/84 (In Re: Inquiry Concerning a Judge-Mark A. Speiser), 12/16/97 (case retained by Judge Speiser where he

disclosed he spoke to Chief Judge Ross about the case), 12/3/98 (felony murder ruling), and 4/9/99 (alleged attorney/client information). On 4/30/98, Weaver filed his motion to recuse the court and a supplement on 11/2/98 which was ruled on the same day (R4 409-14; R5 528-32; T3 329-32). They were legally insufficient, legal nullities, See Burke v. State, 732 So. 2d 1194, 1195 (Fla. 4th DCA 1999) as they were filed pro se, beyond the 10 day limit, were unsworn, and did not allege the grounds for disqualification as required by Rule 2.160 (d) and (e). As mandated by Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978), the court did not look beyond the legal sufficiency of the motion, and did not abuse its discretion in denying the request.

However, should this Court look at the facts alleged, they do not establish "a well grounded fear" of not receiving a fair trial. Livingston, 441 So. 2d at 1087. The focus of a motion to disqualify is not on the reasonable subjective belief of the defendant; rather, it "is whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." Livingston, 441 So. 2d at 1086 (emphasis in original). See, Correll v. State, 698 So.2d 522, 524 (Fla. 1997).

With respect to the allegation his case was being treated differently and that there had been ex parte discussions with

the prosecutor, the record refutes this. The State incorporates its answers for Point I and VI to show Moldof's removal was reasonable, and the State had no ex parte conversations (R 409-14), thus, there was no basis for recusal as no reasonably prudent person would be in fear. The thrust of the motion (R4 409-14) was Weaver did not want to go to trial for another two years. Livingston, 441 So. 2d at 1086 (cautioning against delay). The assignment of judges is a matter of judicial administration, an area in which Weaver has no standing to object. See Kruckenberg v. Powell, 422 So.2d 994 (Fla. 5th DCA 1982); Adler v. Seligman of Florida, Inc., 492 So.2d 730, 731-32 (Fla. 4th DCA 1986). There was no basis for recusal.

The record developed when Judge Speiser took over the case, and at the hearing on the motion to disqualify the prosecutor, establish nothing to put a reasonable person in fear of bias. At the 12/16/97 status hearing, at which Weaver was present, the parties discussed whether Judge Speiser or another judge would preside over Weaver's case (SR13 235-57). Judge Speiser recognized Weaver's case had been assigned blindly to Judge Taylor's docket (T3 373-75) which he was covering because she was elevated to the district court. As a result of that, and Judge Hinkley's retirement, Chief Judge Ross was evaluating assignments and wanted Judge Speiser to keep the case; Judge

Speiser agreed. The State, concerned with the case's age, was interested in having a judge assigned who would remain with it until resolution. Moldof was given the chance to discuss the issue with his client. (SR13 237-39, 243-46). A week later, in Weaver's presence, the parties revisited the issue and Judge Speiser reported Chief Judge Ross rejected Weaver's suggestion to have the case assigned to Judge Backman and determined the Judge Speiser should keep the case as he was in Judge Taylor's division. Moldof replied: "And we're at the Court's disposal." (T1 153-57).

Weaver's instant allegations of *ex parte* discussions between two judges about the docket, "with or without" Mr. Satz is insufficient, especially where Weaver can offer only "possibly other *ex parte* discussions" took place. It is clear from the record only Judges Ross and Speiser conversed. Mr. Satz testified he had been losing witnesses due to the continuances, and did not speak to the court *ex parte* (T1 153-57, T3 340-42, 346-47; SR13 235-46). That Judge Ross was concerned with division assignments based upon recent judicial vacancies and determined a judge who had been handling a case should retain it is not the type of matter which would put a reasonably prudent person in fear. Livingston, 441 So.2d at 1086; Lusskin v. State, 717 So.2d 1076, 1077 (Fla. 4th DCA 1998) (affirming denial of

recusal where judge retained case to hear sentencing issues after leaving criminal division); Willie v. State, 600 So.2d 479 (Fla. 1st DCA 1992) (noting judge is not divested of authority to preside over criminal case after reassignment to non-criminal division); Kruckenberg, 422 So.2d at 994; Adler, 492 So.2d at 731-32.

The allegation Judge Speiser was former prosecutor would not put a reasonable person in fear. Cf. Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000) (finding recusal unnecessary); Kearse v. State, 770 So. 2d 1119, 1129 (Fla. 2000). At the time of Weaver's 1998 motion to recuse, it had been at least 14 years since Judge Speiser left the State Attorney's employ. Similarly, the fact Judge Speiser had been the subject of In Re: Inquiry Concerning a Judge-Mark A. Speiser, also 14 years before, would not give a reasonable person pause especially where this Court saw no need to take further action. Again this is an example of Weaver's slash and burn advocacy and an attempt to disparage the court. See Nassetta, 557 So.2d at 921. It would be unreasonable to bar the court from hearing criminal cases under these circumstances and should not form a basis for reversal here.

For his claim of "leaked" attorney/client information, Weaver cites pages 2273-75 (IB 61). Such is incorrect

factually. First, no privileged information was disclosed, second, the matter was discussed because Weaver asked to have new counsel appointed, and third, Weaver announced the basis for counsel's withdrawal.[11] During the 4/9/99 request for new counsel, well after the motion to refuse was denied, Weaver reported, in the State's presence, Salantrie "would definitely not be willing to do my defense." (T15 2269). The State noted it was operating in a vacuum, thus, the court asked Weaver: "there's a difference in strategy as to the defense, right?" and Weaver clarified the disagreement was due to the "[p]resentation of the defense." (T15 2271). Without question, the court did not disclose privileged information.

As for the argument on page 62 of the initial brief that: "Jeffrey Weaver knew both the judge and prosecutor would soon face reelection or retention. He feared that his case was becoming more about politics than justice.", the State must again take issue with appellate counsel's unsupported and scurrilous allegation. The crime in this case occurred on

[11] In his pro se motion for removal of counsel, Weaver argued Salantrie would not present the defense Weaver wished (R8 922-23). Salantrie's motion noted he and Weaver "had a serious disagreement regarding" experts and defense theory, that extensive investigation was conducted, but "no credible evidentiary support" for Weaver's desired defense was developed (R8 970-71). Both motions were served upon the State, thus, it was the defense, not the court, which revealed the basis for the disagreement existed.

1/5/96. At the time the prosecutor had been the elected State Attorney since 1976. The prosecutor and judge were not up for re-election for four years after the crime, i.e., the year 2000. Further, the claim the court allowed Weaver to be prosecuted under a felony murder theory is belied by the record (T6 790-93; T30 6248). Even if the court had so ruled, it would not form a basis for recusal. See Tafero v. State, 403 So.2d 355, 361 (Fla. 1981). This Court must affirm.

POINT VI

THE REQUEST TO DISQUALIFY THE STATE ATTORNEY'S OFFICE WAS DENIED CORRECTLY (restated)

Weaver claims the State Attorney's Office ("Office") should have been disqualified and "actual prejudice" resulted from its involvement in Moldof's removal[12] (IB at 64-65). The State submits Weaver has failed to show actual prejudice, as Moldof's removal was proper. Weaver faced nothing he otherwise would not have faced.

Review of a denial to disqualify a State Attorney's Office is abuse of discretion. Rogers v. State, 783 So.2d 980, 992 (Fla. 2001). In order to disqualify the Office, Weaver must

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[12] Below, Weaver alleged the State had *ex parte* communications with the court to get the case on the "fast track." (T3 335). Weaver has abandoned the argument here.

show actual prejudice resulting from the prosecution. Downs v. Moore, 801 So.2d 906, 914 (Fla. 2001); Rogers, 783 So.2d at 991; Farina v. State, 679 So.2d 1151, 1157 (Fla. 1996), receded from on other grounds, Franqui v. State, 699 So.2d 1312 (Fla. 1997); Bogle v. State, 655 So.2d 1103, 1106 (Fla. 1995). "Actual prejudice is something more than the mere appearance of impropriety." Meggs v. McClure, 538 So.2d 518, 519 (Fla. 1st DCA 1989). Disqualification "must be done only to prevent the accused from suffering prejudice that he otherwise would not bear." Id. See Kearse, 770 So.2d at 1129.

Weaver points to Moldof's discharge as "actual prejudice" occasioned by the State, but as is clear from the State's answer to Point I reincorporated here, Moldof was replaced appropriately by other counsel.[13] Also, Mr. Satz explained he had been losing witnesses due to the defense continuances, and denied speaking to the court *ex parte* (T3 340-42, 346-47). Denying disqualification, the judge noted the random assignment of Weaver's case and recalled that it remained with him at the Chief Judge's direction (T3 373-76). Such facts cannot form "actual prejudice" as the State was merely seeking to prosecute the case and had no *ex parte* communications. Weaver faced

[13] The second trial was mis-tried and the third concluded July 2000. Weaver's trial would not have started until July 2001.

nothing he would not have faced had the Office been disqualified.

Farina, is instructive as it shows actual prejudice was not found even though the State improperly asked the clerk to assign a case to a particular judge. Id. at 395-96. Likewise in Kearse, disqualification was not required where the prosecutor had been elected judge, but had not yet taken office. Kearse, 770 So. 2d at 1229. The State's pursuit of a timely trial does not amount to an impropriety. Merely because Weaver wanted Moldof who would be unavailable for years, does not evince the type of actual prejudice required to remove the Office. Simply put, this argument is nothing more than another example of Weaver's unfounded attempt to discredit the prosecutor, who along with the judge, was the subject of Weaver's attempts to remove them from the case for his own benefit. The court's must be affirmed.

POINT VII

PREVENTING ADMISSION OF ALLEGED MEDICAL NEGLIGENCE EVIDENCE WAS PROPER (restated)

Weaver complains it was error to preclude him from presenting evidence tending to establish Peney died as a result of medical malpractice (IB at 65-69). For support, he cites Donohue v. State, 801 So. 2d 124 (Fla. 4th DCA 2001), rev. denied, 821 So. 2d 301 (Fla. 2002). The State submits Donohue

was decided wrongly and is distinguishable. The record reveals the court properly excluded evidence of alleged medical malpractice as it was irrelevant to any legally recognized defense. The State established Weaver inflicted lethal wounds which were the "actual" and "proximate cause" of Peney's death, thus, precluding the argument medical malpractice excused criminal liability. Johnson v. State, 59 So. 894 (Fla. 1912); Hallman v. State, 371 So.2d 482 (Fla. 1979), abrogated on other grounds, Jones v. State, 591 So.2d 911 (Fla. 1991); Rose v. State, 591 So.2d 195 (Fla. 4th DCA 1991). See, Melynda L. Melear, Intervening Causation as a Defense, 33, No. 1 Fla. Crim. L. J 6 (Fall 2002) (discussing Donohue) (copy attached)

Admission of evidence is within the court's discretion, and its ruling will be affirmed unless there has been an abuse of discretion. Ray v. State, 755 So.2d 604, 610 (Fla. 2000); Zack v. State, 753 So.2d 9, 25 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997); Jent v. State, 408 So.2d 1024 (Fla. 1981).

