IN THE SUPREME COURT OF FLORIDA
CASE NO: 00-247

JEFFREY LEE WEAVER,

Appellant,

vs.

STATE OF FLORIDA

Appellee.
_____/

AMENDED
INITIAL BRIEF OF APPELLANT
JEFFREY LEE WEAVER

On Appeal From The Judgments, Convictions, And Imposition Of The Death Sentence And Other Terms of Imprisonment By The Circuit Court In And For Broward County, Florida
Case No.: 96-1644CF10A
Honorable Mark A. Speiser

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Jeffrey Lee Weaver v. State of Florida

Case No. 00-247

CERTIFICATE OF INTERESTED PARTIES

Undersigned counsel for Appellant, Jeffrey Lee Weaver, certifies that the following is a complete list of persons who have an interest in the outcome of this case. This is a criminal case and there are no identifiable corporate entities.

1. Robert Butterworth, Attorney General;
2. Leslie Campbell, Assistant Attorney General;
3. Seth Katlein, interested party;
4. Michael Gottlieb, Esquire, Counsel for Seth Katlein;
5. Kathy Heaven, Assistant State Attorney;
6. Georgina Jimenez-Arosa, Assistant Attorney General;
7. Richard L. Jorandby, Public Defender for the Fifteenth Judicial Circuit;
8. William Laswell, Assistant Public Defender;
9. W. Anthony Lowe, Assistant State Attorney;
10. Jeffrey Marcus, Assistant State Attorney;
11. Carolyn V. McCann, Assistant State Attorney;
12. Melynda L. Melar, Assistant Attorney General;
13. Hilliard Moldof, Esquire, Defense Counsel;

14. Raymond Myers, victim;

15. Graciela Ortiz, victim;

16. Bryant Peney, Victim;

17. Patrick C. Rastatter, Esquire, Counsel for Seth Katlein;

18. Gene Reibman, Esquire, Defense Counsel;

19. Richard L. Rosenbaum, Esquire, Appellate Counsel for Jeffrey Weaver;

20. Michael Ryan, Esquire, Defense Counsel;

21. Edward G. Salantrie, Esquire, Defense Counsel;

22. Michael J. Satz, State Attorney for the 17th Judicial Circuit;

23. Alan H. Schreiber, Public Defender for the 17th Judicial Circuit;

24. Raag Singhal, Esquire, Penalty Phase Defense Counsel;

25. Honorable Mark Speiser, 17th Judicial Circuit Judge;

26. Honorable Carol Taylor, Magistrate;

27. Michael Tenzer, Esquire, Standby Defense Counsel;

28. Jeffrey Lee Weaver, Defendant/Appellant;

29. Honorable Zebedee Wright, Magistrate.

Respectfully submitted,

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BY_____
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STATEMENT OF THE ISSUES

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II. WHETHER THE TRIAL COURT REVERSIBLY ERRED BY DISCHARGING COMPETENT CONFLICT-FREE COUNSEL OVER JEFFREY WEAVER'S OBJECTION, ALLOWING NEW APPOINTED COUNSEL TO WITHDRAW ON THE EVE OF TRIAL AND FORCING JEFFREY WEAVER TO DEFEND HIMSELF?

III. WHETHER THE TRIAL COURT ADHERED TO *FARRETTA* AND *NELSON* ?

IV. WHETHER JEFFREY WEAVER'S STATE AND FEDERAL DUE PROCESS AND SIXTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS FORCED TO WEAR A STUN BELT DURING TRIAL?

V. WHETHER THE STUN BELT WAS ACTIVATED OUTSIDE THE PRESENCE OF THE JURY DURING A BREAK IN THE *VOIR DIRE* PROCEEDINGS?

VI. WHETHER JEFFREY WEAVER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO CONTINUE TRIAL?

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XIII. WHETHER ADMISSION OF OFFICER PENEY'S DYING DECLARATION TO HIS IDENTICAL TWIN BROTHER WAS UNDULY PREJUDICIAL AND LACKED PROBATIVE VALUE?

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XIX. WHETHER HE TRIAL COURT FAILED TO PROPERLY ASSESS AGGRAVATING AND MITIGATING CIRCUMSTANCES?

XX. WHETHER FLORIDA'S HYBRID SENTENCING SCHEME WHICH ALLOWS CAPITAL SENTENCING FACT FINDING AND THE ULTIMATE SENTENCING TO BE LEFT UP TO THE JUDGE IS UNCONSTITUTIONAL AS APPLIED?

PRELIMINARY STATEMENT

The following symbols, abbreviations, and references will be utilized throughout this Initial Brief of Appellant, Jeffrey Lee Weaver:

The term "Appellant" shall refer to the Defendant in the Circuit Court below, Jeffrey Lee Weaver.

The term "Appellee" shall refer to the Plaintiff in the Circuit Court below, the State of Florida.

The Record on appeal in this case includes all pleadings, documents, and orders filed at the trial court level, contained in Volumes 1 through 13, pages 1 through 1584. Citations to the documents contained in the Record on appeal shall be indicated by an "R" followed by the appropriate page number (R). Transcripts of pretrial hearings, the trial proceedings, post-trial hearings and sentencing are contained in Volumes 1 through 39, pages 1 through 6827. Citations to the transcript of the hearings, trial, and sentencing proceedings shall be indicated by a "T" followed by the appropriate page number (T).

A Supplemental Record, contained in Volumes I through XV, pages 1 through 777 contains transcripts of various proceedings, pleadings, and orders. Citations to the Supplemental Record shall be indicated by "ST" followed by the appropriate page number (SR).

All emphasis indicated herein have been supplied by the Appellant unless otherwise specified.

STATEMENT OF THE CASE

Jeffrey Lee Weaver[1] was arrested on January 6, 1996 for the homicide of police officer Bryant Peney the previous day (R 2; 3-4). Jeffrey Weaver was subsequently indicted by a Grand Jury and charged with one count of premeditated first degree murder of a law enforcement officer (Count I)[Officer Peney]; one count of aggravated assault on a law enforcement officer with a firearm (Count II)[reserve officer Myers]; one count of armed resisting, obstructing, or opposing an officer with violence (Count III)[reserve officer Myers]; one count of carrying a concealed firearm (Count IV); and, one count of attempted armed burglary of an occupied conveyance (Count V)[2] [Mrs. Graciela Ortiz] (R 5-6).

The case of *State v. Jeffrey Lee Weaver*, case number 96-310 was *nolle prossed* on January 25, 1996. Thereafter, the case was re-filed and prosecuted in *State v. Jeffrey Lee Weaver*, case number 96-1644 CF10A. The clerk was ordered to transfer all pleadings to the re-filed case (R 159). Jeffrey Weaver was again taken before a magistrate, this time on January 30, 1996 (R 147-8). Discovery was demanded, and the state filed its Notice of Intent to Seek Death Penalty under Rule

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[1]Jeffrey Weaver is a white male born on November 16, 1961. He was 35 years old at the time of his arrest.

[2]Said count was severed by the court pretrial based upon the court's finding that the evidence was "... not meaningfully and significantly related." (T 781)

3.202, Fla. R. Crim. P. (R 165-7). A Motion to Strike the state's notice was filed by the defense in response thereto (R 179-81).

The state answered the Defendant's Demand for Discovery (R 186-211). In excess of 250 witnesses were ultimately listed in the Answer to Defendant's Demand for Discovery and the Supplemental Amended Answers (R 257-62; 265-7; 272-5; 279-80; 283-4; 296-7; 298-9; 303; 304; 305; 310; 313; 316-17; 324; 325; 330-2; 362; 367-8; 369-70; 373-6; 377-8; 379; 380; 381-2; 383; 390-1; 415-16; 423-4; 429-30; 431-2; 433-4; 435; 447-8; 453-4; 455-6; 460-1; 495-6; 506-7; 508; 524; 525; 535; 536; 685-6; 900-2; 905-6; 914-15; 916-17; 918; 919-20; 1032-4; 1035-7). Discovery ensued.

The office of the public defender was initially appointed to represent Jeffrey Lee Weaver at his initial appearance before the Magistrate on January 7, 1996 (R 1). In late February 1996, the public defender's office filed a Motion to Withdraw as attorneys of Record on Jeffrey Weaver's behalf, citing a conflict of interest (R 211-12; 214-15; 220). Attorney Hilliard Moldof, was appointed as a special public defender to represent Jeffrey Weaver on February 27, 1996 (R 221). Thereafter, the state and defense continued to engage in discovery.

In February 1998, Jeffrey Weaver's counsel, Mr. Moldof, filed a Motion for Special Status and Determination of Continuing Circumstances, advising the court

of the complexity of this case, and of counsel's schedule (R 392-5). The gravamen of the motion was that because of the large number of witnesses listed by the state and the extensive work which needed to be performed to be prepared for trial, appointment of additional counsel to assist Mr. Moldof was required. The state attorney, Mr. Satz, was pushing for the case to expeditiously proceed to trial. The defense maintained that the state was attempting to rush the defense's preparation and investigation. A hearing was conducted on the defense motion (T 173-93).

Mr. Satz agreed that a lot of work remained to be done on the case at a time (T 177). He acknowledged that over 100 people had already been deposed already (T 176). Mr. Moldof advised that he had done DNA work on the case, and had worked on many of the "involved issues" as well (T 174). Mr. Moldof suggested that since Mr. Satz wanted the case expedited, another lawyer should be appointed to assist Mr. Moldof in conducting discovery (T 175). The county, holding the fiscal strings of the defense budget, objected to paying two lawyers for representation during the guilt phase, although the county recognized the need for separate guilt phase and penalty phase lawyers in a capital case such as this (T 178). Mr. Moldof did not move to withdraw from representing Jeffrey Weaver (T 80). His discharge as Jeffrey Weaver's counsel was not based upon a conflict of interest (T 81). Mr. Moldof was ordered off of the case based upon the

state's request and the judge's order.

On March 3, 1998, Edward Salantrie was appointed by the court to represent Jeffrey Weaver (R 396). Subsequently, additional counsel was appointed as "second chair" for the potential penalty phase, if required (R 907).

Trial was scheduled for mid-April 1999. In March 1999, Jeffrey Weaver filed a Motion for Removal and Replacement of Appointed Counsel (R 921-4). Mr. Salantrie subsequently filed a motion to withdraw as attorney of Record (R 970-2).

The judge summarized Jeffrey Weaver's disagreement with Mr. Salantrie as being a disagreement over the defense. Mr. Salantrie wanted to put forth the defense of lack of premeditation, basically "shooting" for a second degree or a manslaughter conviction. Jeffrey Weaver's defense was that his bullet didn't hit Officer Peney, it was Reserve Officer Myers' and that he was set up to appear guilty (T 2098).

On April 7, 1999, an Order was entered discharging Edward Salantrie (R 1113). After conducting a *Nelson* hearing and a *Faretta* inquiry, the court appointed "standby counsel."[3] (R 1114; T 2053-2226).

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[3]The judge stated "a standby counsel will be there just to answer your questions. A standby counsel will not be an advocate for you, will not be taking an

On April 9 and 14, 1999, the last of the pretrial motions were heard. Jeffrey Weaver represented himself (T 2249-2399; 2400-2445)

Prior to the commencement of trial, Jeffrey Weaver requested appointment of new counsel, terming himself "unqualified to represent himself in a case of this magnitude." (T 2257) Pretrial and during trial, Jeffrey Weaver repeatedly requested Mr. Moldoff be reappointed to represent him (T 3228-9; 3394; 2473).

Over Jeffrey Weaver's objection, the case proceeded to trial on April 14, 1999. Jeffrey Weaver requested a continuance on several occasions (T 2224; 2315; 2405; 2409; 3227-9; 3398-9; 3472; 3706; 4196; 4296). The State of Florida called over forty witnesses in its case-in-chief (T 3441- 5571). The defense elicited testimony from eight witnesses, plus the Defendant himself (T 5677- 6011). The state called several witnesses in rebuttal (T 6046). Jeffrey Weaver was convicted as charged (R 1238-48; T 6436-7).

Penalty phase proceedings commenced on June 16, 1999. The court refused to allow Jeffrey Weaver to introduce a number of exhibits, including several cards

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affirmative role for you." (T 2153) At one point, Judge Speiser requested that standby counsel take a more active role in the defense (T 3736). The following day, counsel discussed his "new role" and the judge ultimately told him to "sit there and be passive as standby counsel (T 3749). Stand-by counsel admitted he did not review the court file (T 2598).

he had drawn and mailed to family members and loved ones, limiting Jeffrey Weaver to a total of ten (T 6472). Further, the court refused to allow several photographs to be presented to the jury (T 6476). The following day, by a vote of eight to four, the jury recommended that Jeffrey Weaver be sentenced to life imprisonment (T 1301-2; T 6711) (R 1287).

A *Spencer*[4] hearing and hearing on Motion for New Trial were conducted on August 6, 1999. At the *Spencer* hearing the state argued that several statutory aggravating circumstances existed.[5] First was the contemporaneous conviction of threatening violence by pointing a firearm at reserve officer Myers and the armed resisting or obstructing (T 6729). Second, the victim was a law enforcement officer. Third, Jeffrey Weaver was alleged to have committed the crime to avoid arrest. Fourth, it was asserted that the capital offense was committed to disrupt or hinder law enforcement. Two statutory mitigating circumstances and two non-statutory mitigating circumstances were found by the judge to have been established, although many more were asserted (T 6802-3). Further, the court denied Jeffrey Weaver's Motion for New Trial.

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[4]*Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

[5]No aggravating circumstances were alleged in the Indictment. The Record does not reflect an unanimous verdict as to any aggravating factors.

Sentencing was conducted on August 27, 1999 (T 6755-6827). Jeffrey Weaver was sentenced to death on Count I (T 6824). The Defendant was sentenced on Count II to a term of 120 months with a three year minimum mandatory. On Count III, the Defendant was ordered to be incarcerated for 120 months. On Count IV, the same sentence was imposed. The sentences in Counts II, III, and IV were ordered to run consecutive to each other and consecutive to Count I. A sentencing order was entered into the Record (R 1461-91).