The State filed a motion in limine regarding "alleged intervening cause of death" (SR13 320-24) and while represented by counsel, testimony was taken from Drs. Constantini and Tabry,[14] the cardiothorasic surgeons who operated on Peney

[14] Dr. Constantini, had done 300 to 400 cardiothorasic surgeries and Dr. Tabry had done 6,000 to 7,000, with 100 involving gunshots (T7 884, 949-50, 978).

together, and Dr. Wright, a forensic pathologist (T7 868, 949-50; T 1015). The three agreed the injuries to the vena cava and aorta were lethal; left untreated, they are uniformly fatal (T7 885, 890-93, 896, 929-31, 937-39, 961-62, 964-67, 972-73, 975, 994, 998-99; T8 1027-28, 1049-50, 1060). Per Dr. Tabry death is usually instantaneous when the vena cava is torn in the area Peney's was (T7 961-62, 964-67, 970, 972-73, 975, 994).

Dr. Wright, a non-surgeon, last assisted in surgery over 30 years ago. Nonetheless, he believed the doctors should have **assumed** there were injuries to both blood vessels based upon the bullet's trajectory, taken Peney to surgery without more tests, operated on the left then right chest or used a by-pass machine to operate from the front. According to him, it was the **delay** that caused the death, not Dr. Constantini's heart attack mid-surgery. Even so, Dr. Wright admitted that had the surgery started sooner, Peney may not have survived (T8 1023-27, 1036-49, 1063-68).

As noted previously, Drs. Constantini and Tabry operated together on Peney. The fact Dr. Constantini's suffered a heart attack during the operation was unknown to Dr. Tabry at the time as he thought Dr. Constantini was excusing himself because of belly cramps and carried on with the surgery (T7 960-61). The doctors explained the tests were required before operating,

because Peney had been shot through the center of the chest and they needed to know the structures involved as such dictated the entry point (T7 876-80, 895, 913, 928-29, 932, 955-56, 959-60, 983-84, 988). The wound placement precluded simultaneous repair as the aorta injury was behind the heart which required entering the chest from the back/left side and the vena cava necessitated entry through the right (T7 876-82, 890-91, 914-18, 959-60). Cracking the chest from the mid-line could not be done as it required the use of a bypass machine and Heparin, a blood thinner counter-indicated as it would cause more bleeding (T7 883-84, 892-93, 915-18, 968-72, 1003-04).

While Weaver was pro se, the court ruled on the motion. Although he asserted he did not have a copy of the State's motion, the court recognized he had been present throughout the testimony. (T15 2346-49). The court relied upon the testimony of the above doctors and found: (1) Dr. Wright was not a surgeon, was not present for the operation, and looked at the issue "from a side perspective", (2) Dr. Constantini's heart attack did not cause error, (3) Peney's wounds were "mortal", "devastating injuries", (4) the appropriate testing and procedures were followed, and (5) there was no medical negligence. (T15 2350-52).

Weaver points to Donohue, 801 So.2d at 125-26 submitting a

evidence of malpractice should be permitted where it tends to establish reasonable doubt. However, Donohue was decided wrongly as it misinterpreted and misapplied long-standing precedent. Weaver would have this Court find he should escape responsibility for the life-threatening wounds inflicted merely because a surgeon was unable to save Peney's life. However, under this Court's precedent, a defendant cannot escape the consequences of his act which caused a wound "dangerous to life" even where the death may have been avoided had different medical care been administered unless the medical malpractice was itself the sole cause of death. Johnson, 59 So. at 895. The Johnson rationale was reiterated in Hallman where the defendant was denied a new trial even though the treating hospital had been found liable civilly for malpractice. Hallman, 371 So.2d at 485-86. "[T]he hospital's negligence would not have precluded Hallman's conviction" even if it had contributed to the death. Id. at 485-86 (citing Tunsil v. State, 338 So.2d 874, 875 (Fla. 3d DCA 1976) (finding defendant responsible for death even though victim died of pneumonia).

In Rose, 591 So.2d at 199-200, the court excluded evidence tending to show malpractice contributed to the death. Relying on Hallman and Barns v. State, 528 So.2d 69 (Fla. 4th DCA 1988), the court stated: "the evidence showed that the head injuries

suffered by the child were themselves lethal and were caused by child abuse. Although medical treatment might have saved the child's life, it did not excuse the defendant's act." Id. at 196. The court addressed admissibility and reaffirmed that the evidence was excluded properly "because such evidence [is] irrelevant and immaterial unless it could be shown that as a matter of law, the malpractice was the sole cause of death." Id. It was uncontroverted the victim suffered a lethal blow to her head and died of the injury, thus, the "alleged failure to diagnose and treat this injury in no way contradicted the fact, that **left untreated, it was a mortal wound**." Id. at 200 (emphasis supplied). "[A]s a matter of law, the subsequent alleged misdiagnosis and failure to treat was no defense to defendant's liability for the acts with which he was charged." Id.

With the exception of Donohue, Florida law is clear, neither medical malpractice from an affirmative act nor from a failure to act relieves a defendant of criminal responsibility where it was his actions which produced a wound "dangerous to life."[15]

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[15] See, Klinger v. State, 816 So.2d 697, 698-99 (Fla. 2d DCA 2002); Nunez v. State, 721 So.2d 346, 347 (Fla. 2d DCA 1998) (holding only were intervening negligence was sole, proximate cause of death will it relieve defendant of liability); State v. Smith, 496 So.2d 195, 196 (Fla. 3d DCA 1986) (reinstating criminal charged against defendant even though it was proven

Donohue is a departure from the settled law and cannot form a basis for relieving Weaver of responsibility here.

The claim in Donohue was that evidence of "mal-intubation" should have been admitted because the victim's injuries were not life-threatening and the treatment may have contributed to the death. Id. at 125. The district court found the evidence admissible by distinguishing Rose on two fronts. First, the injuries in Rose were life-threatening and second, the cases relied upon in Rose, did not involve the admissibility of evidence, but rather, the sufficiency of the evidence. Id. at 126.

The court in Donohue erred in its analysis of Johnson by asserting Johnson was not intended to apply to admissibility of evidence issues, but, instead, was limited to cases where the defendant was seeking an acquittal. Although Johnson argued the death was caused by malpractice, it is unclear how the point was argued. While this Court noted "much of the brief" was devoted to the argument, it did not specifically address the evidentiary claim, opting for a clear announcement "...that, where the wound is in itself dangerous to life, mere erroneous treatment of it or of the wounded man suffering from it will afford the

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malpractice was committed which may have caused death); Karl v. State, 144 So.2d 869, 870 (Fla. 3d DCA 1962) (noting delay in treatment did not reduce defendant's responsibility).

defendant no protection against the charge of unlawful homicide." Johnson, 59 So. at 895. This Court did not limit its holding to a sufficiency of the evidence claim as one of the "assignments" may have been an admissibility claim. Likewise, Hallman, 371 So.2d at 485 did not limit itself to a sufficiency of the evidence matter when opining, "even if the hospital's negligence had contributed to the victim's death, this fact would not entitle Hallman to a new trial on his conviction." Id. at 486. Donohue was decided wrongly.[16] The decision is not dispositive of this case.

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[16] Also, the Donohue court erroneously relied on Rivera v. State, 561 So.2d 536 (Fla. 1990), Vannier v. State, 714 So.2d 470, 472 (Fla. 4th DCA 1998), and Butts v. State, 733 So.2d 1097 (Fla. 1st DCA 1999) for the proposition any evidence tending to show reasonable doubt is admissible. Rivera, Vannier, and Butts were attempting to show that someone else committed the crime, not that they caused the injury, but through medical error death resulted. It is well settled malpractice will not reduce criminal responsibility. See Johnson, 59 So. at 896; Hallman, 371 So.2d at 485-86. Both here and in Donohue, the defendants acknowledged involvement in the crimes, but were attempting to show that had the medical staff rendered different care, the result may have been different. Were this Court to permit the evidence suggested by Donohue, then any time a victim reaches a doctor before death, the defendant could reduce his criminal responsibility, as a result of the doctor's inability to save the victim. Such could not be the intent of Rivera or Vannier, and was not the intent in Johnson, Hallman, or Rose. Similarly, Buenaono v. State, 527 So.2d 194 (Fla. 1994) and Butts were misapplied in Donohue. Where the malpractice evidence is irrelevant to overturn a conviction or sustain dismissal of charges, then it is irrelevant during a homicide trial no matter what standard is used to determine the medical certainty the victim died from a specific cause.

Even under Donohue, Weaver is not entitled to relief. None of the cases addressed to malpractice require the injury inflicted be lethal, but here, the injuries were mortal. See, Johnson, 59 So. at 895. The three doctors agreed Peney's injuries were uniformly fatal if untreated (T7 892-93, 937-39, 961-62, 964-67, 972-73, 994, 998-99, 1004; T8 1027-28, 1040, 1049-50). Donohue distinguished Rose on the difference in wound severity. It is uncontroverted, Weaver inflicted the fatal wounds from which Peney succumbed.

Yet, even if it were error to exclude the malpractice theory, such was harmless. See, DeGuilio, 491 So.2d at 1129. As noted above, the defense was not that the doctors hastened Peney's death, only they did not save him. At trial, the M.E., Dr. Perper, opined Peney had three potentially fatal injuries: (1) lung injury (not high survivability rate), (2) perforated aorta (very high mortality rate), (3) Torn vena cava (most severe and "difficult to repair"). He did not recall anyone surviving a similar vena cava injury. "[T]he combination of the three [wounds] made this a definitely unsurvivable injury" (T32 5524-25). The jury also heard Peney's dying declaration and testimony from Myers, and lay witnesses that Weaver shot Peney. The forensic and ballistic evidence proved it was Weaver's bullet which injured Peney. The overwhelming evidence was

Weaver inflicted three wounds, which in combination were "definitely unsurvivable", thus, the excluded testimony would not have altered the result. The conviction must be affirmed.

POINT VIII

CONDUCTING A JURY VIEW WAS PROPER (restated)

Weaver asserts it was error to grant a jury view. The State submits the viewing was proper as it assisted the jurors in analyzing the evidence. The decision should be affirmed.

Permitting a jury view under section 918.05, Florida Statues, is within the court's discretion and "may be granted if it appears that a useful purpose would be served." Thomas v. State, 748 So.2d 970, 983 (Fla. 1999); Rankin v. State, 143 So.2d 193 (Fla. 1962). The court's ruling is presumed correct absent proof otherwise. Thomas, 748 So.2d at 983; Bundy v. State, 471 So.2d 9, 20 (Fla. 1985). The purpose of a jury view is to "aid jurors in analyzing and applying the evidence." Rankin, 143 So.2d at 195. Where the scene remains the same, the jury's analysis may be aided by seeing the area first-hand.

While represented by counsel, Weaver objected to a jury view of the shooting, concealment, and arrest areas (R8 966-68; SR15 775; T12 1823-31). Weaver hid in Cliff Lake following the shooting and was captured on its western bank next to Evergreen Cemetery (T12 1820-22). The State asserted the viewing would

assist the jury in its evaluation of the evidence and was necessary because the photographs were inadequate to capture the relevant distances involved (R8 966-68; T12 1824-25, 1831-36). The court agreed that under the case facts a jury view was necessary (T12 1836-37).