Following sentencing, a Motion to Correct Sentencing Error was filed pursuant to Rule 3.800(b), Fla. R. Crim. P. (R 1494-7). The essence of the motion was that the trial court erred by overriding the jury's eight to four life recommendation. The defense asserted the court committed three separate sentencing errors: 1) the court failed to view the aggravators and mitigators in the light most favorable to the jury recommendation; 2) the court erred by failing to find unrebutted and or conceded mitigating factors; and 3) the court made numerous factual findings and omissions which undermined the jury recommendation (R 1495).

Contrary to Judge Speiser's sentencing order, the state conceded in its sentencing memorandum that the Defendant's non-statutory "contribution to society" argument was entitled to weight (R 1424-5). The state further conceded

that the Defendant's non-statutory "circumstance of the offense" was entitled to weight (R 1425). The Defendant's non-statutory "potential for rehabilitation" was also conceded by the state to be entitled to some weight (R 1426). Further, the Defendant's "conduct while awaiting and during trial" argument was entitled to some weight (R 1426). The court found none of those uncontroverted conceded mitigating factors warranted following the jury's recommendation of life imprisonment (R 1496-7). The court denied the motion on January 25, 2000 (R 1515-16).

Jeffrey Weaver remains incarcerated on "death row" in maximum custody at Union Correction Institution. His Notice of Appeal was timely filed on February 3, 2000 (R 1517). This appeal ensues.

STATEMENT OF THE FACTS

A) The Trial

On January 5, 1999, Fort Lauderdale Police Officer Charles Sierra responded to a call when he heard Fort Lauderdale Police Officer Bryant Peney advise over the police radio that he was stopping somebody in the 1500 block of South Federal Highway (T 3442; 3505). Officer Sierra testified that he recognized Officer Peney's voice (T 3444-5). Officer Sierra heard Officer Peney say "303" was "1031" (in pursuit of somebody) (T 3445; 3505). Officer Sierra entered his

patrol vehicle and a few seconds later heard Officer Peney state "I've been shot." (T 3445; 3449-50; 3505) Officer Sierra immediately traveled to the scene. He saw Officer Peney lying in the northbound lanes on Federal Highway (T 3447).

Officer Sierra approached and asked Officer Peney if he was all right. He saw that he was bleeding (T 3451). Officer Sierra tried to make an assessment of Officer Peney's wounds. He pulled back Officer Peney's bullet proof vest cover and noticed that there was a puncture wound to the right side of his chest (T 3452). Officer Sierra noticed blood on the ground (T 3459).

Officer Sierra watched as Officer Peney was lifted onto a stretcher. Officer Sierra testified that he was standing ten to fifteen feet away, and even though there was a lot of talking and radio noise, he heard what he thought was a projectile hit the ground, bouncing about one foot (T 3508-9). He saw a glinted metal object fall to the ground. He claimed it was the projectile from the shooter's gun (T 3458). Officer Sierra escorted the ambulance to the hospital (T 3462). He was not impeached on cross-examination (T 3504-3512).[6]

David Landers, a fire fighter/paramedic for Broward County Fire Rescue

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[6]Prior to commencing cross-examination, Jeffrey Weaver, acting as his own attorney, again asked the judge for a continuance, informing the court that he had not read the witness' "deposition, statements, or anything." (T 3464)

testified that at approximately 10:15 p.m., he and his partner were dispatched to 1400 South Federal Highway (T 3513). David Landers observed a police officer down in the street, and approached him (T 3516-17). He established that the officer was conscious and spoke with him. The EMS technician administered oxygen to the officer, and his partner commenced primary care by putting an occlusive dressing over the entrance wound (T 3519). Immediately, the technician noticed an entrance wound in the right forearm area, which appeared to be a through-and-through entrance wound. There was another entrance wound to the right chest area, approximately the fifth rib area (T 3519-20). From the time that Landers arrived to the time that Officer Peney was transported from to Broward General Hospital in the back of the ambulance, four minutes elapsed (T 3520-1). The technician accompanied the officer to the emergency room.

Gary Cline testified that he heard Officer Peney say on the radio that he was checking out in the 1400 block of South Federal on a “signal 13" for a suspicious person (T 3537). Officer Cline radioed that he would respond as a backup officer (T 3538). Officer Cline testified that he and Officer Peney were fairly close friends. Officer Cline knew that Officer Peney was training Reserve Officer Ray Myers that night. Subsequently, he heard Officer Peney say that he was in pursuit (T 3539). Officer Cline testified that a couple of moments later he heard just a single word ---

"shot." (T 3539) Officer Cline went to South Federal Highway and headed south. He saw Officer Peney's car parked on the west side of the road (T 3539).

Officer Sierra was kneeling beside Officer Peney. Fifty-seven year old Reserve Officer Ray Myers was standing by Officer Peney's head (T 3540-1; 3860-61). Officer Cline asked some bystanders what the "guy" who shot the officer looked like. Two individuals said to him that the shooter was dark - he said "you mean black?" (T 3541) They said "yes." Officer Cline radioed a BOLO with the description that the culprit was a black male headed eastbound on 15th Street (T 3541-2).

Officer Cline noticed that there was one shell casing on the road in the northbound lane. Officer Cline walked up to see how Officer Peney was, and watched as EMS personnel worked on the officer. When they picked him up to put him in the ambulance, Officer Cline noticed something drop to the ground. Officer Magnanti asked him whether he saw it. Officer Cline responded affirmatively, but still didn't recognize what the object was. Officer Magnanti told him that it was a bullet. The officer was unable to recall where he saw the projectile fall (T 3560). Officer Cline stood between the bullet and the shell casing for the rest of the night until it was taken into evidence by Detective Hill (T 3546).

John Buckley testified that he and his girlfriend, Barbara Engelke had gone to

dinner and were on their way to Publix on 17th Street Causeway when he noticed a pedestrian crossing Federal Highway from the median into the northbound lane (T 4684). He slowed down. The person was about half way across the street when he saw another person cross Federal Highway. He slowed down even more (T 4685). Before Mr. Buckley got to the Boston Market, a third person came into the highway just off the median. They were each headed in an easterly direction. As Mr. Buckley approached the Boston Market, the first person turned around and pointed a gun at the other two people and fired a shot. The second person went down to the ground almost immediately. The third person ran up to the second person and fired a shot back at the first person (T 4686).

Barbara Engelke testified that she and her boyfriend had finished dinner and were on their way home when she heard what she thought were gunshots (T 3569). Next she saw people running across Federal Highway (T 3570-1). Ms. Engelke described the individual who fired the gun, and identified Jeffrey Weaver as the shooter (T 3577). She testified that he turned around, went into a shooting squat and fired (T 3572). She admitted that the following day she was unable to identify Jeffrey Weaver from a photographic lineup (T 3578). On cross-examination, Ms. Engelke admitted that she was leaning over the seat playing with her son in the back when she heard the first shot (T 3601-2). She testified that she heard the gunshot

first, then looked up, then saw the men running across the street (T 3605).

Fort Lauderdale Police officer Michael Vaughn-Stetina testified that he was dispatched to the area of 15th street and 10th Avenue in response to an officer who had been shot (T 3639). There was chaos on the radio as officers were in the process of setting up a perimeter (T 3641).[7] While Officer Vaughn-Stetina was looking northbound on 10th Avenue, within ten to fifteen seconds he noticed a white male coming out from between the yards about one hundred feet north of the intersection. The man appeared to be out of breath (T 3644). Officer Vaughn-Stetina walked in the suspect's direction and radioed in an attempt to get a better description of the suspect. He was told by dispatch that the suspect was a black male, wearing dark clothing (T 3646). The person that Officer Vaughn-Stetina saw walking was "very, very suspicious to me. Extremely suspicious." (T 3636) The officer approached him. The quicker Officer Vaughn-Stetina picked up his pace, the faster the man walked. Finally, the officer broke into a trot and the suspect started running. He ran due east across the street and into an entrance road area

[7]Sergeant James Polan testified that ninety-nine officers were assigned to different locations as part of the search (T 3888). Officer David Wheeler, supervisor of the police canine unit testified that he and his dog, Axle, responded in reference to this case (T 3950). Over twenty canine teams were present (T 3952). No one was able to locate the suspect that evening.

into a condominium complex (T 3647). The officer stopped chasing him and advised dispatch that he thought that the person[8] he was pursuing was the culprit (T 3648).

Officer Magnanti testified that he heard over the radio that Officer Peney was checking out a suspicious person in the 1400 block of South Federal Highway (T 3772). Officer Magnanti was close by, so he responded as a backup unit to see if assistance was needed (T 3773). He heard Officer Peney say two times "303, I'm shot." (T 3774) Officer Magnanti arrived on the scene thirty to forty-five seconds later (T 3818). Officer Magnanti took Officer Peney's Baretta .92 semi-automatic handgun and removed it from his holster (T 3792). The paramedics cut the officer's duty belt so that they could look for wounds (T 3788-9). Officer Magnanti removed the front vest panel from Officer Peney's bullet proof vest, and turned over both the vest panel and Officer Peney's firearm to Detective Mangifesta, who locked the items in his vehicle and later turned them over to the forensics unit (T 3798-9; 3840-1).

Officer Magnanti testified that when Officer Peney was being lifted onto a

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[8]On January 9, 1996, Officer Vaughn-Stetina viewed a live line up and picked Jeffrey Weaver as being the person he saw. He likewise identified Jeffrey Weaver at trial (T 3651-2).

gurney, he noticed something fall to the ground (T 3802). Subsequently, he walked over and saw that a projectile[9] was laying on the street (T 3804). It was not near the blood stain on the street (T 3805).

Detective Thomas Mangifesta also heard Officer Peney's transmission over the radio and arrived at the scene at approximately 10:30 p.m. (T 3836-7). When he arrived, Officer Gary Cline pointed to a pool of blood in the roadway and a copper jacketed projectile nearby (T 3839).

Reserve Officer Myers told Detective Mangifesta at the scene that he fired one or two shots -- he wasn't sure (T 3858).[10] He believed he was ten feet south of Officer Peney at the time he fired (T 3859). Officer Myers testified that the suspect took out his gun, turned, and pointed it at Officer Peney. However, Officer Myers told Detective Mangifesta that he was not looking at Officer Peney when the shot was fired (T 3866-7; 3871).

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[9]In the officer's original statement, he mentioned that he saw a projectile. In his supplemental statement, the description changed to a "copper colored jacketed projectile." (T 3821)

[10]Mylan Uzelac, a civilian witness, testified that at the time he was close by at a local Kinkos (T 4652). He was coming back in from using the phone and as he pushed the door open he heard people scream "shooting." (T 4652) He turned and heard a "boom boom" and saw a flash, which directed his attention (T 4653). Months later, in February 1997, when a detective took Mr. Uzelac's statement again, he drew another diagram of the scene. The new diagram indicated that he saw two casings on the ground. Previously he had only remembered one (T 4670).

Theresa Miller, a registered nurse, treated Bryant Peney the night of January 5, 1996 and into the early morning hours of January 6, 1996 (T 4125). Nurse Miller assisted in giving blood transfusions to Officer Peney (T 4126). She recalled giving him twelve or fourteen units (T 4126-7).[11]

During the early morning hours of Saturday, January 6, 1996, Detective Langston and Sergeant Medley were on a boat searching Cliff Lake. Fifteen or twenty minutes into the search, Sergeant Medley observed some clothing on the bottom of the lake. He reached down and grabbed what turned out to be a pair of pants and a shirt. Sergeant Medley searched the pants and found a round of ammunition in the left front jeans pocket and a cardboard box in the back pocket. They also recovered shoes about twenty feet from the bank of the lake (T 3915).

Officer Raul Diaz likewise responded to Southeast 17th Street and Cordova Road on Saturday morning and assisted Detective Gerald Fuller in looking for the

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[11]The court refused to allow Jeffrey Weaver to cross-examine the nurse concerning his defense of intervening medical malpractice based upon the state's Motion in Limine. The court refused to allow the defense to introduce any evidence in this regard, or to even argue the theory despite the fact a respected defense expert testified in a pretrial hearing that malpractice on the part of the emergency room doctors prevented Officer Peney's successful recovery (T 1026; 1039; 1045; 1063). Following direct examination, the Defendant proffered the testimony he sought to elicit via Nurse Miller and objected to the restriction on cross-examination (T 4133-45). Jeffrey Weaver objected to not being permitted to fully cross-examine the witness or fully present his theory of defense (T 4145).

homicide suspect (T 3919). They walked to the Evergreen Cemetery. At approximately 7:30 a.m., they saw the suspect wearing no shirt and two pairs of shorts. He was identified as Jeffrey Weaver (T 3924-5). During a pat-down of the suspect, the officers located a leatherman tool and a strip of ammunition bullets, as well as a set of keys from Jeffrey Weaver's left front pocket (T 3925). Officer Diaz placed Jeffrey Weaver under arrest (T 3929). Jeffrey Weaver said he was thirsty and asked what was going on (T 3929). He was ordered to lie down on the ground (T 3939-40).

Detective Kevin Schults[12] testified that on Saturday, January 6, 1996 he and another detective were on bicycles riding within the perimeter area of the shooting (T 4199- 4201). At approximately 7:37 a.m. Officer Shults heard Detective Fuller begin yelling "get your hands up ...." (T 4203) When Detective Shults arrived at the scene, he saw a wet Jeffrey Weaver[13] (T 4205). According to Officer Shults, at approximately 7:48 a.m., Mr. Weaver stated "I want to tell you what happened." (T 4206) After fifteen or twenty seconds of silence, Jeffrey Weaver stated "he was harassing me. It wasn't right." (T 4207)

According to state's witnesses, while being transported to the police station,

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[12]Detective Joel Maney's testimony mirrored Officer Schults' (T 4612-20).

[13]Several other officers showed up at the scene (*see e.g.* T 3945- 50; 3982).

Mr. Weaver asked "how's the cop." (T 4209) Officer Shults noted that it was 7:57 a.m. During cross-examination, Officer Shults admitted that in hindsight, Jeffrey Weaver might have had no idea of the officer's true condition (T 4210).

A prior roommate of Jeffrey Weaver's, Christine Wells, testified over defense objection. She informed the jury that Jeffrey Weaver told her if he was ever surrounded by the police he would shoot them before they shot him (T 4063). On cross-examination she admitted that she and Jeffrey Weaver were "high" when the statement was made (T 4065). Additionally, Ms. Wells testified that in 1994 when there was a raid on Jeffrey Weaver's apartment, no guns were drawn. There were no sniper attacks; no dead bodies (T 4066).

Over defense objection, James Lowery testified that he met Jeffrey Weaver in the Broward County jail (T 4087). Mr. Lowery had been convicted of improper exhibition of a firearm and was serving a six-month jail sentence (T 4088). Mr. Lowery testified that he had only one conversation with Jeffrey Weaver which was "less than 30 minutes. Probably fifteen, maybe ten." (T 4089) Mr. Lowery testified that after the conversation he went immediately back to his cell and wrote down notes of his conversation (T 4091). According to Mr. Lowery, Jeffrey Weaver confessed to him that he shot at the officers and one fell. Mr. Lowery testified that Jeffrey Weaver stated "I knew if I could hit one, I could get away." (T

4097) Mr. Lowery wrote a letter to Mr. Satz concerning Jeffrey Weaver's alleged confession. He was released from jail a few days later on August 5th (T 4110). Upon his release he was confronted by Mr. Satz' chief investigator and detective John Adams (T 4109). Mr. Lowery was questioned concerning Jeffrey Weaver's alleged jailhouse confession.[14]

Officer Rick Burn of the Fort Lauderdale Police Department also responded to the scene in the early morning hours of January 6, 1996 (T 4335). He was a member of a six officer nautical team which assisted in this case (T 4337). On the west side of the lake by the cemetery, using underwater metal detecting devices, the dive team located Jeffrey Weaver's firearm (state exhibit 53; T 4349; 4351).

Detective Sonya Friedman responded to the Winn Dixie store and maintained control over Jeffrey Weaver's vehicle, a four door gold 1988 Honda Accord, with a North Carolina license tag (T 4115). Detective Friedman stayed with the vehicle for approximately three hours until it was towed. She followed the car back to the police department's forensic garage (T 4118).

Over defense objection, Mark Hollingsworth[15] was permitted to testify that

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[14] Mr. Lowery knew Bryant Peney personally and considered him a friend. Mr. Lowery even attended the officer's funeral (T 4102).

[15]Mr. Hollingsworth admitted that he was on probation for dealing in stolen property at the time of trial (T 4160).

he met Jeffrey Weaver while employed as the captain of a yacht (T 4160). Jeffrey Weaver was one of five crew members (T 4163). Mr. Hollingsworth stated that he talked to Jeffrey Weaver ". . . about prior history, rather than to go to prison and rot in jail, he would rather go out in a hail of bullets if he ever got into a gun battle with gang members or police officers." (T 4165) Mr. Hollingsworth admitted that when the apartment Jeffrey Weaver resided in had been raided by the Fort Lauderdale Police Department in 1994, Jeffrey Weaver had not been hostile. He was very cooperative (T 4173).

Donna Marchese, a forensic serologist and DNA specialist, testified as a state expert witness in the field of DNA analysis (T 4174). Ms. Marchese testified that she received a bullet from Dennis Gray of the BSO firearms section.[16] The bullet tested positive for the presence of blood (T 4180). Further, Ms. Marchese testified that she took a saliva standard from Todd Peney, the decedent's identical twin.[17] Via Ms. Marchese, the state introduced evidence of a trace of blood from the projectile and the projectile itself (T 4188-9)(exhibits 3C and 3D). According to Ms. Marchese, a dry flake of blood could not have been put into the crevice of the

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[16]Firearms examiner, Dennis Gray admitted on cross-examination, that he did not look for gunshot residue on the duty weapons (T 5303-40).

[17]Ms. Marchese testified that because they are identical twins, their DNA would be identical (T 4184). Mr. Degulielmo concurred (T 4272; 4263).

bullet. According to Ms. Marchese, it had to have attached when it was wet (T 4190). On cross-examination, Ms. Marchese admitted that it takes an excessive amount of heat to destroy DNA (T 4191). A small amount of heat could have "dampened" a dry blood flake and the flake could have been placed in the tip of the nose of the bullet. She admitted that it was possible, although she did not believe it probable (T 4192).

Michael Degulielmo, Director of the Forensic Analysis with Microdiagnostics International, testified that he was responsible for overseeing the DNA testing laboratory (T 4240-1). Mr. Degulielmo was declared an expert in the field of DNA analysis, genetics, and microbiology, without objection (T 4255). Mr. Degulielmo identified state's exhibit #49 which was the blood scraping from the nose of a bullet and compared the same with the blood sample from Bryant Peney and a saliva sample from Todd Peney (T 4261).

Joseph Warren, a forensic scientist from Houston, Texas testified concerning his work as a molecular biologist in the field of genetics (T 4275). He processed samples that Mr. Degulielmo provided him. Mr. Warren was declared an expert in the field of PCR (plenary chain reaction) testing and DNA analysis. Based upon Mr. Warren's analysis, the blood on the projectile matched Todd

Peney's saliva exactly, and was Officer Peney's blood (T 4285).[18]

Detective Steve Palazzo, one of the lead homicide investigators in the case testified that he first came in contact with Jeffrey Weaver at approximately 7:57 a.m. (T 4387-4609). Jeffrey Weaver was taken into an interview room in the detective division (T 4390). He and Detective John Abrams entered the interview room at 8:01 a.m. (T 4391). He had a Rights Waiver Form and Detective Abrams had a tape recorder (T 4392). The detective read the Rights Waiver Form to Jeffrey Weaver. The officer testified that he wrote down what Jeffrey Weaver's verbal responses were and that Jeffrey Weaver wanted to make a statement - he just didn't want it recorded (T 4394; 4395-8). According to the detective, Jeffrey Weaver admitted being the person who shot Officer Bryant Peney and explained the details which led up to the shooting and explained what occurred after the shooting (T 4402).

According to the detective, Jeffrey Weaver stated that he parked his car at the Winn Dixie parking lot earlier in the evening and went for a walk. He walked to Stanley's Bar on 7th Street and North Federal Highway, just south of the "tunnel."

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[18]Molecular Biologist Dr. Martin Tracey testified that he found Mr. Degulielmo's arithmetic to be correct (T 4325). The doctor opined that the odds of finding another person who would also match the blood from the bullet was approximately one in 229,000,000 (T 4333-4).

From there, he walked south on Federal Highway. When he got to 13th Street and Federal Highway, Jeffrey Weaver noticed a lot of debris in the intersection in the roadway. It looked like there had been a car accident there. He picked up several items including a "a four-way pen and a box."[19] (T 4403) He continued walking south on Federal Highway. When he got to the 1400 block, he realized that a police car had pulled up behind him. The overhead lights were on, and he heard an officer holler to him. He turned and walked back over to the officers. The younger officer, Officer Peney, did most of the talking. The younger officer questioned him about whether he had been digging in the bushes. He felt like the officer was harassing him. At one point, the officer asked Jeffrey Weaver if he had any illegal weapons.

Detective Palazzo testified that Jeffrey Weaver told him he had a .357 revolver down the front of his pants. He knew the officer was about to search him. The officer told him to put his hands on the car and Jeffrey Weaver took off running (T 4404). He could hear the officers chasing him. He thought that Officer Peney was going to catch up to him, so he pulled out his gun, took a few more steps, and fired backwards toward the ground. He continued running, later looking

[19]The pen was found at the scene and processed (T 3847).

back and seeing Officer Peney on the ground. Jeffrey Weaver continued running east on 15th Street and disappeared between yards. Jeffrey Weaver told the officers where he had thrown his gun in the lake. At 8:37 a.m. they took a break (T 4405). After the first interview, Jeffrey Weaver was given dry clothes (T 4408).

The detectives returned to the interview room and Jeffrey Weaver agreed to go with the detectives to the lake to attempt to recover the gun (T 4409). Sergeant Bronson drove. Detective Abrams sat in the front seat. Detective Palazzo and Jeffrey Weaver sat in the rear seat (T 4409). When they got to the scene, Jeffrey Weaver again re-enacted the events of the evening and morning (T 4410). Jeffrey Weaver explained where he hid through the night (T 4418-33). He pointed out his car in the Winn Dixie parking lot (T 4436).

According to Detective Palazzo, Officer Myers was interviewed at the scene (T 4471). Detective Palazzo later took a sworn statement from Officer Myers who was adamant that Jeffrey Weaver pointed a gun at him (T 4473). Detective Palazzo denied telling Jeffrey Weaver that officer Peney was okay or misleading Jeffrey Weaver when he asked about the officer's condition (T 4498-9).

Reserve Officer Ray Myers' sworn statement was taken on January 9, 1996 (T 4535-6). At the time Detective Palazzo knew of an allegation by the defense that Ray Myers may have been the one who shot Officer Peney (T 4536; 4550).

Detective Palazzo admitted that there was nothing in the news he saw about Ray Myers having shot Officer Peney (T 4579-80). There was nothing about Officer Myers even firing his weapon (T 4581).

Various items of physical evidence were introduced at trial. Via Ms. Coval, Detective Hill, and Michael Dew the state introduced a gun belt, a vest back, a white t-shirt, a uniform shirt, a .9 mm firearm, and various photographs (T 4728-48; 4804-5; 4809; 5252; 5280; 5291; 5302). Further, Deputy Sheriff Stewart Mosher testified concerning his search of Jeffrey Weaver's vehicle on January 9, 1996 (T 5060). Officer Mosher identified photographs, rounds of ammunition and other items seized from Jeffrey Weaver's car (T 5062-84). Finally, Detective Sergeant Richard Herbert took various items including a revolver, a spent cartridge, a recovered bullet, and the remaining cartridges that were in the cylinder of Jeffrey Weaver's firearm for testing (T 4839).

Raymond Myers recounted[20] the events of January 5, 1996 (T 4862-89). At the time of his testimony Mr. Myers was a director of security for Sun Trust Bank and held that position since 1992 (T 4855). He was an FBI agent from 1969

[20]At the time Ray Myers was called to testify, Jeffrey Weaver advised the court that he was not even half way through reading Myers' deposition (T 4848). The state admitted that he was the key witness in the case (T 4849).

through 1973 (T 4856). He was thereafter with the security department at Florida Power & Light for a little over eighteen years. He became a reserve officer in 1994 (T 4859).

Mr. Myers testified that he first observed Jeffrey Weaver walking at a normal pace (T 4903). Officer Peney stopped the car and twenty or thirty seconds later activated his flashers (T 4904). Jeffrey Weaver picked up his pace. Officer Peney told the individual to "come back, we want to talk to you." (T 4911) Jeffrey Weaver walked back to the car. According to Officer Myers, Jeffrey Weaver started to put his hands in his pockets and Officer Myers commanded him "get your hands out of your pockets." Then the situation changed.

Jeffrey Weaver was compliant. Mr. Myers felt the situation had relaxed somewhat (T 4916). Jeffrey Weaver stated "don't hassle me. What are you bothering me for. I didn't do anything." (T 4916) Officer Peney asked Jeffrey Weaver about the pen in his pocket, but Officer Myers testified that he did not see Officer Peney take the pen from him (T 4917). The officers nodded to each other to apprehend Jeffrey Weaver and search him. Jeffrey Weaver took off running (T 4921). They ran after him.

Officer Myers testified that he heard Bryant Peney yell, "I'll take him." (T 4921) While running, Officer Myers yelled to Officer Peney "he's got a gun."

Simultaneously, Officer Myers drew his weapon. Everyone was running full blast (T 4928). According to Officer Myers, Jeffrey Weaver planted his left foot, pivoted to the left and fired (T 4929). At the time Officer Myers heard a shot, he thought that Officer Peney tripped (T 4931). Officer Myers believed he heard Jeffrey Weaver's shot. He did not believe he heard his own shot (*Id*.). Officer Myers witnessed Officer Peney push his emergency button and fall forward with his hands in front of him at a high rate of speed (T 4932-3).

Officer Myers admitted that in police officers' training they are specifically trained to fire two shots when in a situation where use of a firearm is necessary (T 4936). He stated that he did not believe he got two shots off. He might have only fired one (T 4937). Officer Myers was repeatedly asked why he had not "double tapped" like he was trained to do. He was asked whether it was because Officer Myers had already hit his target (T 4942-3).

Dr. Martin Fackler testified as an expert in the field of wound ballistics (T 4999). He reviewed the hospital record and autopsy report and looked at numerous photographs. He analyzed ten unfired bullets which had been found in possession of the accused, and a box of newly unfired bullets of the same kind used by the police department (T 4999-5000). The doctor also utilized an officer's shirt of the kind worn by Officer Peney and body armor like the one Officer Peney

was wearing at the time (T 5000). He examined the Baretta model 92, the .9 mm, and the Smith and Wesson 19-5 with a six inch barrel, single action revolver (T 5000). He fired shots with the .357 Magnum and did testing with the .9 mm Remington golden saber jacketed hollow point bullets (T 5002). Over defense objection, items seized from Jeffrey Weaver's car were introduced into evidence (T 5011). Finally, the doctor showed the jury the path of the .357 bullet (T 5027-30).