During the trial, the jury's ability to see the cemetery was discussed (T30 5174-78). There was no way to reach the west side of the lake by land, without going through the cemetery (T30 5177-80). The State noted Weaver was captured near the cemetery after hiding in the lake over night, but it was not the focus of the viewing. Weaver admitted the lake was in the cemetery, and steps were taken not to highlight it (T30 5180-81 5209; T31 5378-80).

The planning for the viewing with the assistance of stand-by counsel, addressed security and the logistics of moving to the various scenes. As agreed for the viewing, the court identified each location, east and west sides of the lake, the shooting site, and relevant landmarks. At each area, the jurors were permitted to walk about, but not discuss what they viewed. (T30 5185-98, 5200-11; T31 5372-84, 5419-31; T33 5634, 5637, 5643-45, 5651-55).[17]

[17] During the viewing, reporter Diana Diaz asked Mr. Satz if he wished to talk to the press; he declined. Weaver asserts reporter Nick Bogert ("Bogert") put a microphone in his face.

Weaver notes the jury was able to view a cemetery which was next to the lake arrest site. He relies on U.S. v. Triplett, 195 F.3d 990 (8th Cir. 1999); U.S. v. Passos-Paternia, 918 F.2d 979 (1st Cir. 1990), nor Hughes v. U.S., 377 F.2d 515 (9th Cir. 1967) for reversal. Merely because the court was found not to have abused its discretion in denying views in cases where the crime scene was described sufficiently through photographic evidence, Triplett, 195 F.3d at 999; Hughes, 377 F.2d at 516, or where the scene, a boat, was too dangerous for the jury to board, Passos-Paternina, 918 F.2d at 986, does not establish an abuse of discretion here. In the instant case, the court agreed the photographs were not sufficient to permit the jury to understand the distances discussed by the witnesses and analyze the evidence.[18] This decision was proper. See, Rankin, 143 So.2d at 195; Tompkins v. State, 386 So.2d 597, 599 (Fla. 5th DCA

While the judge was not going to discuss the matter, when the opportunity arose, he examined Bogert. Bogert explained he did not have a microphone, but had called to Weaver to see if he wished to talk. Bogert was asked why he did not seek prior approval. Because Weaver was pro se, Bogert did not believe it necessary to obtain approval. The court thought Bogert's actions inappropriate, but seemed to accept his apology (T38 6636-38).

[18] While Weaver claims the viewing was cumulative to the photographic evidence, the record establishes otherwise. The State noted the photographs failed to adequately depict the distances noted by the witnesses. As such, the jury view would permit the jurors to make their own assessment and the evidence would not be cumulative to the photographs admitted previously.

1980).

In spite of the fact a cemetery was visible, the viewing was proper. The cemetery was adjacent to the location where Weaver attempted to hide, and the west side of lake could not be reached, except through the cemetery. Weaver should not be shielded from this fact. Cf. Henderson v. State, 463 So.2d 196, 200 (Fla.), cert. denied, 473 U.S. 916 (1985) (holding murder defendants should expect to be confronted with evidence of their "accomplishments"). Likewise, Weaver cannot escape the fact he secreted himself in a lake adjacent to a cemetery. The cemetery was not highlighted, but merely visible as part of the overall scene.

Even if the jury view was improper, such was harmless. DeGuilio, 491 So. 2d at 1129. The testimony of Myers, Peney's dying declaration, and lay witnesses all establish that Weaver shot Peney. Forensic and ballistics evidence confirmed this. The fact the jury saw first-hand that Weaver hid near a cemetery does not establish a reasonable possibility it caused the verdict. This Court should affirm.

POINT IX

WEAVER'S STATEMENTS OF THE BOOKING OFFICER WERE EXCLUDED PROPERLY AS HEARSAY (restated)

Weaver wanted to call Detective Macauley as a witness to

Weaver's comments he was "sorry" and "it was an accident" (T33 5664-69). Citing sections 90.803(1)(2)(3), Florida Statute, Weaver maintains the court erred in excluding these statements (IB 73-74). The claim is not preserved and no error occurred as Weaver's statements were self-serving, exculpatory comments which did not fall within any recognized hearsay exception (T33 5790-5814).

Admissibility of evidence is within the court's discretion, and will be affirmed absent a clear abuse. Ray, 755 So.2d at 610; Zack, 753 So.2d at 25. See Trease, 768 So.2d at 1053, n. 2.

At trial, Weaver argued, with the assistance of stand-by counsel, that the statements made to Detective Macauley were against his penal interest and showed his state of mind, thereby, making them exception to the hearsay rule (T33 5664, 5666-67). The court excluding the evidence as self-serving hearsay. The statements did not fall under the section 90.803(18), Florida Statute exception to the hearsay rule (T33 5814).

Now, Weaver claims the comments were admissible as either "spontaneous statements", "excited utterances" or "then existing mental, emotional or physical conditions" (IB 73), yet, he admitted he did not recall making the statements he wished to offer in evidence (T33 5809). Respecting the argument the

statements were spontaneous or excited utterances, Weaver has not preserved the issue; it was not raised below. Steinhorst, 412 So.2d at 338.

For a statement to be spontaneous, it must be explaining or describing an event while the declarant is perceiving the event or shortly thereafter. §990.803(1). See, Grim v. State, 841 So.2d 455, 463-64 (Fla. 2003); Cotton v. State, 763 So.2d 437, 440 (Fla. 4th DCA 2000) (en banc). As announced in Stoll v. State, 762 So.2d 870, 873 (Fla. 2000) and State v. Jano, 524 So.2d 660, 661 (Fla. 1988), for a statement to be an excited utterance it must be made in response to a startling event which causes nervous excitement, before there is time to contrive or misrepresent, and made while the person is under the stress of the startling event. Where there is time for reflective thought, the statement will be excluded unless there is proof there was no reflective thought by declarant. Jano, 524 So. 2d at 662. See Evans v. State, 838 So.2d 1090, 1094 (Fla. 2002). Under section 90.803(3)(b), a declarant's "after-the-fact statement of memory or belief to prove a fact remembered or believed" is not admissible. See Cotton, 763 So.2d at 442.

However, not only did the statements not fall under the exception of section 90.803(1)(2)(3), but they were excluded properly for their exculpatory, self-serving nature. Under

section 90.803(18), a party may not present his own statements in his case in chief. See Charles W. Ehrhardt, Florida Evidence, section 803.18, at 800 (2002). In Christopher v. State, 583 So.2d 642, 645 (Fla. 1991) the defendant sought the introduction of a statement he made to the witness. In construing section90.803(18(a), this Court reasoned: "... because the statute does not allow a party to introduce his own exculpatory hearsay statements. *See Fagan v. State*, 425 So.2d 214 (Fla. 4th DCA 1983) (defendant's self-serving hearsay statement inadmissible)." See, Jordan v. State, 694 So. 2d 708, 712 (Fla. 1997) (noting time between first admission he shot victim and comment he did not intend to kill "only increase[d] the unreliability of the hearsay").

Here, approximately 15 hours elapsed between the shooting and Weaver's discussion with the booking officer (T33 5809). During the intervening time, he spent the night in the lake, was arrested, confessed, and directed a drive through of the scene. In spite of Weaver's recent admission he did not recall making the statement, he had time to contrive a defense, and was attempting to reduce his responsibility for Peney's shooting. There is no indicia of reliability for Weaver's after-the-fact comments and description of his prior actions. The statements do not qualify under any of the hearsay exceptions listed in

sections 90.803(1)(2) and (3). Moreover, under section 90.803(18), the statements are exculpatory and inadmissible Weaver case in chief.

Even if it were error, such was harmless. DeGuilio, 491 So.2d at 1129. The jury had Peney's dying declaration, Myers' account, and lay witness testimony, all of which show Weaver turned, aimed, and shot Peney. The forensic evidence and ballistics testimony establish it was Weaver's bullet which mortally injured Peney. Moreover, the jury was informed that several times during Weaver's confession he asked if Peney wore a vest, where he was shot, and if he were alright (T26 4405-06, 4418-19, 4486, 4497-99). The fact the jury did not hear from the booking officer that Weaver said he was "sorry" and that "it was an accident" does not establish a reasonable possibility the jury would not have convicted in this case. The conviction must be affirmed.

POINT X

WEAVER'S CONFESSION WAS ADMITTED PROPERLY (restated)

Claiming police misconduct during the interrogation Weaver asserts it was error not to have suppressed his statement.[19] The

[19] Weaver makes no claim he asked for a lawyer (IB 74-76). As such, the suppression hearing testimony in this area will not be addressed and the issue should be found abandoned.

court correctly admitted the confession upon a supported finding of no police misconduct, but rather Weaver knowingly and intelligently waived his Miranda v. Arizona, 384 U.S. 436 (1966) rights.

The standard of review applicable to a court's ruling on a motion to suppress is that "a presumption of correctness" applies to a court's determination of historical facts, but a *de novo* standard applies to legal issues and mixed questions of law and fact that ultimately determine constitutional issues. See Smithers v. State, 826 So.2d 916, 924-25 (Fla. 2002); Connor v. State, 803 So.2d 598, 608 (Fla. 2001). "When, as here, a defendant challenges the voluntariness of his or her confession, the burden is on the State to establish by a preponderance of the evidence that the confession was freely and voluntarily given." DeConingh v. State, 433 So.2d 501, 504 (Fla. 1983). "In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that there was coercive police conduct." State v. Sawyer, 561 So. 2d 278, 281 (Fla. 2d DCA 1990), citing Colorado v. Connelly, 479 U.S. 157 (1986). "The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained." Sawyer 561 So.2d at 281.

During the suppression hearing, the lead detectives, Abrams and Palazzo, Weaver, defense expert Dr. Richard Ofshe, and Officer Bronson testified (T10 1473; T11 1606, 1755: T12 1854, 1927). According to Abrams, at 7:45 a.m. on 1/6/96, he met Weaver at the cemetery adjacent to the west side of the lake as Weaver lay on his stomach handcuffed (T10 1471-74). During Weaver's transportation to the station, he asked "How's the cop?", but no one answered (T10 1476, 1478, 1556-57; T11 1761-62).

In Abrams' presence, Palazzo and Weaver completed the Miranda form and Weaver agreed to talk to the officers, but only off-tape.[20] (T10 1481-88; T11 1574-76, 1609, 1612, 1615-19, 1717-20 1728-29). Weaver confirmed he refused to be taped and told the police if they insisted on a tape recording, he needed a lawyer (T12 1771). Nothing was promised Weaver in return for his confession, nor was he threatened (T10 1494-95; T11 1620). He agreed to assist the police in finding the gun and doing a

[20] Weaver confessed to having been stopped by two officers. They conversed about his identification and whether he had any weapons. When asked to place his hands on the cruiser, Weaver knew they would find his concealed gun and arrest him, thus, ran. Admitting the pursing police were gaining on him, and not wanting to be shot, Weaver turned and fired. Looking back, he saw the officer laying in the street and his partner approaching. Weaver continued to run, trying to evade the search. He discarded some clothing and his .357 blue steel Smith and Wesson revolver, and hid in Cliff Lake over night. (T10 1491-94, 1498; T11 1620-23).

"walk-through" of the crime scene (T10 1497-98; T11 1631).