Graciela Ortiz testified that on the night of January 5, 1996, she went to see her husband around 7:30 p.m. to drop some food off where he was working(T 5130). She was driving her daughter's 1983 Pontiac Firebird (T 5132). As she was leaving the parking lot she saw a man[21] coming across the street (T 5133). He appeared to be very nervous (T 5134). She turned to head west, and caught a red light (T 5134). The young man walked to the passenger side of her car, then around the back. He pulled out an old-fashioned wooden gun (T 5137). Mrs. Ortiz froze and did not know what to do (T 5138). The person went off into the bushes. She went to find a police officer.

On January 5, 1996, Ethel Wilcher was with a friend and had stopped at a

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[21]Ms. Ortiz subsequently identified Jeffrey Weaver from a photographic lineup (T 5141; state exhibit 103). On January 9, 1996, she picked Jeffrey Weaver out of a live line-up (T 5142).

Mobile station at U.S. 1 and 15th Street just north of the tunnel (T 5225). After turning off the car, she noticed that there was a gentleman standing looking into the gas station. Ms. Wilcher was forty feet away from the individual. He looked "agitated", pacing back and forth inside the Mobile station (T 5231). This was between 9:15 and 9:30 at night. The man looked dirty. He had brown pants and a T-shirt with a regular shirt over it (T 5233). After she passed the Mobile station going south, she went through the tunnel. Ahead she saw flashing blue lights. She saw a policeman on the ground (T 5233).

Dr. Joshua Perper, the chief medical examiner for Broward County was declared an expert in the field of forensic pathology without objection (T 5510). Dr. Perper testified that he did an autopsy on Officer Bryant Peney. Dr. Perper testified concerning the path the bullet took in Officer Peney's body (T 5529-34; 5531-7). The bullet went straight through the arm. From there, it traveled through the right lung and perforated the aorta. Based upon the wounds, it was impossible for the doctor to determine whether the officer was running or standing still when shot (T 5543).

A) <u>Penalty Phase Proceedings</u>

Following the "community's" recommendation of life over death by an 8 to 4 vote, Jeffrey Weaver was sentenced to death via a judicial override follwoing

sentencing proceedings.

Several family members and friends testified as witnesses on Jeffrey Weaver's behalf during the penalty stage proceedings. David Decker testified that he worked on a 4.2 million yacht with Jeffrey Weaver in 1995 (T 6523). Mr. Decker testified that Jeff was a "very hard working, generous, honest person." (T 6524)

Michael Mykitka, the owner of J & J Yacht Finishers, employed Jeffrey Weaver. He described Jeff Weaver as a "good worker, a diligent worker." (T 6541) He never had any problems with him. He would hire him back.

Dorothy Page, the Defendant's mother, testified that her son kept in touch with her during the three and one-half years he was incarcerated pretrial and that he was dearly loved (T 6547). Via Jeffrey Weaver's mother, several photographs were introduced into evidence (T 6548-54).

Tammy Weaver Mowery, Jeffrey Weaver's older sister testified that she and her husband split up because her husband beat she and her children (T 6556). Jeffery Weaver let the family move in with him so that he could take care of them (T 6556). She testified that Jeffrey Weaver loved her and her children. Lisa Weaver Smith, another sister of Jeffrey Weaver, said that life without Jeff was "very sad." "Very miserable." (T 6563) She testified that even from jail Jeff did

good things.

William Eaton, a friend of Jeffrey Weaver's for over twenty-five years testified he used to live with Jeff Weaver (T 6568). They grew up together. When Mr. Eaton was fifteen years of age, his father kicked him out of the house. Jeffrey Weaver convinced his family to take in William Eaton. During the time Mr. Eaton knew Jeff, he saw him do nice things for people. He was never a violent individual (T 6570).

Timothy Denton likewise testified on Jeffrey Weaver's behalf (T 6573). He met Jeffrey Weaver in 1975 when they were in grade school. He recalled "plenty of times" when Jeff was helpful to other people (T 6574). Jeffrey Weaver and his father convinced Timothy Denton to go to church with them. They did a lot of bible reading and bible study. They were really dedicated to the church, attending services every Sunday morning, Sunday night, and Wednesday night (T 6575). He testified that Jeff headed up a bible study group (T 6575). He stated that they would read scripture from the bible, take prayer requests, and offer prayers (T 6576).

Betty Rabon-Scott, one of Jeffrey Weaver's classmates in the late 1970's drove down from North Carolina to testify on Jeffrey Weaver's behalf (T 6581). She recalled an incident in high school when Jeffrey Weaver was provoked but did

not retaliate (T 6582). She likewise remembered Tim Denton and Jeffrey Weaver running a prayer group before class (T 6582). She characterized Jeffrey Weaver as a "very honest guy." (T 6584)

Brian Putnam likewise testified that he knew Jeffrey Weaver from 1982 to 1994, when they worked together in a cotton mill in North Carolina (T 6589). Mr. Putnam testified that Jeffrey Weaver oftentimes helped other people with their work (T 6589). Mr. Putnam testified that Jeffrey Weaver treated he and his daughters "good, real good." (T 6590)

Michelle Smith, Jeff Weaver's youngest sister testified that Jeffrey Weaver gave her away on her wedding day (T 6595). She testified that Jeffrey Weaver is a very good father to his son, Nicholas (T 6597).

Jennifer Cooper-Burleson testified on Jeffrey Weaver's behalf (T 6599). She and Jeffrey Weaver were supposed to get married before all of this happened. She testified that Jeffrey Weaver obtained his high school diploma while in the Broward County jail (T 6605-6).

Bryant Peney's mother, Eleanor Peney testified during the penalty proceedings that Bryant was unique to the family (T 6498). She testified how as a child Bryant and his twin brother Todd were inseparable. Bryant Peney used to work for her father (T 6502). Further, retired officer Urshalitz, who used to work

with Office Peney, testified concerning his good character (T 6511-20).

Pursuant to a stipulation, the jury was informed that Jeffrey Weaver had previous convictions for breaking and entering and larceny in 1979, possession of marijuana in 1983, and a DUI in 1984 (T 6539).

Jeffrey Weaver elected not to testify during the penalty phase (T 6620).

SUMMARY OF ARGUMENT

Jeffrey Weaver has been wrongfully sentenced to death as a result of his actions of January 5th and 6th, 1996, despite the jury's eight to four recommendation for life imprisonment. Stopped while walking the streets based upon officers' suspicions, Jeffrey Weaver returned with Officer Peney and training officer Myers to the police car. After the questioning turned "harassing" according to Jeffrey Weaver - he fled. The officers chased him. Jeffrey Weaver turned and fired, hoping to scare off the officers' pursuit. Thereafter, he hid through the night in and around Cliff Lake.

Jeffrey Weaver's State and Federal constitutional rights were violated at bar. First, Jeffrey Weaver's appointed counsel was discharged two years into the case over Jeffrey Weaver's vehement objection. This was after the judge assured counsel that he would never order him off the case. His next appointed counsel refused to present the defense Jeffrey Weaver wanted and was prepared to admit

his client's guilt to a lesser included offense, while Jeffrey Weaver insisted he was innocent. Jeffrey Weaver, a thirty-five year old lay person, was forced to stand trial for premeditated murder without an attorney. More daunting was the fact that the State Attorney for the Seventeenth Judicial Circuit, Michael Satz, decided to try this case himself. What that meant was that over 250 witnesses were listed in discovery, and exhaustive efforts were taken by the state on every front.

Jeffrey Weaver's trial was fraught with errors. First, Jeffrey Weaver should have never been forced to try his case without a lawyer. The trial court reversibly erred by honoring the prosecutor's wishes and discharging Jeffrey Weaver's court-appointed counsel, Mr. Moldof. The court exacerbated the error by allowing substitute appointed counsel, Mr. Salantrie to withdraw on the eve of trial because he refused to abide by Jeffrey Weaver's wishes as to the defense. Further, the court grossly abused its discretion refusing to continue the trial despite the fact that Jeffrey Weaver was wholly unprepared to defend himself.

Jeffrey Weaver's State and Federal due process and Sixth Amendment rights were violated when he was forced to wear a stun belt during trial. Unbelievable, the stun belt was activated outside the presence of the jury during a break in the *voir dire* proceedings. The stun belt was utilized without any analysis of less severe alternatives, clearly, than use of a stun belt, in the presence of the jury, turned

Jeffrey Weaver into a meek advocate on his own behalf.

Judge Speiser reversibly erred by refusing to grant Jeffrey Weaver's motion to disqualify the judge. Jeffrey Weaver maintained that his case was being treated different from any other case on the court's docket. Judge Speiser, a probate judge, violated Jeffrey Weaver's right to the blind assignment of a judge by unilaterally deciding to preside over the case in an effort to assist the prosecutor in expediting the proceedings. Further, the judge disclosed privileged attorney-client communications between Jeffrey Weaver and his attorney to the prosecutor over objection and erred by failing to disqualify the state attorneys' office based upon actual prejudice.

As if the errors set forth above were not enough, the trial court further erred by precluding evidence concerning intervening medical negligence. The Defendant presented testimony from expert medical examiner Ronald Wright, who opined that the doctors at Broward General Hospital caused Officer Peney to die. They committed malpractice. Even the state's expert admitted that they "missed the rena cavity tear." Further, the court erred by refusing to allow evidence of statements made by Jeffrey Weaver during the booking process including "I'm sorry" and "it was an accident." By failing to allow Jeffrey Weaver to present his defense and present all of the evidence, reversible error occurred.

Further, the trial court erred by allowing a jury view over defense objection. The jury was transported by bus to the scene of the crime, and ultimately was in a position to view the Evergreen Cemetery and the tombstones located therein. Clearly, Jeffrey Weaver was prejudiced by the jury view.

Jeffrey Weaver's State and Federal constitutional rights were violated by the trial court's refusal to suppress his confession which was the result of police misconduct, including express or implied promise of leniency in exchange for his cooperation.

The admission of Bryan Peney's dying declaration to his identical twin brother was likewise unduly prejudicial and lacked probative value.

The trial court reversibly erred by allowing the state to introduce evidence concerning an alleged attempted armed robbery of Mrs. Ortiz. The trial court correctly severed the count from the Indictment, yet allowed the evidence over Jeffrey Weaver's vehement objection. As a result, the state was permitted to argue Jeffrey Weaver's guilt based upon a felony murder theory, rather than having to argue that the murder was committed in a premeditated fashion - a factor which the state could not prove.

Jeffrey Weaver's override sentence of death must be reversed. The trial court reversibly erred by restricting defense evidence and closing argument during

the penalty phase. Nevertheless, the jury recommended that Jeffrey Weaver be sentenced to life imprisonment. Clearly, because death is different in its severity and irrevocability, there is a requirement of heightened reliability. In this case, the judicial override was unconstitutional. There was no unanimous verdict that the prosecutor proved beyond a reasonable at least one aggravating factor. At a minimum, reversal and remand for resentencing is required.

This is not a case where the jury recommended death and the court followed the recommendation. To the contrary, eight of the twelve individuals who heard this case decided that life was an appropriate sentence and that death was not. The judge inserted his whim over the voice of the community, the jury and overrode the majority decision, ordering Jeffrey Weaver's death. In light of *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Jones v. United States*, the death sentence imposed cannot stand. Reversal and remand for a new trial or for resentencing is required.

ARGUMENTS

I. JEFFREY WEAVER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CHOSEN COUNSEL WERE VIOLATED BY THE PROSECUTORS' FORCED REMOVAL OF CONFLICT-FREE DEFENSE COUNSEL

Jeffrey Weaver's Fifth and Sixth Amendment rights under the United States Constitution, and Article I, Sections 9 and 16, of the Florida Constitution were violated when the trial court discharged Jeffery Weaver's court appointed counsel of choice, Mr. Moldof, after counsel had worked on the case for approximately two years. During said time period, Jeffrey Weaver and Mr. Moldof had bonded as their attorney/client relationship strengthened and progressed. The prosecutors and the court were concerned that because of Mr. Moldof's other trial commitments, he might not ". . . be ready for this case until the beginning of next year [1999]."[22] (T 181) Because of 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 (R 1113). This was after the judge assured Jeffrey Weaver that he would not order Mr. Moldoff off the case (SR 254-255).

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[22]Trial commenced on April 14, 1999 (T 2400).

Jeffrey Weaver acknowledges that an indigent individual accused of a crime has no absolute right to counsel of his choice. *United States v. Davis*, 604 F.2d 474- 478 (7th Cir. 1979); *United States v. Hampton*, 457 F.2d 299, 301 (7th Cir.), *cert. denied* 409 U.S. 856, 93 S.Ct. 136, 34 L.Ed.2d 101 (1972). However, Jeffrey Weaver's fundamental constitutional rights to have his chosen counsel continue to represent him were violated at bar based upon the Judge's assurance to Jeffrey Weaver that his original counsel could continue and the fact that the trial took so long to prepare for.

In *Morris v. Slappy*, 461 U.S. 1, 22-23 & n.5, 75 L.Ed.2d 610, 103 S.Ct. 1610 (1983), Justice Brennan, concurring in the result, stated that "considerations that may preclude recognition of an indigent defendant's right to choose his own counsel . . . should not preclude recognition of an indigent defendant's interest in *continued representation by an appointed attorney with whom he has developed a relationship of trust and confidence*." [Emphasis added] Appellate courts have held that trial judges do not abuse their discretion by appointing "competent counsel who is uncommitted to any position or interest which would conflict with providing an effective defense." *Drumgo v. Superior Court*, 8 Cal.3d 930, 935, 106 Cal.Reptr. 631, 634, 506 P.2d 1007, 1010 (1973), *cert. denied* 414 U.S. 979, 94 S.Ct. 212, 38 L.Ed.2d 223 (1973). *Sub Judice*, Mr. Moldof was providing

effective representation which Jeffrey Weaver was pleased with. Just when Jeffrey Weaver felt comfortable that he was receiving a zealous defense, the prosecutor had the defense lawyer thrown off the case. In so doing. Jeffrey Weaver's State and Federal rights were trampled upon.

The law is well settled that an analysis of the discharge or disqualification of an accused's counsel of choice begins with the "presumption in favor or petitioner's counsel of choice. . .that . . . may be overcome not only by a demonstration of actual conflict, but by a showing of a serious potential for conflict. *United States v. Wheat*, 486 U.S. 153, 164, 108 S.Ct. 1692, 100 L.Ed.2d 1140 (1988). The Sixth Amendment to the United States Constitution guarantees that "in all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." "A defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Because no conflict existed at bar, and because the perceived time restraints of counsel were blown out of proportion, the judge reversibly erred by discharging Mr. Moldof over Jeffrey Weaver's objection.

The state provided Judge Speiser with *Finkelstein v. State*, 574 So. 2d 1164 (Fla. 4th DCA 1991) as authority to remove Mr. Moldof (T 185-6). In *Finkelstein*, an assistant public defender was removed as counsel when he refused to proceed

with a hearing on pretrial motions until his client's competency was determined. In *Finkelstein,* the Fourth District Court of Appeal granted a petition for writ of *certiorari*, stating:

> We conclude that the trial court departed from the essential requirements of law when it removed Howard Finkelstein as public defender representing petitioner John Fogelman. The court could have ordered Finkelstein to proceed, and suggested the possibility of contempt proceedings against him if he were to fail to do so. However, it did not entertain that option. Removal of counsel without even allowing an opportunity for objection and argument is and should be perceived as a threat to the independence of the bar as well as an abuse of discretion.
>
> *Id.* at 1169.

The *Finkelstein* court cited decisions from out-of-state jurisdictions stating:

> Although an indigent defendant does not have the right to demand that a court appoint particular defense counsel, the substitution of counsel once appointed falls under the trial court's reasonable discretion. Abuse of the trial court's discretion has been found in several cases, such as *Mckinnon v. State,* 526 P.2d 18 (Alaska 1974) (*overruled on other grounds, Kvasnikoff v. State,* 535 P.2d 464 (Alaska 1975)), where the court held that a trial judge's removal of a public defender, over counsel's and defendant's protest, based on the judge's belief that counsel was unprepared, constituted a deprivation of the defendant's fundamental and constitutional rights to his choice of counsel.
>
> *Id.* at 1167.

Jeffrey Weaver maintains that *Finkelstein* is, in actuality, supportive of his position. This was not a situation wherein the court had discretion in disqualifying

a conflict - burdened attorney in order to protect the fair and proper administration of justice. This was not a case where a lawyer was incompetent or ineffective and needed to be removed. This was the type of intimidating discharge of defense counsel which chills the rights of defendants. It more than chilled– it "shocked[23]" Jeffrey Weaver's rights to effective assistance of counsel, to a fair trial, and to due process under state and federal law. Jeffrey Weaver asserts that never before has a prosecutor so easily forced the termination of an appointed attorney without a conflict or just cause.

In an analogous case, the California Supreme Court rejected a claim when an indigent defendant complained about the removal of his attorney, noting that the attorney-client relationship:

> . . .is independent of the source of compensation . . . Once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted
> and invidious discrimination arising merely from the poverty of the accused.

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[23]Jeffrey Weaver was further stifled by being forced to wear a stun belt throughout these proceedings without any finding of necessity or reasonableness. *See Argument III, infra.* The stun belt was activated and Jeffrey Weaver received an electric shock outside the presence of the jury in the midst of *voir dire* (T 2717-23).

Smith v. Superior Ct., 68 Cal.2d 547, 561-562, 68 Cal. Rptr. 1, 440 P.2d 65 (1968).

The Appellant suggests that a vast difference exists between "counsel of choice" at the time counsel is selected via appointment or retention, and one's right to the continued representation of one's "chosen counsel." The right to chosen counsel is a much more sacred right because counsel has an existing relationship with an indigent defendant. A defendant has a right to have his lawyer, whom he develops a relationship with, follow the case through to conclusion.

This was not the type of situation wherein Mr. Moldoff's continued representation violated any ethical duties. He was effective and Jeffrey Weaver trusted him. Jeffrey Weaver contends that Mr. Satz had Mr. Moldof removed because he was indeed a formidable opponent, a far cry from lay person Jeffrey Weaver, who earned his GED while incarcerated pretrial, without access to the materials to defend himself and forced to try this case without an advocate. To uphold the prosecutor and court's removal of Mr. Moldof at bar, cannot be sustained. Reversal and remand for a new trial is required.

II. THE TRIAL COURT REVERSIBLY ERRED BY DISCHARGING COMPETENT CONFLICT-FREE COUNSEL OVER JEFFREY WEAVER'S OBJECTION, ALLOWING NEW APPOINTED COUNSEL TO WITHDRAW ON THE EVE OF TRIAL, AND FORCING JEFFREY WEAVER TO DEFEND HIMSELF; THE TRIAL COURT FAILED TO ADHERE TO *FARRETTA* AND *NELSON*

Jeffrey Weaver made it clear from the outset and throughout trial that he wanted the lawyer he had "bonded with," Mr. Moldof, to be his counsel. He even asked to have a previous lawyer from the public defender's office return to the case despite that office's withdrawal based upon a conflict of interest (T 2169). Jeffrey Weaver repeatedly made it known he was not competent to try a first degree murder case against Mr. Satz who was seeking imposition of the death penalty. Ultimately, as Mr. Satz pushed for the April 1999 trial date, Jeffrey Weaver and Mr. Salantrie had a breakdown over Jeffrey Weaver's defense strategy.

Jeffrey Weaver maintained his innocence, acknowledging that he fired a shot without the specific intent to shoot anyone, just to scare them off. Jeffrey Weaver asserted that reserve officer Myers' shot might have killed Officer

Peney, that there was police misconduct[24] concerning the evidence collected falsely portraying Jeffrey Weaver's bullet as the cause of the injuries, and that Officer Peney might well have been saved but for the intervening medical malpractice as testified to by an undisputed expert, Dr. Ronald Wright (T 1026; 1030; 1035; 1045; 1063; 1070).[25]

Jeffrey Weaver responded to the court:

> I see Mr. Salantrie as - when he looks at the evidence, he is blinded by a projectile that the state has to offer in evidence. He can't see nothing else. And it's my feeling that even - because I've told him about this and discussed this with him on every occasion, or near about every occasion that he's come to see me, and it's always the same: No, he won't do it. Now, I know for a fact that I didn't do it, that my projectile did not hit Officer Peney, and I see no reason to go into court and the most I can expect is 25, 35 years - I mean, the least I can expect is 25, 35 years for something I didn't do, period.
>
> (T 2091-2).

During the *Faretta/Nelson* inquiry, the judge asked Jeffrey Weaver how he intended to explain to the jury that the bullet that matched his with the decedent's blood fell off the gurney. Jeffrey Weaver stated:

Well there's pictures right here that's got a bulletproof vest, that in

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[24]At the time, the evidence room was run by Officer Peney's father (T 2129). Early on the defense requested a Special Master be appointed to store and preserve the evidence in the case (ST 146-147; 161).

[25]*See Argument VI, infra*.

> the back where the bullet was - supposedly stayed it's just caked in blood. And a bullet has rifling grooves in it and there's not a lick of blood on that bullet in the grooves. I'm suggesting that they switched the bullets. I mean, I know you're going to say - you're probably going to say, well, you know, that's not possible.
>
> (T 2080).

The court acknowledged that police misconduct might explain the evidence, stating:

> I'm not saying it sarcastically. I mean, things do, you know, in this world there are corrupt policemen. There are policemen, especially if one policeman of their own is shot and it looks like he's dead, that possibly might do that. But the question is a jury going to buy that? That's the question, okay. Even though it's possible, what is a jury going to buy? I'm asking you to think about that tonight because tomorrow we'll have to continue this. Okay. I have to go now.
>
> (T 2081).

It is clear from a review of the *Farretta* inquiry that Jeffrey Weaver never made a clear and unequivocal request to represent himself. The same did not meet the requirements set forth in *Farretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). While the court engaged in a discussion with the procedure adopted in *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973), Jeffrey Weaver's rights were not scrupulously upheld. *See also Mora v. State*, 814 So. 2d 328 (Fla. 2002).

Jeffrey Weaver desired his defense to be centered around the fact that

Officer Myers' bullet was not recovered. Further, the evidence was conflicting as to whether Officer Myers fired one shot or two (T 2122-4). After inquiring, the court made a finding that Mr. Salantrie was not ineffective, and that there was no reason to remove him (T 2144). Thereafter, the court conducted a *Faretta* inquiry (T 2146). The court was concerned that trial was scheduled for the following Monday, and that trial needed to begin as planned (T 2153). Jeffrey Weaver unequivocally stated that he would rather not give up his right to an attorney (T 2161). He did not want to have to represent himself, but felt that he was being forced to (T 2188). He again requested Mr. Moldof act as standby counsel (T 2168).

Jeffrey Weaver was not competent to represent himself. While he had received a GED in jail, and had represented himself in speeding tickets in North Carolina on a couple of occasions, he did not even have time to read his files, let alone present a competent defense in a death penalty case (T 2202). Nevertheless, he did not want Mr. Salantrie to represent him with his given defense which admitted guilt (T 2204). Jeffrey Weaver's State and Federal constitutional rights to a fair trial, to effective assistance of counsel, and to due process of law were violated when Jeffrey Weaver was forced to defend himself. Reversal and remand for a new trial is required.

III. JEFFREY WEAVER'S STATE AND FEDERAL DUE PROCESS AND SIXTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS FORCED TO WEAR A STUN BELT DURING TRIAL; THE STUN BELT WAS ACTIVATED OUTSIDE THE PRESENCE OF THE JURY DURING A BREAK IN THE *VOIR DIRE* PROCEEDINGS.

Because Jeffrey Weaver was represented by counsel until the eve of trial, the subject of a need to restrain Jeffrey Weaver during trial was never raised until immediately before trial. Jeffrey Weaver had never acted up in court or in the jail, and aside from disagreeing with the judge's decision to remove Mr. Moldof as his attorney approximately two years into the case, Jeffrey Weaver hardly complained. No one informed him that one of the adverse consequences of discharging counsel and representing himself meant that he would be required to wear a restrictive device known as a stun belt throughout trial.

The trial judge was concerned about the Defendant being "his own attorney" and the fact that people would be moving around the courtroom (T 2256). The court deputy recommended Jeffrey Weaver wear a stun belt (T 2251). The court deputy stated "we are recommending the stun belt be put on the gentleman for safety and we will have a detention person that's qualified to handle the stun belt."

(T 2252) The deputy described the belt, which affixed around the waist, was electrified, and approximately three inches thick. The deputy stated that it looked "like a weight belt on the outside." (T 2252)

Pretrial, the court asked a Broward Sheriff's officer to explain and describe the stun belt. Jeffrey Weaver stated "that is much bigger than that [described]. [As] they described [it] there is no way you can conceal that under the shirt." (T 2281) Even the courtroom deputy admitted that the stun belt would be "bulky in the back of the shirt." (T 2281) Subsequently, the court inquired whether the Defendant had appropriate clothing to cover the stun belt, and even offered the public defender's office wardrobe (T 2295).

Following a recess in which the stun belt was placed on Jeffrey Weaver to "try it out," Jeffrey Weaver objected (T 2282-3). The court noted the objection for the Record, but found that the stun belt was neither "visible nor suggestive of anything to any perspective juror who would not have any idea what that is." (T 2283) Jeffrey Weaver asked if the court could "at least explore some other alternative."[26] Although several alternatives existed, the court summarily rejected

[26]During the jury view, Jeffrey Weaver wore a stun belt and a leg brace (T 5186). A leg brace goes beneath one's pant leg and the brace "locks" if any furtive movement is made (T 5197-1; 5383).

the same (T 2284).

Trial commenced on April 14, 1999. Following a break in the *voir dire* proceedings, prior to the panel re-entering the courtroom, the stun belt was deployed and Jeffrey Weaver was shocked (T 2717-23). Jeffrey Weaver was speaking with his stand-by and penalty phase counsel at the time electrical shocks were sent throughout his body by law enforcement. No one in the court room, least of all Jeffrey Weaver could comprehend that despite Jeffrey Weaver's complete compliance with the court's rules and rules imposed by the courtroom deputies, the stunner was activated and Jeffrey Weaver was "zapped" with a sustained bolt of electricity (T 2717-18). The courtroom security officer charged with activating the stunning device claimed it was an accident. The officer stated that the stunning was caused by the fact that she didn't have the "new equipment," which had extra safety features.

Unbeknownst to the judge or Jeffrey Weaver, the deputy advised that Jeffrey Weaver had been provided with an "old belt" rather than the "new belt" which had been demonstrated to the court. The stun belt demonstrated previously was not the one utilized (T 2723-4). The court deputy advised that to prevent further unintentional shocking, the key to activate the device would be placed in the drawer (T 2719). Shortly thereafter, the judge asked whether Jeffrey Weaver was

prepared to go forward. Jeffrey Weaver asked for a fifteen minute break." (T 2719) His penalty phase counsel stated "I'm not fine, judge, I will tell you that right now. I was shocked by what - - I've seen that happen before for a defendant who was misbehaving." (T 2719-20). The court refused to allow any break.[27] The prospective jurors were brought into the courtroom and *voir dire* continued.

In *United States v. Durham*, 287 F.3d 1297 (11th Cir. 2002), the appellate tribunal vacated Durham's conviction based upon the fact that Durham was forced to wear a restraining device commonly referred to as a stun belt during trial. Durham had previously attempted escapes from jails in Tampa and Pensacola, and the government argued that a stun belt in his case was necessary to protect the security of those in the courtroom and to prevent any attempted escape.