Several times at the station and during the walk-through, Weaver asked about Peney, whether he wore a vest, and what his condition was. Although the police knew Peney had died, they did not disclose the fact, but redirected his attention elsewhere. Weaver was not informed of Peney's death because the police wanted a truthful statement and wanted him to continue talking (T10 1498-99; T11 1579-85, 1720-25). When Weaver saw blood in the area of the shooting, he again asked about Peney's vest and was told one was worn, but he had an injury to his side, then Weaver's attention was directed away (T11 1580-83, 1661, 1722-25).

Weaver confirmed the first few times he asked about Peney, he was not told of the officer's condition (T11 1763-64). Both Palazzo and Abrams confirmed Weaver was told Peney wore a vest, but they disagreed with Weaver's claim he was told Peney was fine. (T11 1583, 1591, 1652, 1700-03, 1763-64, 1777). Weaver claims he needed to know the officer's condition as it would impact on whether he gave a statement. Weaver asserted had he known Peney was dead, he would not have talked (T11 1763-65, 1779).

Dr. Ofshe testified as a defense expert. He had not reviewed Weaver's police confession nor had he reviewed the

audio/video tape of the walk-through, but had talked to defense counsel and read the suppression hearing testimony of Abrams, Palazzo, and Weaver (T12 1867-68, 1879-86, 1895, 1898). Of the 101 times Dr. Ofshe testified in criminal trials, **none** were for the State (T12 1906-07). Dr. Ofshe opined Weaver was manipulated and deliberately lied to by withholding facts which would affect his decisions and he cooperated because he feared being beaten and thought he would get better treatment if he talked (T12 1886-90, 1911).

In ruling on the motion, the judge noted he considered the witnesses' credibility and credited the testimony of Abrams and Palazzo in finding Weaver was given his Miranda rights. (T13 2028). Also, found was that Weaver "specifically conditioned" his talking to the police on the fact he not be recorded and this was "a valid condition" for Weaver talking to the police (T13 2029). The court ruled the officers could testify "as to their recollection as to the statements made by the Defendant" both at the station and during the walk-through, but the tapes of those conversation could not be played because of Weaver's condition he would talk only if not recorded (T13 2029, 2033).

In ruling, the judge found "no misrepresentations or misstatements made by the police" with respect to Peney's condition (T13 2030). Rejected also was the "implied

suggestion" the police were obligated to inform Weaver of Peney's condition or to answer all of his questions; such would be adding an unnecessary condition to Miranda (T13 2030-31). The court found Weaver's waiver and confession were knowing intelligent, and voluntary and that he was intelligent and articulate. Weaver took the position he would not speak on tape, but "did not persist in refusing to speak to the police officers based on his not getting the answer to the question as to the condition of Officer Peney":

> Although the officers on a number of occasions refused to answer that question, the Defendant could have, as he did with respect to deciding not to speak to them if the conversation was recorded, could have refused to answer the questions until he got a specific answer.
>
> He did not get a specific response to that question (Peney's condition), yet he still nevertheless continued and persisted in answering the questions....
>
> So I find that his - that there was no - by refusing and omitting to answer that question, that that was a scheme of delusion designed to induce the Defendant to testify.

(T13 2030-33) (emphasis supplied).

The court's factual findings are supported by the record and legal conclusions are proper. See Moran v. Burbine, 475 U.S. 412 (1986) (finding that the constitution does not require suspect know and understand every possible consequence of Miranda waiver); Oregon v. Elstad, 470 U.S. 298, 316-17 (1985).

Once Miranda warnings are given, official silence cannot cause a suspect to misunderstand the nature of his rights - his right to remain silent. See, U.S. v. Washington, 431 U.S. 181, 188 (1977). As noted in Washington, a defendant who has been advised he has the right to remain silent is in a curious position to complain that his statements were compelled. Id. There in no constitutional requirement that a suspect be given all the information he may feel useful in making his decision or that "might...affect his decision to confess." Moran, 475 U.S. at 422. The police have never been required to help a suspect decide whether or not to talk. Id. It has never been a constitutional requirement the police make sure the defendant's waiver was a prudent decision. Hence, the denial of the motion to suppress Weaver's oral statements was proper and must be affirmed.

POINT XI

PENEY'S DYING DECLARATION WAS ADMITTED PROPERLY (restated)

Alleging Peney's dying declaration presented through his twin brother Todd ("Todd") was inadmissible because its probative value was out weighed by its prejudicial effect, Weaver seeks reversal. He claims identity was not at issue, merely whether the police "planted" his bullet. Contrary to

Weaver's position, the testimony was admitted properly as a dying declaration. It was relevant to the issues in the case and was not unduly prejudicial.

Admission of evidence is within the courts sound discretion and will not be reversed absent an abuse of discretion. Ray, 755 So.2d at 610; Zack, 753 So.2d at 25. See Trease, 768 So.2d at 1053, n. 2 (discussing standard of review).

Pre-trial, Weaver's counsel moved to preclude the admission of the dying declaration and to preclude Todd from testifying. Weaver relied upon counsel's written motion in arguing to the court (T15 2296-97, 2301). The court ruled the testimony admissible as a dying declaration and that Todd was the witness who was privy to the entire conversation. (T15 2298-99, 2303-06). The ruling was based upon Todd's testimony he was with his twin brother at the hospital. They were very close and sometimes communicated without speaking. Peney kept telling Todd he loved him, which was something he had never said before. Also, he said he was shot by the 5'10" white male suspect he was checking. The man had a black .357 gun. In severe pain, critically wounded, and scared, Peney knew he was dying. (T15 2284-90).

The issue was revisited before Todd testified. During the discussion, Weaver stated he did not object to Todd giving the

facts, but it was “highly prejudicial” because “there’s no way to ask questions” on cross-examination “without making yourself look bad....” (T31 5415-16). The court reaffirmed its pre-trial ruling on admissibility (T31 5416-18).

Peney’s statement to Todd was an exception to the hearsay rule. Under section 90.804(2)(b), Florida Statutes, a statement about the “physical cause or instrumentality” of his impending death made by a person “under the belief of impending death” is admissible. Peney spoke of the person who inflicted his wounds and of the instrumentality of the injury. It was clear from the circumstances he knew he was dying - he told Todd he loved him, something he had not said before. Also, as a police officer, he was aware he was shot in the chest with a .357 gun. It was not necessary for Peney to utter the words he was dying for the statement to qualify as a dying declaration. Pope v. State, 679 So.2d 710 (Fla. 1996); Henry v. State, 613 So.2d 429 (Fla. 1993).

Moreover, the statement was relevant to the crime as Peney identified the person who shot him and the weapon used. The fact that this information was disclosed to a twin brother should not preclude the State from using this probative evidence. Weaver, having killed a person with a twin brother should not be shielded from the truth of his actions.

Henderson, 463 So.2d at 200 (holding murder defendants should expect to be confronted with evidence of their "accomplishments").

However, even if it were error, such was harmless. DeGuilio, 491 So.2d at 1129. Myers was with Peney when they stopped Weaver and was part of the chase as Weaver bolted. Further, Myers saw Weaver turn, aim, and fire upon Peney who fell immediately. This was confirmed by lay eye-witnesses The bullet recovered containing Peney's DNA was from Weaver's gun. Weaver admitted to the confrontation with the officers and firing his weapon. The mere fact Peney, through his dying declaration, identified Weaver does not mandate reversal here. With the extensive evidence of Weaver's guilt the conviction should be affirmed.

POINT XII

EVIDENCE OF AN ATTEMPTED ARMED BURGLARY OF A CONVEYANCE WAS ADMITTED PROPERLY (restated)

Weaver next argues the court abused its discretion by allowing evidence of the attempted armed burglary of the conveyance occupied by Graciela Ortiz ("burglary") as "inextricably intertwined" with the murder of Peney. This Court will find the evidence was properly admitted to establish the entire context of Peney's murder and to present a complete picture of the crime. Moreover, even if this Court finds it was

error, such was harmless.

At the outset it must be recognized that contrary to Weaver's assertion (IB 79), the State was not allowed to rely upon the burglary evidence to argue a felony-murder theory. The trial court specifically ruled the State could not argue felony-murder, it was not argued in the State's closing, and the jury was not instructed on the theory (R5 683; T6 790-91; T30 6248). As a result, it is an issue on cross-appeal.

It is well-established that the admission of evidence is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. See Thomas v. State, 748 So.2d 970, 982 (Fla. 1999); Sexton v. State, 697 So.2d 833 (Fla. 1997); Heath v. State, 648 So.2d 660 (Fla. 1994). The evidence of burglary was admissible, under section 90.402, because it was "inextricably intertwined" with the charged crimes, necessary to prove the entire context of Peney's murder. In Griffin v. State, 639 So.2d 966, 968 (Fla. 1994), this Court distinguished between evidence admitted under section 90.404(2)(a) of the Florida Evidence Code--Williams rule evidence--and evidence admitted to establish the entire context of the charged crime and found "evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule

evidence." See Coolen v. State, 696 So.2d 738, 742-43 (Fla. 1997).

"Inseparable" or "inextricably intertwined" evidence includes evidence that is "inseparably linked in time and circumstance," see Erickson v. State, 565 So.2d 328, 333 (Fla. 4th DCA 1990), and which is "necessary to fully describe the way in which the criminal deed happened," see T.S. v. State, 682 So.2d 1202 (Fla. 4th DCA 1996). Admissible "inseparable crime" evidence "explains or throws light upon the crime being prosecuted" and allows the State "to present an orderly, intelligible case . . ." Tumulty v. State, 489 So.2d 150, 153 (Fla. 4th DCA 1986). See Ferrell v. State, 686 So.2d 1324, 1329 (Fla. 1996). "Inseparable" crimes evidence clearly includes evidence describing the events **prior to** or **leading up to** the crime. See Zack, 753 So.2d at 16-17; Damren v. State, 696 So.2d 709 (Fla.1997); Ferrell, 686 So.2d at 1324; Anderson v. State, 841 So.2d 390 (Fla. 2003); Coolen, 696 So.2d at 742-43; Campbell v. State, 227 So.2d 873 (Fla. 1969); Consalvo v. State, 697 So.2d 805, 809 (Fla. 1996); State v. Cohens, 701 So.2d 362 (Fla. 2d DCA 1997); Henry v. State, 649 So.2d 1361 (Fla. 1995); Tumulty, 489 So.2d at 153.

To admit only the facts of Peney's shooting would have painted an inaccurate and incomplete picture of the events

surrounding the crime. Weaver's suspicious behavior, noted not only by the police, but by private citizens, prior to and at the time he was observed and stopped by Peney, was interwoven with the earlier attempted burglary. The jury was entitled to know the context within which the crime was committed. Here, the record reflects from the time of the burglary to the homicide, Weaver was lurking in bushes near the burglary scene surreptitiously. The burglary occurred at approximately 8:00 p.m. Ortiz testified she was stopped at a red light when Weaver approached her driver's side, grabbed the door handle, and pointed a gun at her. She fled the scene, running a red light. Sometime between and 8:00 and 8:30 p.m., Ortiz informed Mr. Lopez, a security guard, about the incident and he looked for the assailant. Ortiz also informed Sergeant Lerman. He issued a BOLO over the radio which Officer Loges heard, prompting him to Ortiz's location. Ortiz again described the perpetrator in more detail and the Officer relayed the description. (SR15 403-23).