As discussed in *Durham*, a district court retains "reasonable discretion" to determine whether or not to physically restrain a criminal defendant. *United States v. Mayes*, 158 F.3d 1215, 1225 (11th Cir. 1998); *Durham* at 1303-4. Surely, the fact that Jeffrey Weaver was actually "zapped" should have caused the court, *sua sponte*, to analyze the wisdom of continuing to use the stun belt with the activation

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[27]Later, over the lunch break, the judge asked that Jeffrey Weaver be examined by a nurse as a result of the electrical shock. The deputy advised the court that Jeffrey Weaver had been taken to the infirmary. Jeffrey Weaver was not questioned (T 2804).

key kept in a drawer throughout the remainder of trial.

Sub judice, the decision to use a stun belt was not subject to close judicial scrutiny required for the imposition of this physical restraint. No factual findings were made concerning the operation of the stun belt (T 2284). No findings supported any purported necessity of wearing the belt. The court never addressed issues such as criteria for triggering the belt or the possibility of an accidental discharge. Contrary to *United States v. Theriault*, 531 F.2d 281, 285 (5th Cir. 1976), the court failed to place its rationale on the Record to enable the appellate tribunal to determine if the use of the stun belt was an abuse of the court's discretion.

Theriault requires a trial court to articulate, on the record, a rationale for its decision to impose particular security measures. In this case, the trial judge's rationale for imposing this highly intrusive method of restraint was simply not supported by the Record. Accordingly, the court grossly abused its discretion.

As set forth in *Durham*:

> If a stun belt is to be used to restrain a particular defendant, a court must subject that decision to careful scrutiny. This scrutiny should include addressing factual questions related to its operation, the exploration of alternative, less problematic methods of restraint, and a finding that the device is necessary in that particular case for a set of reasons that can be articulated on the record.
>
> *Id*. at 1309

The United States Supreme Court has held that the presumption of innocence is an integral part of a criminal defendant's right to a fair trial. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The presence of shackles and other physical restraints on a defendant tend to erode the presumption of innocence. *Mayes*, 158 F.3d at 1225. In this case, the use and discharge of the stun belt fatally offended Jeffrey Weaver's rights. Jeffrey Weaver maintains that the same constituted fundamental error warranting reversal and remand for a retrial. See also, *Shelton v. State*, 831 So.2d 806 (Fla. 4th DCA 2002).

The law is well settled that physical restraints on a defendant during trial should be used as rarely as possible. *See Allen v. Montgomery*, 728 F.2d 1409, 1413 (11th Cir. 1984)[seldom will the use of handcuffs be justified as a courtroom security measure]; *Zygadlo v. Wainwright*, 720 F.2d 1221, 1223 (11th Cir. 1983)[many considerations dictate that the use of shackles to restrain a defendant at trial should rarely be employed as a security device]. Even if the stun belt placed on Jeffrey Weaver might not have been visible to the jury,[28] it unconstitutionally infringed upon his right to a fair trial and to due process of the

[28]Jeffrey Weaver does not concede this point. Jeffrey Weaver maintains the stun belt was visible as it was bulky in the back of his shirt and it was apparent as he acted as his own counsel, constantly viewed and scrutinized in the courtroom (T 2280-3).

law. Jeffrey Weaver suggests that he became meek and subdued after being stunned by an electrical bolt. He was no longer as zealous an advocate for himself. He feared another electrical bolt throughout the remainder of trial, even though he had not committed a single transgression during all of his visits to the courtroom over the three and one-half years since his arrest.

In *Zygadlo*, the court noted that leg shackles "may confuse the defendant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses to follow. *Id.* 720 F.2d at 1223. If the defendant in *Zygadlo* was "confused," Jeffrey Weaver was more than "bewildered" by the restraints placed on his ability to defend himself, advocate on his own behalf, and receive a fair trial.

Durham relied upon the United States Supreme Court's decision in *Illinois v. Allen*, 397 U.S. 337 (1970), which held that physical restraints also damage the integrity of criminal trials in a less tangible, but no less serious way. They are "an affront to the very dignity and decorum of judicial proceedings, that the judge is seeking to uphold." *Id*. at 344.

The court in *Durham* stated:

> A stun belt seemingly poses a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles. The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial - including

> those movements necessary for effective communication with counsel.
>
> *Id*. at *1305*

Durham held that a stun belt can have an adverse impact on a defendant's Fifth and Sixth Amendment right to be present at trial and to participate in his defense. The court stated:

> Wearing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case. It is reasonable to assume that much of a defendant's focus and attention when wearing one of these devices is occupied by an anxiety over the possible triggering of the belt. A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial.
>
> *Durham* at 1306.

At bar, Jeffrey Weaver needed to participate fully in his defense. No one else was there to advocate Jeffrey Weaver's rights, or to proclaim his innocence. The same principal set forth in *Durham* is even more profound at bar. Jeffery Weaver could not follow the proceedings or take an active interest in his case while concerned of being zapped. As set forth by the Eleventh Circuit in *Durham*, "shackles are a minor threat to the dignity of the courtroom when compared with the discharge of a stun belt, which could cause the defendant to lose control of his limbs, collapse to the floor, and defecate on himself." *Id*. at 1306.

Because the court did not take the steps necessary to justify using a stun

belt to restrain Jeffrey Weaver at trial, and because of the use of this inappropriate, faulty, outdated device, reversal and remand is required.

IV. JEFFREY WEAVER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO CONTINUE TRIAL; UNDER THE SPECIFIC FACTS AND CIRCUMSTANCES OF THIS CASE, THE JUDGE ABUSED HIS DISCRETION.

After being indicted for the first degree murder of a police officer and offenses related thereto, Jeffrey Weaver had overseen Mr. Moldof's work on the case for approximately two years, only to have Mr. Moldof removed over objection based on Mr. Satz' request. Jeffrey Weaver's objection to the discharge of his counsel fell on deaf ears. After proceeding with a different court appointed counsel, Jeffrey Weaver learned that his new court-appointed attorney refused to proceed with Jeffrey Weaver's defense theory and was going to concede guilt to a lesser included offense to the jury.

On April 7, 1999, Mr. Salantrie's Motion to Withdraw was granted.[29] On April 9, 1999, Jeffrey Weaver appeared for the first time as a *pro se* Defendant (T

[29]Jeffrey Weaver asserts that Mr. Salantrie should not have been permitted to withdraw as he was ethically bound to abide by his client's reasonable decisions. *See* Rule 4-1.2(a), Rules Regulating the Florida Bar.

2249-2399). Despite Jeffrey Weaver's requests for a continuance, the jury trial commenced on April 14, 1999, five days later (T 2400).[30]

Although the court took a couple of intermittent days off and Jeffrey Weaver had minimal additional time to review depositions and discovery when the court recessed early some afternoons and weekends, Jeffrey Weaver was not able to "catch up" or gain the knowledge necessary to effectively defend a case of this magnitude. He had not been present at the depositions. He had not received all of the sworn statements and discovery prior to the commencement of trial. He repeatedly told the court he was not competent to try the case himself and needed a continuance.

The Florida Supreme Court has stated:

> The granting or denying of a continuance is within the sound discretion of the trial court and this court will not disturb such a ruling absent an abuse of discretion, even in a capital case. *Williams v. State*, 438 So. 2d 781 (Fla. 1983), *cert. denied* 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed. 2d 146 (1984).
>
> *Branch v. State*, 685 So.2d 1250 (Fla. 1996).

In certain circumstances such as at bar, the denial of a request for a

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[30]In the midst of trial, Mr. Weaver filed with the court, an inventory and photographs of the voluminous boxes of materials he was provided at the beginning of trial (T 4226).

continuance creates an injustice which outweighs the policy of not disturbing the trial court's ruling. *See Fasig v. Fasig*, 830 So. 2d 839 (Fla. 2d DCA 2002); *Silverman v. Millner*, 514 So. 2d 77 (Fla. 3d DCA 1987). In this case, the court abused its discretion and its refusal to order a continuance created the most serious injustice possible - a sentence of death following an eight to four life recommendation.

Jeffrey Weaver asserts that because of the short period of time between the discharge of his court appointed counsel and the beginning of trial, he did not have adequate time to prepare. He did not have copies of the outstanding motions. He did not have any of the materials necessary to prepare for important depositions, nor was he prepared to argue all outstanding motions two days later or start trial in less than a week (T 2230). Jeffrey Weaver could not even figure out where the boxes of files and discovery would be stored since he was "living" at the Broward County Jail (T 2230). When questioned concerning the whereabouts of the discovery, Mr. Salantrie stated "I have no clue." (T 2231) The judge advised Jeffrey Weaver "that's your problem, sir." (T 2231) As trial was set to commence, Jeffrey Weaver complained to the court that he hadn't had time to prepare for the pretrial motions (T 2266). He repeatedly advised he was unprepared (T 2315-16). Jeffrey Weaver advised the court that he had not yet even had access to the boxes

of discovery (T 2340).

The day trial began, Jeffrey Weaver again requested a continuance. The request was again denied (T 2405; 2409). After the jury had been selected, the request was renewed (T 3227). Jeffrey Weaver stated:

> Your Honor, at this time defense would like to once again ask for a continuance based on the fact that I was just receiving the evidence. I haven't a clue as to who's being called, not able to be prepared for cross-examination in the four short days that I've had the evidence - five short days now, the five days I've had the discovery. I just respectfully ask that you grant a continuance and give me time to at least review the discovery, at least prepare a little bit for cross-examination.
>
> (T 3227).

The request for a continuance was again denied (T 3229).

Jeffrey Weaver repeatedly and unsuccessfully requested continuances throughout trial (*see e.g.* T 3379; 3398-9); 3474; 3704-10; 3718-25; 3963-7; 4196-4296). Based upon the facts and circumstances of this case, the court's refusal to continue this case resulted in undue prejudice to Jeffrey Weaver. *See Fennie v. State*, 648 So. 2d 95, 97 (Fla. 1994). Reversal and remand for a new trial is required.

V. THE COURT REVERSIBLY ERRED BY REFUSING TO GRANT JEFFREY WEAVER'S MOTION TO DISQUALIFY THE JUDGE

Jeffrey Weaver filed a *pro se* motion to remove Judge Speiser and

prosecutor Michael Satz from this case, which was subsequently adopted by court-

appointed counsel (R 409-13; 426; 528-32; T 335). The state filed a Motion to Strike and/or Deny the Defendant's Motion (R 425-8). Jeffrey Weaver asserted that his case was being treated different from any other case on the court's docket (T 412). Further, Jeffrey Weaver claimed his right to the blind assignment of a judge was violated when Judge Speiser unilaterally decided to keep this case. Finally, Jeffrey Weaver complained that Judge Speiser "leaked" attorney/client privileged matters pertaining to his defense to Mr. Satz, over objection (T 2273-5).

Jeffrey Weaver objected to Judge Speiser presiding over his trial. He alleged *ex parte* communications between Judge Speiser and Chief Judge Dale Ross as well as *ex parte* communications between Mr. Satz and judges Speiser and Ross. He alleged fears of bias and prejudice against him. The defense sought to establish that via *ex parte* communications, the judge was succumbing to Mr. Satz' wishes to "get this case on a fast track before a non-criminal judge who has one case and will expedite this thing to trial." (T 335) Mr. Satz was placed under oath, and testified that the case "dragged on for a long period of time." (T 340)

Mr. Satz testified that in December 1997 he wanted to get a judge to preside

over the case who could get this case to trial within approximately five months (T 343; 360). On the stand, the chief prosecutor denied having spoken to Chief Judge Ross concerning the case (T 348). However, he admitted having seen the "1000 day list" which had been compiled of all the prisoners who had been in custody awaiting trial on first degree murder cases more than 1000 days (R 354). Many accused individuals had been pretrial detained much longer than Jeffrey Weaver. Many had been in custody for "years," yet, their attorneys had not been discharged by the court at the suggestion of the prosecution.

Jeffrey Weaver asserts that Judge Speiser's "taking" of this case violated his right to the blind assignment of cases. *See State ex. rel. Zuberi v. Brinker*, 323 So. 2d 623 (Fla. 3d DCA 1975). In *Brinker*, the court held that it was not the function of the court to determine whether the blind assignment of cases or a master calendar system was a better system. The court's duty was to make sure defendants charged with felonies were accorded random selection of assignment pursuant to local rule (*Id*. at 626).

Undisputedly, Judge Speiser hand selected Jeffery Weaver's case. Although the judge filled in as judge for the criminal division in which Jeffrey Weaver's case was assigned for a while, when a new judge was transferred into the division to take over the caseload, Judge Speiser refused to relinquish the case

to the division judge. Jeffery Weaver felt pretrial, during trial and post trial, and maintains herein that Judge Speiser was biased and prejudiced against him and in favor of the state. Jeffrey Weaver knew both the judge and the prosecutor would soon face reelection or retention. He feared that his case was becoming more about politics than justice.

Jeffrey Weaver had reason to fear Judge Speiser's partiality towards the state. Judge Speiser had been an assistant state attorney for more than four years while Mr. Satz served as the county's top prosecutor. Judge Speiser was publicly reprimanded by the Florida Supreme Court for his conduct as an attorney prior to becoming a circuit judge. *In Re: Inquiry Concerning a Judge- Mark A. Speiser,* 445 So. 2d 343 (Fla. 1984), as Justice Ehrlich stated in his dissenting opinion (concurred with by Justice Shaw):

> The JQC has recommended a reprimand and the majority of the Court is approving that punishment. I do not believe that this disposition comports with justice. I am apprehensive that the public's confidence in the judge will have been seriously undermined, or perhaps destroyed, by his past conduct as a lawyer. *What confidence in the impartiality of the judiciary will a defendant in a criminal case have when he appears before the judge knowing that as a lawyer the judge secretly conferred with the prosecutor in a case which was being defended by his firm and counseled the prosecutor on how to obtain a conviction in that very type of case? Will he not, with some reason, feel that the judge's sympathies are still with the prosecutor? How can the judge, in the eyes of the public or of those who appear before him, possibly eradicate the*

> *lingering doubts about the judge's integrity and impartiality, all stemming from this secret meeting?* The charges made against the judge are far too grave for a simple reprimand to suffice, but by the same token I am loathe to vote to remove him from office on the basis of the stipulated facts.
>
> The issue before us is far too serious, and the consequences too far-reaching, to handle on the basis of the facts given to us. I would therefore refuse to accept the recommendations of the JQC and would remand the matter to the JQC to handle by means of formal proceedings.
>
> *Id*. at 345. [Emphasis added].

In light of the fact that Judge Speiser revealed attorney/client privileged matters pertaining to the defense to Mr. Satz, Jeffrey Weaver's fears were well founded. Additionally, Judge Speiser allowed Jeffrey Weaver to be prosecuted under a felony murder theory despite the fact there was clearly no premeditation. Jeffery Weaver maintains that the Ortiz incident was irrelevant and immaterial and should not have justified the felony murder instructions. Judge Speiser allowed other crime evidence which was rightfully severed from the trial of this case to be presented over objection. Based upon the totality of the circumstances, Judge Speiser should have recused himself, or in the alternative, granted a new trial.

VI. THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO DISQUALIFY THE STATE ATTORNEYS' OFFICE BASED UPON "ACTUAL PREJUDICE."

Jeffrey Weaver acknowledges that to disqualify the state attorneys' office, a defendant must show substantial misconduct or "actual prejudice." *Downs v. Moore*, 801 So. 2d 906 (Fla. 2001); *Farina v. State*, 679 So. 2d 1151 (Fla. 1996), *receded from on other grounds by Franqui v. State*, 699 So. 2d 1312 (Fla. 1997). Based upon the prosecutor's actions at bar, the "actual prejudice" requirement was met and Mr. Satz and the Broward County State Attorneys Office should have been disqualified from prosecuting this case. In *Farina*, the court held that actual prejudice was not shown where the state attorney improperly asked the clerk's office to assign a case to a particular division. Actual prejudice is "something more than the mere appearance of impropriety." *Downs* at 914; *Kearce v. State*, 770 So. 2d 1119, 1129 (Fla. 2000), *quoting Meggs v. McClure*, 538 So. 2d 518, 519 (Fla. 1st DCA 1989).

As a result of the violation of Jeffrey Weaver's right to chosen counsel at the state's insistence, actual prejudice occurred. A new trial should be ordered, with Mr. Satz and the Broward Count State Attorneys Office prohibited from prosecuting this action on remand.

VII. THE TRIAL COURT REVERSIBLY ERRED BY PRECLUDING EVIDENCE CONCERNING INTERVENING MEDICAL NEGLIGENCE

One of Jeffrey Weaver's intended trial defenses was that he did not intend

to harm Officer Peney or anyone. Jeffrey Weaver claimed Officer Peney died as a result of an intervening act, medical malpractice and negligence by his doctors. Jeffrey Weaver had a good faith basis in the defense, specifically predicated upon renowned medical examiner, Dr. Ronald Wright's opinion that:

> They elected to do more extensive x-ray procedures than that which in this particular case *I believe caused Officer Peney to die* because they lost extremely valuable time. Instead of fixing what needed to be fixed with outrageous speed, they twittered away that time in looking to see what was hit. What was hit is pretty well discernible from calculating where the bullet trajectory is inside the body which you know when you have the entrance and exit wound that bullet went there and left there.
>
> (T 1026) [Emphasis added].

In Dr. Wright's opinion, the surgeons at Broward General Hospital could have saved Officer Peney (T 1039). The surgeons committed malpractice (T 1045; 1063). Both of the lesions to the aorta were reparable (T 1070). Officer Peney had obtained normal vital signs in the emergency room (T 901). Even the state's expert admitted that the doctors "missed" the rena cavity tear (R 998). Dr. Wright opined that the doctors wasted time getting x-ray studies and performing other tests and that the doctors should have quickly performed the echtocardiogram (T 1030; 1035).

While the Defendant acknowledges that generally a defendant cannot escape the penalty for an act which in point of fact produces death which might possibly

have been averted by some possible mode of treatment, Jeffrey Weaver should not have been precluded from presenting this as a defense or in mitigation.

One of the motions Jeffrey Weaver was forced to argue on his own pretrial, was the state's Motion in *Limine* based upon an intervening cause of death (T 2346). No response to the state's motion was filed by counsel or *pro se* (T 2347). Jeffrey Weaver did not even have a copy of the state's motion, and could not offer any argument in opposition (T 2350). Contrary to Dr. Wright's expert opinion, the court found that there was no intervening medical negligence (T 2351). The court found the fact that one of the thoracic surgeons suffered a heart attack during the course of the surgery did not contribute to negligence in the care of Officer Peney. Thus, the court concluded as a matter of law that there was no intervening negligence. Over defense objection, the court granted the state's Motion in *Limine* concerning intervening medical evidence (T 2351).

As set forth by the United States Supreme Court in *Chambers v. Mississippi*,
410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), "few rights are more fundamental than that of an accused to present witnesses in his own defense."

During trial, Jeffrey Weaver requested permission to cross-examine nurse Miller as to the negligence which the defense asserted caused Officer Peney's

death (T 4126-45). The court denied the Defendant's request and prohibited evidence of what Mr. Satz termed a "medical misadventure." (T 862; 4127; 4534).

The state argued that *Rose v. State*, 591 So. 2d 195 (Fla. 4th DCA 1999) was controlling. In *Rose*, the court held that the trial court properly refused to allow the defendant to present evidence that medical negligence contributed to the infant's death because the prosecution did not make lack of medical care an issue. Further, the court held that the lack of medical treatment did not excuse the defendant's actions.

However in *Donahue v. State*, 801 So. 2d 124 (Fla. 4th DCA 2001), the Fourth District Court reversed a murder conviction and ordered a new trial under similar circumstances. The court stated:

> Limiting the admissibility of evidence of maltreatment to cases in which the treatment was the sole cause of death would, in our opinion, be inconsistent with the following principle reiterated by the Florida Supreme Court in *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990); 'where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission.' *See also Vennier v. State*, 714 So. 2d 470, 472 (Fla. 4th DCA 1998)[a murder prosecution, exclusion of evidence that decedent might have committed suicide was reversible error].
>
> *Id.* at 126

In *Donohue*, the court stated "applying the *Johnson*[31] rule to admissibility of evidence would be inconsistent with cases holding that expert medical testimony as to the cause of death in a homicide case need not meet the 'reasonable medical certainty' standard used in civil cases." *Citing Buenoano v. State*, 527 So. 2d 194 (Fla. 1998); *Butts v. State*, 733 So. 2d 1097 (Fla. 1st DCA 1999). See also, *Intervening Causation as Defense*, 33 Fla. Crim.L.J. 6 (Fla.. 2002) Jeffrey Weaver asserts that under *Donohue*, his expert should have been able to testify that the medical malpractice could have caused the death of officer Peney both at trial and before the jury during the penalty phase. That type of evidence could have affected the jurors in this case as to whether Jeffrey Weaver had a depraved mind or was guilty of homicide.

While the bullet wound suffered by Officer Peney was ultimately lethal, had the proper course of treatment been followed, Officer Peney might have lived. The trial court abused its discretion in excluding any evidence of the medical malpractice which resulted in Officer Peney's death both at trial and as mitigation during the penalty phase. Based upon the error, reversal and remand for a new trial is required.

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[31] *Johnson v. State*, 64 Fla. 321, 59 So. 894, 895 (Fla. 1912).

VIII. THE TRIAL COURT REVERSIBLY ERRED BY ALLOWING A JURY VIEW OVER DEFENSE OBJECTION

Jeffrey Weaver maintains that the trial court reversibly erred by granting the state's motion to allow the jury to view the scene of the shooting and Evergreen Cemetery [32] on the west side of the lake (R 9-66-8). A hearing was conducted (T 1819-50). In short, the state wanted the jury to view all of the scenes relative to the case (T 1821). The defense was vehemently opposed to the request (T 1822-31; 5198-9; 5209). Among other concerns, the defense objected to the jurors standing in a cemetery looking at tombstones or viewing a cemetery (T 1828). It later became clear it was impossible to conduct the jury view without seeing the cemetery (T 5378-9).

Prior to the jury view, the state had already introduced a multitude of photographs and video tapes of each locale, thus the defense argued the jury view was cumulative. Further, the defense was concerned about the media attention during the viewing and prejudicial effect related thereto (T 5382).[33] The state

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[32]The defense had a continuing objection to the jury viewing the cemetery (T 1841).

[33]Although the Record does not reflect the actual contact the media had with Jeffrey Weaver during the jury view, it is clear from the Record that a television newscaster tried to speak with Jeffrey Weaver. Nick Bogert from NBC Channel 6 asked Jeffrey Weaver questions and put a microphone in his face (T 6636-8).

argued that the photographs and videos did not adequately capture the relevant distances. Over defense objection, the court granted the state's request for a jury view (T 1837; 5177-80).

After the state rested its case, the court arranged for the jurors to be taken to view the scenes. Jeffrey Weaver had the stun belt strapped to him, was forced to wear a leg brace, and was followed by a plain clothes officer who stayed within fifteen feet of him (T 5634). The court commenced the jury view at approximately 5:45 p.m. (T 1840). The jurors arrived and exited from a bus. The judge advised them that they were on the east side of Cliff Lake, and that they were to walk around, but not to talk (T 5637). A short time later, the jury got back on the bus and went to the west side of the lake next to the cemetery. The jurors were allowed to walk up and down the west bank of the lake and view the cemetery. Next the jurors were shown the vicinity around South Federal Highway and 15th Street at approximately 8:25 p.m. (T 5645). The judge thereafter pointed out the Boston Market, Lauderdale Motor Cars, and the Whiddon Adult Education Center (T 5651-2).

A motion to view is one directed to the discretion of the trial judge. The statute provides that the judge may order such a view when in his "opinion" it is "proper." *See* Section 918.05; *Rankin v. State* 143 So. 2d 193, 195 (Fla. 1962).

In this case, the judge abused his discretion as the jury view was improvidently granted. Defense requests for jury views which have been rejected by the trial court have routinely been affirmed on appeal. *See e.g. United States v. Triplett*, 193 F.3d 990, 991 (8th Cir. 1999). The state's motion below should have met the same peril. While the decision to permit a view is entrusted to the sound discretion of the trial court, Jeffrey Weaver maintains an abuse of discretion occurred. *United States v. Passos-Paternina*, 919 F.2d 979, 986 (1st Cir. 1990), *cert. denied* 449 U.S. 982 (1991); *Hughes v. United States*, 377 F.2d 515, 516 (9th Cir. 1967).

In *Triplett*, the evidence presented at trial included photographs and diagrams of the sites of Triplett's arrest, as well as witness testimony concerning the circumstances and conditions of the locations. Despite Triplett's claims that a jury view of the arrest sites would have been critically helpful to the jury's assessment of the police officers' credibility, the appellate court held that the district court did not abuse its discretion in denying Triplett's jury view request.

In this case, because the jury view was cumulative to other evidence and testimony, and because the view of the cemetery was so prejudicial, the trial court reversibly erred by granting the state's request to view the scenes. The evidence was not harmless in light of the other issues raised herein. Reversal and remand is

required.

IX. THE TRIAL COURT ERRED BY REFUSING TO ALLOW EXCULPATORY DEFENSE EVIDENCE

Prior to presentation of the defense case, the Prosecutor objected to Jeffrey Weaver introducing what the Prosecutor termed "self-serving statements" (R 31-36). Specifically, the Defendant sought to elicit testimony from a booking officer. Jeffrey Weaver argued

> Your Honor, the issue about the self-serving statement, the self-serving objection is not valid - is not a valid reason to exclude otherwise admissible evidence. And in this statement, my out of court statement to Detective Macauley is the one he's referring to is hearsay, but is admissible as a declaration against interest, admissible and to show state of mind admission - excuse me - admission and to show state of mind. All three are admissible hearsay exceptions.

The Prosecutor responded:

> Your Honor, if I may regarding that issue. The Evidence Code 90.803, Subsection 18, states that an exculpatory statement of a party is admissible against the party making the statement itself. Under the Evidence Code, although the Defendant is a party, he's not trying to admit this testimony against himself. He's submitting it for himself. And the case law in Erhardt (phonetic) on evidence is abundantly clear that a party cannot introduce an exculpatory statement to buttress their own case because they're not offering it against anybody. It's not an opponent's admission. Also, that the Defendant's statement is not part of the res gestae because it lacks an indicia of trustworthiness. In this case the Defendant's comment that "I'm sorry" and "it was an accident" were made well after the

> incident, after he had been
> apprehended, after being in the lake all night, and they were clearly made for the purpose of avoiding responsibility for the act that he had committed. And there is no theory in evidence that would allow his exculpatory statements to be admissible...

Despite the State's protestations to the contrary, Jeffrey Weaver's spontaneous utterances during the booking process were admissible as hearsay exceptions. *See, e.g.* Section 90.803(1)(2)(3), *Goldman, Distorted Vision:*

Spontaneous exclamations as a "Firmly Rooted" exception to the Hearsay Rule, 23 Loy. L.A. L. Rev. 4523 (1990). Because of the court's denial of the admission of exculpatory evidence, reversal and remand is required.

X. JEFFREY WEAVER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO SUPPRESS HIS CONFESSION.

Jeffrey Weaver maintains that the court reversibly erred by refusing to suppress his confession subsequent to his arrest (T 1963). The defense maintained that suppression of all of Jeffrey Weaver's statements, admissions, and confessions was warranted because of police misconduct. Specifically, the officers repeatedly misled Jeffrey Weaver as to Officer Peney's death and the resultant homicide investigation. The officers' misstatements deluded Jeffery

Weaver as to his true situation and the jeopardy he was in. Additionally, the defense asserted that the police conduct acted as the functional equivalent of an express or implied promise of leniency in exchange for cooperation (T 1963). Jeffrey Weaver was led to believe that if he cooperated fully, i.e. by providing a statement, showing where the firearm was, accompanying the officers back to the scene, etc., he would face "lesser jeopardy, lesser charges, lesser punishment." The conduct amounted to an implied "promise of leniency. (T 1963)

The trial court held an evidentiary hearing on appellant's motion to suppress and found that Jeffrey Weaver's *Miranda* waiver was knowing, intelligent, and voluntary, and that his statements were admissible. It was incumbent on the state to show by a preponderance of the evidence that the confession was freely and voluntarily given and that his rights were knowingly and intelligently waived. *Thompson v. State*, 548 So. 2d 198, 204 (Fla. 1989). The state failed to meet its burden.