At approximately 9:30 p.m., Ms. Wilcher pulled into a Mobil gas station approximately 0.6 miles from Ortiz's incident. She saw Weaver in the bushes shoving what she thought was a gun into his pants. Weaver made her nervous because he was pacing in the bushes. Near 10:00 p.m., King Irving ("Irving") saw a man near

the bushes near the Gene Whiddon Vocational School. When Irving walked past, the man began to follow. Irving felt in danger and turned around to look at the man. While he could not identify Weaver, he did describe the shirt Weaver was wearing. (SR15 403-23).

At 10:30 p.m., Barbara Engle witnessed Peney's shooting and identified Weaver as perpetrator. Officer Meyers testified he and Peney spotted Weaver near the Gene Whiddon Vocational School appearing nervous. Weaver walked faster as the officers neared and turned on their lights. They briefly detained Weaver who fled after Peney asked if Weaver had a gun. The homicide occurred just two hours after and 1.6 miles from the burglary of Ortiz. As Weaver was confronted by Officers Peney and Myers, he fled, turned, took a shooting stance, and fired upon Peney, killing him. Weaver used the same weapon for both crimes. Clearly, the trial court did not abuse its discretion in admitting the evidence of the burglary as "inextricably intertwined" with Officer Peney's murder. The homicide was the result of Weaver's continued fleeing from the site of the burglary to his car, which was interrupted by Officer Peney's detention.

The evidence of the burglary did not become a "feature" of the trial. The trial court went to great lengths to ensure that

the admission of this testimony was as limited as possible. Weaver's reliance on Porter v. State, 715 So.2d 1018 (Fla. 2d DCA 1998), as a case directly on point, is misplaced. In Porter, the Second District held that a wife's statement, "he's trying to kill me", as the police entered her home in response to a domestic violence call, was not "inextricably intertwined" with the husband's later charges for resisting an officer with violence and battery on a law enforcement officer. The court's ruling is premised on the fact that there was a clear break between the wife's statement and the defendant's later altercation with police. Conversely, here, there was no break between the burglary and Peney's murder. The homicide was the result of Weaver's continued fleeing from the site of the burglary to his car, which was interrupted by Peney's detention.

Finally, even if error, the admission of the collateral crime evidence was harmless beyond a reasonable doubt and there is no reasonable probability that the alleged error affected the outcome of this case. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). The evidence establishing that Weaver shot and killed Officer Peney was overwhelming. In addition to eyewitnesses who saw the shooting, Weaver admitted that he fired the gun, but claimed it was not his bullet that killed Officer Peney. Consequently, there is no possibility that the admission

of this testimony affected the verdict.

POINT XIII

WEAVER'S REQUEST FOR A NEW TRIAL WAS DENIED PROPERLY (restated)

Weaver asserts that his motion for new trial (R11 1278) should have been granted because the court made erroneous rulings with respect to: (1) sufficiency of the evidence for premeditation and aggravated assault, (2) defense continuance, (3) suppression of confession, and (4) evidence of the attempted armed burglary of a conveyance (IB 83-85). There was sufficient evidence of first degree murder and aggravated assault, thus, the new trial was denied properly. Further, as analyzed in Points IV, X, and XII of this brief, the court ruled on those matters correctly. There was no basis for granting a new trial. This Court must affirm under the abuse of discretion standard applicable here. Woods v. State, 733 So. 2d 980, 988 (Fla. 1999) (noting The standard of review for the denial of a new trial is abuse of discretion); Gonzalez v. State, 745 So. 2d 542, 543 (Fla. 4th DCA 1999); Chatmon v. State, 738 So. 2d 970, 971 (Fla. 2d DCA 1999).

In considering Weaver's motion for new trial, where the defense relied upon its written motion, the court noted it had addressed the issues raised both before and during the trial and relied upon those rulings in denying a new trial (R11 1278,

1334; T38 6750-52). With respect to the challenge to the court's rulings on (1) the defense continuance, (2) confession, and (3) motion in limine regarding the attempted armed burglary of a conveyance, Weaver points to nothing more that his argument raised in the individual points of his initial brief (IB 83-84 n. 35-37). The State relies on and reincorporates its analysis presented in Points IV, X, and XII, thereby, submits the record establishes the court did not abuse its discretion in those matters. Hence, *a fortiori,* there was no basis for a new trial. Cf. Wike v. State, 813 So.2d 12, 22 (Fla. 2002)(rejecting claim of cumulative error because no individual errors occurred; Downs v. State, 740 So.2d 506, 509 (Fla. 1999) (same); Zeigler v. State, 452 So.2d 537, 539 (Fla. 1984) (same), sentence vacated on other grounds, 524 So.2d 419 (Fla. 1988); Chandler v. Dugger, 634 So.2d 1066, 1068 (Fla. 1994).

Turning to the challenge to proof of premeditation, the motion for new trial was denied properly as the weight of the evidence proved Peney was killed with premeditation.[21] In Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), this Court held the

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[21] While Weaver claims "the underlying attempted armed robbery was not properly proven", the record shows that the State was precluded from utilizing a felony murder theory and proceeded solely on premeditation. The felony murder theory was not argued in closing nor was an instruction given (T30 6248). The issue will not be discussed further.

consideration in resolving a motion for new trial was not the sufficiency, but the weight of the evidence and that the weight is a somewhat subjective concept. See Florida Rule of Criminal Procedure, 3.600(a)(2).

As this Court is well aware, it announced and defined the elements of premeditation in Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). See, Woods v. State, 733 So. 2d 980, 988 (Fla. 1999); Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991). Weaver's actions here amounted to premeditation. The evidence established Weaver knew he would be arrested when Peney discovered the concealed firearm, thus, he took off running. Recognizing, Peney was gaining on him, and was approximately 25 feet behind, Weaver, pivoted, brought his arms up "point blank" and fired one round from his .357 revolver directly at Peney, hitting him in the chest (T29 4881-82). Although he claimed he did not intend to kill, but merely to frighten the officers, the jury and court were permitted to reject Weaver's excuse. His actions as witnessed by Myers and other lay witnesses established premeditated murder from the fear of arrest, the desire to escape, the decision to produce a .357 revolver, aim it at Peney, and fire, hitting him in the chest. Evans, 838 So.2d at 1095 (finding premeditation in part on fact defendant aimed gun at victim's chest and fired single

shot); Philmore v. State, 820 So.2d 919, 931-32 (Fla. 2002) (recognizing single gunshot to head shows premeditation). The motion for new trial was denied properly.

Likewise, there was sufficient evidence of aggravated assault. Following Peney's shooting, Weaver did a stutter step and brought his gun around and pointed it at Myers. Myers testified Weaver did not fire because Myers shot at Weaver first (T29 4885). A reasonable person would be put in fear by Weaver's actions. Valdes v. State, 626 So.2d 1316, 1322 (Fla. 1993) (affirming conviction for aggravated assault where co-defendant pointed gun at victim); Jefferson v. State, 776 So.2d 1089, 1090 (Fla. 4th DCA 2001) (finding brandishing weapon in victim's presence sufficient to support aggravated assault); Green v. State, 706 So.2d 884, 885-86 (Fla. 4th DCA 1998) (finding prima facie evidence of aggravated assault even though gun not pointed at anyone in particular); Lester v. State, 702 So.2d 598, 599 (Fla. 2d DCA 1997) (noting jury could determine unloaded BB gun was dangerous weapon sufficient to establish aggravated assault when pointed at officer). Myers had just witnessed Weaver shoot Peney, then turn and point the gun at him. As Myers stated, he believed if he did not fire upon Weaver, Weaver would have shot him. This Court must affirm.

POINT XIV

WEAVER'S OVERRIDE DEATH SENTENCE IS PROPER. (restated)

Weaver's first challenge to the propriety of his override death sentence is that the court improperly restricted his presentation of evidence and counsel's penalty phase closing argument by sustaining the State's objection to counsel's referencing to/reading from a newspaper article about a Texas murder (T38 6660-61).[22] Defense counsel argued it was admissible because the jury's sentencing decision would be based on comparing Weaver with other death row inmates (T38 6660). This Court has recently considered and rejected this argument in Hess v. State, 794 So.2d 1249 (Fla. 2001), holding the court erred by allowing defense counsel to discuss the Ted Bundy, Jeffrey Dahmer, and Charles Manson cases finding the issue controlled by Herring v. State, 446 So.2d 1049 (Fla.1984), receded from on other grounds, Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). This Court noted "there is no requirement in [Lockett v. Ohio, 438 U.S. 586 (1978)] for the admission of evidence regarding "the circumstances and sentences in other death penalty cases."

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[22] Weaver does not explain how the court's ruling prevented him from "presenting evidence." What counsel says during closing argument is not evidence. He cites to (T 6476-77), which involved the court's exclusion of certain photographs; however, his complete failure to make any argument on the issue requires affirmance. See Cooper v. Crosby, slip op. case no. SC02-623 (Fla. June 26, 2003).

Hess at 1269. It is not relevant for the jury to consider the cases of other death row inmates because that relates to the proportionality of the sentence, which is an appropriate consideration for the trial court and this Court, but not for the jury. Similarly, here, it was not relevant for the jury to consider the Texas case to make its recommendation.

Weaver's argument that the court erred by "reading" two letters from the public asking him to give Weaver a death sentence, but not reading law review and other articles submitted by former counsel, is also flawed. This issue is not preserved. Steinhorst, 412 So. 2d at 338. Here, defense counsel never argued the court should read these articles because it had inadvertently read the two (2) letters from members of the public.[23] To the contrary, when asked for his position regarding whether the court should read these materials, defense counsel **took no position** responding "[j]udge, it's a law review article from Boston University Law review. If you have an interest in reading it, that's fine. Whatever, you want to do is fine with me. I've made my arguments in my [sentencing] memo." (ST1 9-10). Defense counsel did request that the trial court not read any

[23] The court explained he inadvertently read the letters because they were opened by his secretary and put in his mail (ST1 6-7).

more letters from the public and the court explained his secretary was screening his mail (ST1 7). Also, even if the issue was preserved, it is meritless. The court read the letters inadvertently and did not consider them in ruling. There is no authority requiring him to read such materials.

Weaver next claims the court failed to properly consider and weigh all the mitigating evidence (IB 92-98). This Court in Campbell v. State, 571 So. 2d 415 (Fla. 1990), established the relevant standards of review for mitigating circumstances: 1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and finally, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. See, Kearse, 770 So. 2d at 1134 (observing whether particular mitigating circumstance exists and weight to be given it are matters within court's discretion); Trease, 768 So. 2d at 1055 (receding in part from Campbell and holding that, though a court must consider all the mitigating circumstances, it may assign no weight to an established mitigator).

The court's order states that Weaver requested **five (5)**

statutory mitigators: (1) no significant history of prior criminal conduct; (2) good employment record; (3) contribution to society and his charitable and humanitarian deeds; (4) good parent; and (5) religious devotion **and seven (7) non-statutory mitigators**: (1) circumstance of the offense; (2) his cooperation with the police; (3) his potential for rehabilitation; (4) his adaptation to prison life and future value to society; (5) his sorrow over the victim's injury and death; (6) his pretrial and trial conduct; and (7) any other mitigating circumstance within the knowledge of the court.

The court found Weaver established the statutory mitigator of "no significant history of prior criminal activity", but gave it little weight and rejected, as statutory mitigation, Weaver's "good employment record," "contribution to society/charitable and humanitarian deeds," his "being a good parent" and his "religious devotion" (R 1466-1473). The court found Weaver's "good employment record" to be non-statutory mitigation and gave it moderate weight, but rejected the other three as not established by the greater weight of the evidence (R 1466-73). Regarding non-statutory mitigation, the court found Weaver's "cooperation with the police," and "adaptation to a life of incarceration/future value to society," had been established as non-statutory mitigators but rejected the "circumstance of the

offense," "potential for rehabilitation," "sorrow over the victim's injury and death," "pretrial and trial conduct," and any other mitigating circumstance within the court's knowledge, as not established by the greater weight of the evidence (R 1473-78). The court gave moderate weight to Weaver's "cooperation with the police," and little weight to his adaptation to prison life/future value to society.

Weaver argues the court reversibly erred by rejecting certain mitigators as not established by the greater weight of the evidence and abused its discretion regarding the weight it assigned to the mitigation found. While aggravators must be proven beyond a reasonable doubt, Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992), mitigating factors are "reasonably established by the greater weight of the evidence." Campbell, 571 So. 2d at 419-20 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1061 (Fla. 1990). In analyzing mitigation, the judge must (1) determine whether the facts alleged as mitigation are supported by the evidence; (2) consider if the proven facts are capable of mitigating the punishment; and if the mitigation exists, (3) determine whether it is of sufficient weight to counterbalance the aggravation. Rogers, 511 So. 2d at 534. Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws

a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991), cert. denied, 503 U.S. 946 (1992); Stano v. State, 460 So. 2d 890, 894 (Fla. 1984). Resolution of evidentiary conflicts is the trial court's duty; "that determination should be final if supported by competent, substantial evidence." Id.

There is substantial, competent evidence supporting the trial court's rejection of Weaver's "contribution to society/charitable and humanitarian deeds," as a mitigator. The only evidence in support of this mitigator came from family and friends and was general and conclusory in nature. Further, as the court noted, most of the testimony was extremely remote in time (R 1469-70). Similarly, there is substantial, competent evidence supporting the court's rejection of Weaver's "being a good parent" as a mitigator. As the court noted, Weaver "abdicated his parental responsibility to [his three year-old son] Nicholas, by quitting his job where he was capable of financially supporting his son, leaving Nicholas in North Carolina, and ceasing to provide the daily care and commitment of love to the child, in order to aimlessly travel." (R 1470). The record also supports the court's rejection of Weaver's "religious devotion." Though there was testimony about Weaver's religious practices during high school, the record also shows

that thereafter, Weaver was convicted of breaking, entering and larceny of a hotel, larceny of a vehicle, speeding, possession of drug paraphernalia, possession of marijuana, DUI, reckless driving, and illegal discharge of a firearm on Gamelands. As the court noted, Weaver also conceived a child out-of-wedlock and abandoned him as a toddler. His behavior does not show a continuing and abiding attachment to religion (R 1470-71).

The court's rejection of Weaver's "potential for rehabilitation" is supported by substantial, competent evidence. Weaver points to testimony from his family and friends "that he had a good prospect for rehabilitation and that he had been friendly and helpful to others and good with children," as proving this mitigator but fails to acknowledge he had been afforded an opportunity for rehabilitation, but failed to improve his conduct. Weaver had previously committed a series of minor offenses, for which he had received light sentences, but did not learn his lesson and was now found guilty of the "ultimate crime," the murder of an officer. Likewise, the evidence Weaver asked whether Peney was wearing a vest (T 1590, 1955) and offered a tearful apology to the victim's family during his closing, does not establish the existence of "remorse and sorrow" as a mitigator.

As the court found, Weaver's apology was for the victim's

family having to endure a trial and for the loss of their son; Weaver never admitted shooting Peney. Further, the court noted Weaver's steadfast claim that it was Myers' bullet that killed Peney served to aggravate the family's grief. The court found Weaver's sorrow to be over his own predicament and noted he expressed no remorse during the guilt or penalty phase. The court questioned the sincerity of Weaver's apology during closing argument and found it was calculated to generate sympathy for himself. The court also found Weaver's concern over whether the victim was wearing a bullet proof vest to be a subtle inquiry to determine the nature and extent of the charges he ultimately faced. Finally, the court properly rejected Weaver's "conduct pretrial and during trial" as a mitigator. Weaver's trial behavior and ability to get along and be respectful in court was attributed to the fact he was given little chance to act out or misbehave. Weaver wore a stun belt and there was extensive security in the courtroom.

Weaver's complaint the court abused its discretion in the weight it assigned to the mitigators is also meritless. Weaver takes issue with the fact that the trial court assigned "moderate" weight to Weaver's "good employment record" and "adaptation to a life of incarceration," arguing that both should have been given great weight. A review of the record,

however, shows the court properly analyzed the mitigation and gave weight assignments from very little to moderate. This complied with Trease and Alston.

Weaver next challenges the court's override of the jury's life recommendation. In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court held "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." In other words, if there is a reasonable basis for the jury's life recommendation, an override is improper. Jenkins v. State, 692 So.2d 893 (Fla. 1997). However, the fact a defendant can point to some mitigation in the record does not make an override automatically erroneous. See Zeigler v. State, 580 So.2d 127, 131 (Fla. 1991) ("[a] judge's override is not improper simply because a defendant can point to some evidence established in mitigation"). The mitigating evidence must be sufficient in light of the aggravation and other circumstances of the case to establish a reasonable basis for the jury's life recommendation.

Here, it is clear the mitigation, when considered against the outrageousness of this crime and the weighty aggravation, do not provide a reasonable basis for the jury's recommendation. The court found two aggravators: prior violent felony based on

contemporaneous convictions for resisting with violence and aggravated assault of Myers, a different victim; and that the murder victim, Peney, was a law enforcement officer engaged in the performance of his official duties merged with the avoid arrest, and murder committed to hinder law enforcement (R 1463-65). The court found one statutory mitigator, "no significant history of prior criminal activity", but gave it little weight because Weaver had eight prior convictions over an 11 year period form 1979 to 1990 (R 1466). As the court found, these eight convictions constitute more than "a mere 'brush with the law' and passing contact with law enforcement." (R 1466). While the court was compelled to find the existence of the aggravator because of the remoteness of the prior crimes and their non-violent nature, the court could not "completely overlook the number of occasions [Weaver had] violated the law [even though they were non-violent] and the extensive time frame during which these violations transpired." (R 1466). The court found three (3) non-statutory mitigators: (1) "good employment record" (moderate weight; (2) "cooperation with the police" (moderate weight), and (3) adaptation to prison life/future value to society (little weight) (T 1466-72). The mitigation here was minor and as the court found, pales when compared to the severity and enormity of the crime committed:

> In the scheme of things, how does the (1) merciless gunning down and murder of this young police officer, in full uniform, while discharging his public duties, on a heavily traveled road, in full public view, and (2) the contemporaneous aggravated assault with the same .357 magnum handgun of a fellow police officer, by an experienced marksman, who uncontrovertedly, expressed a deep seated animosity and hatred toward law enforcement officers, and using self-made bullets designed to explode and inflict fatal damage stack up against the countervailing considerations that (1) the killer had seven prior contacts with law enforcement over an eleven year period albeit for nonviolent incidences, (2) that the killer, unemployed at the time of his arrest, suddenly and unexpectedly quit a good paying job in North Carolina leaving his son and parental responsibilities behind to travel to Florida, where in the year preceding his arrest for this dastardly deed he held three different jobs and was unemployed at the time of the murder, (3) that this same person, although never admitting he murdered the police officer nevertheless assists them in locating a shirt he wore at the time of the killing, the gun used to perpetuate the killing, and the car he lived in that was fully loaded to the hilt with an enormous amount of ammunition (over 300 rounds) and (4) that the killer has adjusted well to his incarceration pending the trial of this case by securing a GED, and sending self-drawn cards and communicating positively with his family. This Court suggest that the essence of mitigation is nowhere near that required to offset the aggravators and support a life sentence.

(T 1488-89). In Zeigler, this Court affirmed an override where the defendant had similar mitigation to Weaver: (1) no significant criminal history; (2) a good prison record; (3) church and community involvement; and (4) good character. This Court found that mitigation "minuscule in comparison with the enormity of the crimes committed. The defendant not only murdered his own wife in order to obtain insurance proceeds ...

but also murdered three other people in an elaborate plan to cover up his guilt." Id. 131.

The court's order contains an exhaustive analysis of cases where jury overrides have been reversed and it is clear none of the mitigation found to provide a reasonable basis for the jury's recommendation in those cases is present here. There was no evidence Weaver has brain damage, neurological impairment, mental illness or emotional impairment. To the contrary, the court found him to be a bright man, one of direction and purpose (R 1481). Also, there was no evidence Weaver was impoverished or physically or emotionally abused as a child or under the influence of substances at the time of the offense. Finally, Weaver's reliance upon Jenkins v. State, 692 So.2d 893 (Fla. 1997), Hardy v. State, 716 So.2d 761 (Fla. 1998), Caruso v. State, 645 So.2d 389 (Fla. 1994), Fead v. State, 512 So.2d 176 (Fla. 1987), and Ramirez v. State, 810 So.2d 836 (Fla. 2001), is misplaced. Jenkins is immediately distinguishable from the instant case. As the court found, the defendant in Jenkins resisted arrest by grabbing the officer's gun and shooting him in the leg. The officer bled to death. This Court found that a reasonable basis for the life recommendation was the circumstances of the murder. The officer was only shot once in the leg. There was also reason for the jury to give very little

weight to the prior violent felony aggravator in that case, shooting into an occupied dwelling, because the victim/wife testified she married the defendant after the incident and they worked together with him managing real estate.

Conversely, here, Weaver not only shot and murdered Peney, but also pointed his gun at Myers. Unlike the defendant in Jenkins, Weaver was an experienced marksman, who made his own bullets and used his own gun to murder Peney. Weaver was also carrying an extra clip and his bullets were designed to penetrate deeply and explode.

Hardy is likewise inapposite. The defendant in that case was 18, had been physically and emotionally abused as a child, had an impoverished upbringing, and shot himself in the head, inflicting brain damage, after murdering the police officer. Caruso is inapplicable because the defendant may have been on drugs and committed the murders of his elderly neighbors in an irrational, drug-induced frenzy. That factor coupled with his age, non-violent criminal history, testimony that he was a loving person and good employee were found to be a reasonable basis to support the jury's recommendation. Again, there are no similar facts here. See Fead (holding several valid mitigators supported life recommendation: (1) under influence of alcohol; (2) under extreme mental and emotional distress; (3) hard worker

and supported family; and (4) model prisoner); Ramirez (holding mitigation that defendant had been subjected to sexual abuse at the hands of babysitter's teenage son (from eight and twelve years old); physically abused by his mentally ill father; and has been a source of emotional support and encouragement for his family, provided reasonable basis for jury's life recommendation).

Finally, Weaver's death sentence is proportional. See Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)(proportionality is not a comparison between the number of aggravators and mitigators, but a comparison to other capital cases). The Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So. 2d 6 (Fla. 1999). In support of proportionality, the State relies upon Franqui v. State, 804 So.2d 1185 (Fla. July 3, 2001)(murder of a police officer by shooting him in hip during bank robbery, where there were three aggravators--prior violent felony, felony-murder and victim was officer, merged with avoid arrest and hinder law enforcement); Burns v. State, 699 So.2d 646 (Fla. 1997)(murder of officer where avoid arrest and hindering law enforcement aggravators were found, but merged into one and only one statutory mitigator of no significant criminal history was

found); Armstrong v. State, 642 So.2d 730 (Fla.1994)(murder of officer during course of robbery, with three aggravations– prior violent felony, felony-murder merged with pecuniary gain, and victim was officer, merged with avoid arrest and hinder law enforcement and defendant claimed brain injury but failed to show how it affected his behavior and presented several nonstatutory mitigators); Gonzalez v. State, 786 So.2d 559 (Fla. 2001).

Weaver last argues Florida's capital sentencing scheme is unconstitutional warranting vacation of his death sentence. Specifically, Weaver challenges the failure to allege the aggravating factors in the indictment and the failure to have the jury make specific findings regarding the aggravating factors.

1. The Ring issue is not properly before this Court- Only one (1) of Weaver's two challenges to the validity of Florida's capital sentencing scheme is preserved. See Steinhorst, 412 So. 2d at 338. Here, while Weaver argued his Sixth Amendment rights were violated by the failure to allege the aggravating factors in the Indictment (R 979-81), he never argued his Sixth Amendment right to a jury trial was violated by the jury's failure to make specific findings regarding aggravation. While Ring v. Arizona, 122 S.Ct. 2428 (2002) was decided last year,

the issue is neither new nor novel. Instead, the Sixth Amendment claim, or a variation of it, has been known prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). See Hildwin v. Florida, 490 U.S. 638 (1989)(noting case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida" and determining it does not); Spaziano v. Florida, 468 U.S. 447 (1984). The basis for the claim of constitutional error has been available since before Weaver was sentenced. Hence, Weaver's claim that his Sixth Amendment right to a jury trial was violated by the jury's failure to make specific findings regarding aggravating factors is not preserved and is barred from review.

2. The Ring decision does not apply to Florida-This Court has clearly rejected the argument that Ring implicitly overruled its earlier opinions upholding Florida's sentencing scheme. See Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) (noting only U.S. Supreme Court may overrule its own decision); King v. Moore, 831 So. 2d 143 (Fla. 2002).

Ring does not apply because Florida's death sentencing statute is very different from the Arizona statute at issue in

Ring. The statutory maximum sentence under Arizona law for first-degree felony murder was life imprisonment. See Ring, 122 S.Ct. at 2437. In contrast, this Court has previously recognized that the statutory maximum sentence for first-degree murder in Florida is death and has repeatedly denied relief requested under Ring. See Porter v. Crosby, 28 Fla. L. Weekly S33 (Fla. Jan. 9, 2003); Duest v. State, SC00-2366 (June 26, 2003); Pace v. State, 28 Fla. L. Weekly s415 (Fla. May 22, 2003); Jones v. State, 28 Fla. L. Weekly s395 (Fla. May 8, 2003); Chandler v. State, 28 Fla. L. Weekly, s329 (Fla. April 17, 2003); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003); Grim v. State, 841 So. 2d 455, 465 (Fla. 2003); Anderson, 841 So. 2d at 390; Cox v. State, 819 So. 2d 705 (Fla. 2002); Conahan v. State, 28 Fla. L. Weekly S70a (Fla. January 16, 2003); Spencer v. State, 842 So. 2d 52, 72 (Fla. 2003); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Doorbal v. State, 837 So.2d 940 (Fla. 2003); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, 122 S. Ct. 2670 (2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, 122 S. Ct. 2673 (2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2002); Shere v. Moore, 830 So. 2d 56 (Fla. 2002); Mills v. State, 786 So. 2d 532 (Fla. 2001), cert. denied, 532 U.S. 1015 (2001); Brown v. Moore, 800 So. 2d

223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Mills, 786 So. 2d at 536-38. Because death is the statutory maximum penalty for first-degree murder, Ring does not impact Florida's capital sentencing.

Furthermore, Weaver's claim that the death penalty statute is unconstitutional for failing to require the charging of the aggravating factors in the indictment is without merit. This issue was not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); Cox v. State, 27 Fla. L. Weekly S505, n.17 (Fla. May 23, 2002). Moreover, this Court has already rejected these arguments post-Ring. See Porter, 28 Fla. L. Weekly S33 ((rejecting argument aggravators must be charged in indictment, submitted to the jury, and individually found by unanimous verdict); Doorbal, 837 So.2d at 940.

3. Override-Although Weaver challenges the propriety of his override sentence post-Ring in mere conclusory terms, without supporting argument, the State addresses the issue. Ring does not invalidate Florida's override provision. The court's rejection of the jury's recommendation here was based upon its determination that the recommendation was flawed as to its

weighing responsibilities, not as to whether an aggravator was proven. The jury vote only represents the final jury determination as to appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to particular aggravating factors. In Florida, where the eligibility determination is made at the end of the guilt phase, a flawed recommendation implicates neither the Sixth nor Eighth Amendments. Because there is a constitutionally sound basis to support the court's rejection of the life recommendation, affirmance of the override is required.

In Martin v. State, 2003 Ala. Crim. App. LEXIS 136 (Ala. May 30, 2003), an Alabama appellate court recently held, on direct appeal from an override, that Ring does not conflict with Harris v. Alabama, 513 U.S. 504 (1995), which upheld Alabama's judicial-override procedure:

> [We conclude that] the United State Supreme Court's decision in Harris v. Alabama, 513 U.S. 504, 515, 130 L. Ed. 2d 1004, 115 S. Ct. 1031 (1995), upholding Alabama's judicial-override procedure, remains in force. We have carefully reviewed Ring for any impact it has on Harris v. Alabama. Nowhere in Ring do we find any indication that it affects a sentencing procedure that allows the trial judge to reject the jury's advisory verdict. Moreover, the Ring court left intact that portion of Walton v. Arizona, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), validating judicial sentencing in capital cases. The holdings in Ring and Apprendi focus on the fact that the defendant in each case received a sentence exceeding the maximum that he could have received under the facts reflected by the jury's verdict alone.

> Ring, 536 U.S. at 597-98. Here, the sentence imposed by the trial court was not above the maximum Martin could have received based on the jury's verdict finding him guilty of murder for pecuniary gain. In Harris v. Alabama, the Supreme Court stated, "the Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight." 513 U.S. at 515. Because the holdings in Ring and Apprendi do not conflict with Harris v. Alabama, the trial court acted within its authority in overriding the jury's advisory verdict of life without parole and sentencing Martin to death.

Moreover, in several recent cases, the Alabama Supreme Court has agreed that Ring did not invalidate Alabama's hybrid capital sentencing scheme, which is similar to Florida's, including its override provision. See; Moody v. State, 2003 WL 1900599 (Ala. April 18, 2003); Duke v. State, 2003 WL 1406536 (Ala. March 21, 2003); Ex parte Hodges, 2003 WL 1145451 (Ala. March 14, 2003); Stallworth v. State, 2003 WL 203463 (Ala. Jan. 31, 2003); Ex parte Waldrop, 2002 WL31630710 (Ala. Nov. 22, 2002). These cases recognize the narrowness of the holding in Ring and conclude that Ring does not address judicial overrides:

> Ring's claim is tightly delineated: he contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge Almendarez-Torres v. U.S.. 523 U.S. 224 (1998) which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum

> sentence . . . . **Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty . . . .**

Ring, 122 S.Ct. at 2437 n.7. Other states with hybrid capital sentencing schemes, like Florida and Alabama, have upheld a jury override despite a Ring challenge. Wrinkles v. State, 776 N.E.2d 905, 908 (Ind. Oct. 15, 2002)[24]; Garden v. State, 815 A.2d 327 (Del. Jan. 24, 2003) (approving override in theory but remanding to reweigh jury's recommendation).

4. Prior violent felony and felony murder aggravators- Finally, one of Weaver's two aggravators was due to prior convictions. Weaver was convicted of the aggravated assault of Myers and resisting Officer Meyers with violence. As the court noted, these contemporaneous convictions on a different victim constitute prior violent felonies. See Windom v. State, 656 So.2d 432 (Fla. 1995). Ring did not alter the express exemption in Apprendi v. New Jersey, 430 U.S. 466 (2000) for the fact of a prior conviction ("other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."). Thus, even if Ring were

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[24] The State notes Indiana's legislature has eliminated overrides

found to apply, the requirements of same have been met – the jury found the contemporaneous convection of aggravated assault and resisting arrest with violence.

INITIAL BRIEF OF APPELLEE/CROSS-APPELLANT

ISSUE I

THE SEVERING OF COUNT V (ATTEMPTED ARMED BURGLARY OF A CONVEYANCE) AND PRECLUDING THE STATE FROM ARGUING FELONY MURDER AS A THEORY OF PROSECUTION WAS ERRONEOUS.

The trial court abused its discretion when it severed Count V from the indictment and precluded the introduction of physical or testimonial evidence of the attempted armed burglary of the conveyance occupied by Graciela Ortiz ("burglary"), to prove felony murder (SR12; T5 579-743; T6 746-93). See Johnson v. State, 438 So.2d 774, 778 (1983) (granting of severance is withing court's discretion). Should this Court reverse Weaver's conviction, the State should be permitted to prosecute Count V, present the felony murder theory of guilt, and seek the felony murder aggravating factor in the penalty phase.

Severance should be granted only when two or more offenses are improperly charged in a single indictment or when severance of properly joined offenses is necessary to achieve a fair trial. Fla.R.Crim.P. 3.152(a)(1) and (2); Bundy v. State, 455 So.2d 330, 345 (Fla. 1984), cert. denied, 476 U.S. 1109 (1986). Under Florida Rule of Criminal Procedure 3.150, offenses are

properly charged in a single indictment when they “are based on the same act or transaction or on two or more connected acts or transactions.” The phrase "connected acts or transaction" in rule 3.151(a) means consolidated offense must be "connected in an episodic sense." Livingston v. State, 565 So.2d 1288, 1290 (Fla. 1988). In Ellis v. State, 622 So.2d 991 (Fla. 1993), this Court explained in order for joinder to be appropriate, the crimes must be linked in a significant way. The passage of time between the crimes does not, in and of itself, require severance. See Brunner v. State, 683 So.2d 1129, 1130 (Fla. 4th DCA 1996).

Here, the court granted Weaver’s motion to sever Count V finding the burglary and the homicide were not meaningfully and significantly related (T6 782). The court found there was no causal connection between the crimes, thus, the felony murder instruction would not be given and the State could not present evidence under that theory (T6 790).[25] It is apparent the court abused its discretion because the felonies are based on two or more connected acts or transactions and there is a causal connection between the crimes.

[25] The written order does not comport with the oral findings (R5 683; T6 790-93). The State relies on the oral pronouncement. Cf. Ashley v. State, 28 Fla. L. Weekly S18, (Fla. 2003) (finding oral pronouncement of sentence controls over written).

The events surrounding the burglary occurred at approximately 8:00 p.m. Ortiz testified Weaver approached her door, grabbed the handle and pointed a gun at her. Ortiz fled the scene, running a red light. A BOLO was issued based upon Ortiz's description of the perpetrator. At approximately 9:30 p.m., Hinkey Wilcher pulled into a Mobil gas station approximately 0.6 miles from Ortiz's incident. She saw Weaver in the bushes shoving what she thought was a gun into his pants. Weaver made her nervous because he was pacing in the bushes. Near 10:00 p.m., King Irving ("Irving") saw a man near the bushes near the Gene Whiddon Vocational School. When Irving walked past, the man began to follow. Irving felt in danger and turned around to look at the man. While he could not identify Weaver, he did describe the shirt Weaver was wearing.

At 10:30 p.m., Barbara Engle witnessed Peney's shooting and identified Weaver as the perpetrator. Myers testified he and Peney spotted Weaver near the Gene Whiddon Vocational School appearing nervous. Weaver walked faster as the officers neared and turned on their lights. They briefly detained Weaver who fled after Peney asked if Weaver had a gun. The homicide occurred 1.6 miles from the burglary.

These facts make clear Ortiz's burglary was an integral part of the same criminal episode which culminated in Peney's murder.

Burglary is an enumerated offense for purposes of felony murder under section 782.004(a)(2)e, Florida Statutes. A person is guilty of felony murder if the death occurred as a consequence of and while the defendant was engaged in the commission, attempt, or escape from the immediate scene of the underlying enumerated felony. See Campbell v. State, 227 So.2d 873 (Fla. 1969) (holding "[a]lthough separated by time and space from the original felony ... it is clear that, in the circumstances, the death of Deputy Fish was the inevitable result of and an integral part of the same transaction, i.e., the robbery); Griffin v. State, 639 So.2d 966, 972 (Fla. 1994). In Parker v. State, 570 So.2d 1048 (Fla. 1st DCA), the court found in the case of flight, a most important consideration is whether the fleeing felon has reached a "place of temporary safety." The court found the robbery was not completed at the time of the officer's death even though the time from the robbery to the murder was about an hour, occurred several miles from the robbery, and after the defendants got gas and directions, because all were accomplish their goal of fleeing to a place of safety. It was reasoned there was a causal relationship between the robbery and homicide which occurred during the flight.

Here, the record reflects that from the time of the burglary to the homicide, Weaver was lurking surreptitiously in bushes on

his way from the burglary scene. The homicide took place about two hours after and 1.6 miles from the burglary. As Weaver was confronted by Peney and Myers, he fled, turned, took a shooting stance, and fired upon Peney, killing him. Weaver used the same weapon for both crimes. The trial court abused it's discretion in severing burglary Count V from the indictment as it was causally related in time, place, and manner. The homicide was a result of Weaver's continued fleeing from the burglary to his car, interrupted by Peney's detention.

Also apparent, is the court's error in precluding the State from presenting felony murder as a theory of guilt as there was a clear causal connection between the crimes. There is no evidence Weaver had reached a place of safety. In the event this Court reverses Weaver's conviction, it must reverse the court's rulings severing Count V from the indictment and preventing felony murder theory.[26]

ISSUE II

THE TRIAL COURT ERRED IN EXCLUDING THE AUDIO TAPES MADE OF WEAVER'S CONFESSION

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[26] Alternatively, should this court find the severance proper, in the event of a reversal, the State must be afforded the opportunity to argue Felony Murder as an aggravating circumstance as the State need not charge and convict a defendant of felony murder in order to argue the aggravating factor of murder committed during the course of a felony. Pietri v. State, 644 So.2d 1347 n. 11 (Fla. 1994); Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990).

It was an abuse of discretion to preclude the State from playing the audio and video tapes of the crime scene walk through as Weaver had waived his Miranda rights and had no expectation of privacy as he sat in the police cruiser, spoke with the detectives, and described his actions on the night of the murder. While the State was permitted to present, through the detectives, Weaver's admissions made during the walk through and in the forensic lab, the jury was deprived of the more explicit and demonstrative evidence, i.e., actual voice and video recordings of the events. Should this Court reverse Weaver's conviction, the State should be permitted to utilize this evidence upon retrial.

Admission of evidence is within the court's discretion, and its ruling will be affirmed unless there has been an abuse of discretion. Ray, 755 So. 2d at 610; Zack, 753 So. 2d at 25. The court abused its discretion here by ignoring the fact Weaver had no expectation of privacy in the police car. Although he had asked not to be taped while in the interview room and the police agreed, once Weaver entered the cruiser, walked around the crime scene in public, or went to the forensic lab, he had no expectation of privacy and his statements and actions could be recorded and used by the State.

The waiver of rights and subsequent confession at the police

station were not recorded as Weaver refused to talk on tape even though he was told it would be more accurate than the officers' notes (T10 1488-90, 1563-64; T11 1564-68, 1589, 1612-14, 1624, 1716). Although not informed that talking off-tape was incriminating, Weaver was told the officers were taking notes of the conversation in the interview room which would be used against him (T11 1568, 1573; T11 1648-52, 1709-15; T12 1774-75). Following the interrogation, Weaver agreed to accompany the officers on a walk through of the crime area. Arrangements were made to surreptitiously tape the walk-through (T10 1497-98; T11 1626-27, 1631). Pre-trial, Weaver asked that his statements and the corresponding audio and video tapes be suppressed (T13 1956-2010). The State countered that the Miranda waiver was proper and Weaver had no expectation of privacy (SR15 689-94; T13 2011-28). The court found no police misconduct, and concluded that Weaver's Miranda waiver was knowing, intelligent, and voluntary (T13 2028-33). In addition to the following, the State reincorporates its response to Point X as support.

Florida must follow the law announced by the United States Supreme Court with respect to Fourth Amendment/search and seizure issues. Perez v. State, 620 So.2d 1256, 1258 (Fla. 1993); Bernie v. State, 524 So.2d 988 (Fla. 1988). The Fourth Amendment protects people rather than places, but "the extent to

which the Fourth Amendment protects people may depend upon where those people are." Minnesota v. Carter, 525 U.S. 83, 88 (1998) (drawing distinction between overnight guest in home who has an expectation of privacy and a daily visitor who does not). For there to be a legitimate expectation of privacy, the defendant must show he has a subjective expectation his activities would be held private and his expectation was "'one that society is prepared to recognize as reasonable.'" Bond v. United States, 529 U.S. 334, 338 (2000) See, Katz v. U.S., 389 U.S. 347, 360 (1967) (Harlan, J. concurring). It is well settled that there is no reasonable expectation of privacy in a police cruiser. State v. Smith, 641 So. 2d 849, 852 (Fla. 1994); State v. McAdams, 559 So. 2d 601, 602 (Fla. 5th DCA 1990); Brown v. State, 349 So. 2d 1196, 1197 (Fla. 4th DCA 1977); U.S. v. McKinnon, 985 F.2d 525, 528 (11th Cir.) (noting there is no expectation of privacy in police car regardless of persons status as prisoner or invitee). Even where the suspect has invoked her right to remain silent, her conversation in a jail holding cell may be taped and used at trial, where the State did not foster the expectation of privacy . Larzelere v. State, 676 So. 2d 394, 405 (Fla. 1996).

The State did not foster the expectation of privacy in the police car. While the State had agreed not to tape Weaver when

they were in the interview room, they made no such agreement when the parties drove to the crime scene walk through in a police car, as they walked in plain view of all in the area, or as they discussed the case in the forensic lab. Moreover, from the outset, Weaver was told that all he said could be used against him. Given these facts, Weaver did not have a reasonable expectation of privacy and the court erred in suppressing the tapes.

However, should this Court conclude the audio taping was in contravention with Weaver's agreement with the police respecting the taping within the confines of the interview room, then at least the video tapes of Weaver at the crime scene and police station should be found admissible. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz, 389 U.S. at 351. A person does not have a reasonable expectation of privacy as he walks in public or a police station. U.S. States v. Santana, 427 U.S. 38, 42 (1976); U.S. v. Knotts, 460 U.S. 276, 281-82 (1983); U.S. v. Varkonyi, 645 F.2d 453, 457-58 (5th Cir. 1981); State v. Duhart, 810 So.2d 972, 973-74 (Fla. 4th DCA 2002). The court's ruling in this regard must be reversed in the event a retrial is ordered.

ISSUE III

IT WAS ERROR TO EXCLUDE GUNS, AMMUNITION, AND RELATED EVIDENCE FOUND IN WEAVER'S AUTOMOBILE

Weaver filed a motion in limine to exclude firearm evidence found in his vehicle, and the State objected (R5 537-54; T4 505-15). The court granted the motion to the extent that evidence not associated with a .357 revolver or ammunition was not admissible. This ruling was an abuse of discretion as the other evidence, for example, firearms, ammunition, pawn tickets for firearms, scopes, and books, was relevant to show identity, motive, intent, knowledge of and expertise in his weaponry, lack of mistake. Should this Court reverse Weaver's conviction, at the retrial, the State should be able to admit the entire contents of the firearm and related evidence found in Weaver's car.

Admission of evidence is within the court's discretion, and its ruling will be affirmed absent an abuse of discretion. Ray, 755 So. 2d at 610; Zack, 753 So. 2d at 25. The court abused its discretion here by excluding firearm evidence which would prove identity, lack of mistake by Weaver in his deliberate shooting at Peney, marksmanship, Weaver's knowledge of ammunition velocity and what his bullet would do when fired as he reloads his own ammunition, keeps velocity records and logs the distance

traveled by his reloaded ammunition. Weaver was not just someone who found a loaded weapon and is unfamiliar with how to handle it or the damage it will do when fired. The arsenal Weaver had in his car puts the entire episode in context as well as his ability to spin, aim, and fire accurately at a pursuing officer. The material was inextricable intertwined with the initial felony (attempted armed burglary of a conveyance) and the ability to commit the subsequent homicide. See, Bryan v. State, 533 So.2d 774 (Fla. 1988) (approving admission of evidence of prior bank robbery to establish possession of murder weapon); Irizarry v. State, 496 So. 2d 822, 825 (Fla. 1986) (concluding it was proper to admit two machetes into evidence even though they were not the murder weapon as it showed defendant favored machetes as tools and weapons); Harris v. State, 177 So. 187 (Fla. 1937) (concluding admission of gun found in defendant's car following murder had probative value although not the same caliber as murder weapon); Irving v. State, 627 So. 2d 92, 94 (Fla. 3d DCA 1993); Dowell v. State, 516 So. 2d 271, 274 (Fla. 4th DCA 1987). This evidence should have been admitted.

CONCLUSION

Based upon the foregoing, the State requests that this Court affirm Appellant's conviction and sentence, however, if the Court reverses, it should grant the State's issues on cross-appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Richard L. Rosenbaum, Esq. 350 East Las Olas Blvd., Suite 1700, Las Olas Centre II, Fort Lauderdale, FL 33301 on July 18, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced

proportionately on July 18, 2003.

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LESLIE T. CAMPBELL