The Appellant acknowledges from the outset that a trial court's ruling on a motion to suppress is presumptively correct. *Medina v. State*, 466 So. 2d 1046, 1049 (Fla. 1985). However, a close review of the Record reflects that the trial court erred by improperly concluding that the statements were voluntarily obtained after properly administered warnings pursuant to *Miranda v. Arizona,* 384 U.S.

436, 16 L.Ed.2d 694, 86 S. Ct. 1602 (1966). The determination of voluntariness is based upon the totality of the circumstances, with the determination to be made by the judge based on a multiplicity of factors. *Traylor v. State*, 596 So. 2d 957, 964 (Fla. 1992). The interrogating detectives herein misled and deceived Jeffrey Weaver concerning the officer's death. A renowned defense expert, Dr. Richard Ofshe testified that the police prejudicially deceived Jeffrey Weaver in this case (T 1873-5). In the doctor's opinion, Jeffrey Weaver confessed to the officers because he was concerned he would be beaten by the police and that by being cooperative he would get better treatment (T 1911-19).

In *Escobar v. State,* 699 So. 2d 984 (Fla. 1997), the court was troubled by the precise issue of officers intentionally misinforming a custodial defendant. Under the facts of *Escobar,* the statement was permitted as evidence, yet the Florida Supreme Court put law enforcement on notice stating:

> We caution law enforcement that such tactics can go too far and can render confessions so unreliable that they must be suppressed. However, we recognize that police misrepresentation alone does not necessarily render a confession involuntary. *Frazier v. Cupp,* 394 U.S. 731, 22 L.Ed.2d 684, 89 S.Ct. 1420 (1969); *Burch v. State*, 343 So. 2d 831 (Fla. 1977).
>
> *Id*. at 987.

Based upon the repeated police misrepresentations and the express or

implied promise of leniency, Jeffrey Weaver's confession was rendered involuntary. Reversal and remand is required.

XI. ADMISSION OF OFFICER PENEY'S DYING DECLARATION TO HIS IDENTICAL TWIN BROTHER WAS UNDULY PREJUDICIAL AND LACKED PROBATIVE VALUE.

Officer Todd Peney testified pretrial concerning his contact with his brother following the shooting (T 2284). On grounds of relevance and probativeness, under both the Florida and Federal Evidence Codes, the defense sought to prohibit the hearsay testimony. The court overruled the objection, arguing that the statement was not hearsay as it was not offered to prove the truth, or, if it was hearsay, it fell into a firmly rooted exception as a dying declaration, an excited utterance, or was part of the *res gestae* of the offense. The court permitted the testimony to come in only under the theory that it was a dying declaration (T 2299).[34]

At trial, Todd Peney testified that he and Bryant were identical twins (T 5567). Both he and his brother were right handed. He testified his brother told him in the hospital that "the guy I was out with, turned and shot me." (T 5568) He

[34]Jeffrey Weaver withdrew his objection to the dying declaration on hearsay grounds, but re-lodged his objection on grounds of lack of relevance and the danger of unfair prejudice outweighing any probative value (T 5390; 5562-4).

had a black .357. He fired one or two rounds (T 5569-70). The guy's hair was brown. He was a white male, not "as tall as us." (*Id.*) Bryant Peney said he wasn't able to fire. He was wearing his bullet proof vest (T 5569-70). When Todd Peney asked for a description of the clothing the person wore, Bryant Peney said "Todd, it hurts too bad. I can't answer. Ask me later." (T 5569-70) Bryant Peney passed away at 2:54 a.m. the following morning (T 2291-2).

Todd Peney, Bryant Peney's identical twin was the final state witness. What vision was left in the jurors' minds?

Under Section 90.403, Fla. Stat., relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or potential to mislead the jury. It is well settled that these competing values must be weighed in determining admissibility. *See Chavez v. State*, 525 So. 2d 420, 422-23 (Fla. 1988). *Sub judice*, no issue existed as to the identity of Jeffrey Weaver. The question was whether law enforcement officers or crime technicians might have "planted" the bullet fired by Jeffrey Weaver as the bullet which was shot through Officer Peney's body or whether a reserve officer's stray bullets might have caused a policy officer's unfortunate, unintentional death. The dying declaration evidence was properly objected to. Here, it is "completely impossible... to say that the state has demonstrated beyond a reasonable doubt"

that the error complained of "did not contribute to" the defendant's conviction. *Chapman v. California*, 286 U.S. 18, 26 (1967). Reversal and remand is required.

XII. THE TRIAL COURT REVERSIBLY ERRED BY ALLOWING THE STATE TO INTRODUCE EVIDENCE CONCERNING AN ATTEMPTED UNRELATED ALLEGED ARMED ROBBERY

Jeffrey Weaver adamantly denied any involvement in the alleged attempted armed robbery of Mrs. Graciela Ortiz (T 1592). The trial court properly severed the charges relative thereto. Nevertheless, over defense objection, the prosecutor was permitted to present extensive evidence and argue that between 7:30 and 8:00 o'clock p.m. on January 5, 1996, on Northeast 3rd Avenue and Northeast 3rd Street, Jeffrey Weaver attempted to rob Mrs. Ortiz with a firearm (T 5228).

Jeffrey Weaver asserts that the evidence offered by Mrs. Ortiz was not inextricably intertwined as argued by the state, and should not have been allowed. Her testimony was extensive and prejudicial (T5129-71; 5213-20). It involved substantial identification of both Jeffrey Weaver as well as a .357 firearm, although the description of the black gun with wooden handles was inconsistent with the description of Jeffrey Weaver's firearm. Further, the location of the alleged encounter, north of the tunnel, was inconsistent with the state's theory of where

Jeffrey Weaver traveled that evening (T 4326-7). Because of Mrs. Ortiz' evidence, the state was allowed to argue guilt under a felony-murder theory rather than being forced to prove premeditation which the Appellant contends could not be proven.

The prosecutor argued, "now, you have a situation here where the Defendant had confronted Graciela Ortiz. He was carrying a concealed .357 magnum revolver and he didn't want to be arrested." (T 3434) Further, over defense objection, the court allowed the testimony of Ethel Wilcher which had no apparent relevance or materiality to the homicide (T 5222-36). The judge noted the defense objections to the testimony and held that Mrs. Ortiz and Ms. Wilcher's testimony was admissible under the theory that it was inextricably intertwined with the murder (T 5230). A close analysis discloses the same is untrue and unproven.

In *Lamarca v. State*, 785 So. 2d 1209, 1212-13 (Fla. 2001), the court addressed the standard of review concerning the admission of collateral crime evidence. The court stated that the admissibility of such evidence is within the discretion of the trial court and its determination shall not be disturbed absent an abuse of that discretion. *See also Sexton v. State*, 697 So. 2d 833, 837 (Fla. 1997). "Discretion . . . is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." *Huff v. State*,

569 So. 2d 1247, 1249 (Fla. 1990). *Id*. *Sub judice*, Judge Speiser should not have allowed the irrelevant evidence.

Evidence of other crimes or bad acts are admissible if relevant, i.e. if it is probative of a material issue other than the bad character of the accused. *See Hunter v. State*, 660 So. 2d 244, 251 (Fla. 1995). In *Hunter*, the Florida Supreme Court explained:

> Among the purposes for which a collateral crime may be admitted is establishment of the entire context out of which the criminal action occurred. *See also Ashley v. State*, 265 So. 2d 685, 693-94 (Fla. 1972) (holding that evidence of four other murders committed shortly after the murder for which defendant was tried was admissible). Inseparable crime evidence is admitted not under 90.404(2)(a) as similar fact evidence but under Section 90.402 because it is relevant.
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> 660 So. 2d at 251 (citations omitted).

On the other hand, "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Section 90.403, Fla. Stat. While it is true that all of the evidence presented in a prosecution "prejudices" the defendant, the pertinent question is whether that prejudice is so unfair that it should be deemed unlawful. *See Wuornos v. State*, 644 So. 2d 1000, 1007 (Fla. 1994).

In the present case, the trial court abused its discretion in admitting

testimony and evidence concerning Mrs. Ortiz and Ms. Wilcher. The same had no relevance or materiality to the isolated incident when Jeffery Weaver was stopped, detained and was about to be searched and arrested based upon suspicions.

In *Porter v. State*, 715 So. 2d 1018 (Fla. 2d DCA 1998), the Second District Court of Appeal dealt with an analogous situation. In *Porter*, the defendant appealed his conviction for resisting an officer with violence and battery on a law enforcement officer. On appeal, Porter contended that the trial court erred in denying his motion in limine to exclude a prejudicial statement made by his wife to a deputy sheriff who had been dispatched to the Porter residence. The appellate tribunal reversed, stating:

> We conclude that the wife's statement was not inextricably intertwined with the crimes for which Porter was charged. There was a clear break between the wife's statement and Porter's altercation with the deputies. The only relevance to the wife's out-of-court statement was to explain the deputies' presence at the Porter residence. However, the deputies' presence was sufficiently explained by Deputy Walter's testimony that he received a call concerning a domestic violence incident. There was no need to reveal the wife's statement because the deputies' legal duty to be present was never called into question. Thus, the wife's statement was not relevant to any material issue in the case.
>
> *Id*. at 1220

Evidence of other crimes is admissible if it is probative of a material issue other than the bad character or propensity of an individual. Section 90.404(2)(a),

Florida Statutes, which expresses this view, restates the law as determined by the Florida Supreme Court in *Williams v. State*, 110 So. 2d 654 (Fla. 1959). Section 90.404(2)(a) lists proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident as some of the issues to which the evidence of collateral occurrences may be relevant. The testimony elicited from Mrs. Ortiz and Mrs. Wilcher was neither relevant, material, or probative. Simply put, the trial court reversibly erred by allowing the evidence.

XIII. THE TRIAL COURT ERRED IN REFUSING TO ORDER A NEW TRIAL.

Jeffrey Weaver contends that the trial court reversibly erred by failing to grant his Motion for New Trial (T 1278). A new trial was required as a result of the erroneous admission of Mrs. Ortiz' testimony because the court failed to continue the trial in light of the fact that Jeffrey Weaver was forced to try the case himself, and by denying Jeffrey Weaver's pretrial motions to suppress physical evidence and statements made to Detective Palazzo.

In *Geibel v. State*, 817 So. 2d 1042 (Fla. 2002), the court reiterated that the trial judge acts as a "safety valve" when reviewing motions for new trial. In this case, the evidence was insufficient to prove premeditated murder, and the

underlying attempted armed robbery was not properly proven. At a minimum, a new trial should have been granted as to the aggravated assault on Officer Myers, which triggered one of the aggravators found by the court. Surely, the judge should have utilized his "veto power" to grant a new trial, rather than flying in the face of the citizen's of our community.

A new trial is required because of the court's failure to grant a continuance.[35] A continuance would have allowed Jeffrey Weaver the opportunity to review the discovery materials and be fully prepared to defend himself. Despite Mr. Satz' argument to the contrary, a continuance would not thwart the proper administration of justice. In fact, Jeffrey Weaver's fundamental rights to a fair trial and due process of law, and to effective assistance of counsel would have been preserved.

Further, a new trial is required because of the improper admission of the attempted armed robbery evidence. The evidence was not inextricably intertwined as argued by the state. On the contrary, it is exactly the type of other crime evidence which is unduly prejudicial and violative of Sections 90.403 and 90.404,

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[35]*See Argument* IV, which is specifically adopted as if set forth more fully herein.

Fla. Stat.[36]

Finally, as alleged in Jeffrey Weaver's Motion for New Trial, the trial court reversible erred in denying Jeffrey Weaver's pretrial motion to suppress physical evidence and statements made to Detective Palazzo.[37] The evidence was unlawfully obtained in violation of the Fourth and Fifth Amendments to the United States Constitution and applicable provisions of the Florida Constitution. Based upon the officers' misconduct, misrepresentations, and express and implied promises of leniency, Jeffrey Weaver's statement should have been suppressed. In light of the errors set forth herein, the court abused its discretion, requiring reversal and remand for a new trial.

XIV. JEFFREY WEAVER'S OVERRIDE SENTENCE OF DEATH MUST BE REVERSED.

Jeffrey Weaver maintains that the trial court reversibly erred by overriding the jury's eight to four life recommendation and sentencing him to death. First, the defense was unduly restricted and prohibited from presenting exculpatory testimony and evidence. Second, the override was incorrect as a matter of law.

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[36]Jeffrey Weaver specifically adopts the argument set forth in *Argument XI*, as if set forth more fully herein.

[37]Jeffrey Weaver realleges and reavers statements in *Argument IX*, as if adopted more fully herein.

Third, the death sentence cannot withstand a proportionality analysis. Finally, Florida's hybrid system wherein capital sentencing fact-finding and the ultimate sentencing determination is left up to the judge violates *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002); and *Jones v. United States*, 526 U.S. 227 (1999).

This case should not have been placed in the category of the "worst of the worst." The judicial override at bar places Florida's death penalty laws in blatent violation of the United States Supreme Court's test for constitutionality by being narrowly drawn only to apply to the most egregious of killings. The United States Supreme Court has expressly limited invocation of the death penalty to those situations in which a defendant intends to kill or his conduct is so egregious as to be tantamount to an intent to kill. *See Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *Edmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In *Edmund*, Justice White, writing for the majority, explained it is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." *See Id*. at 798. Under the facts at bar, no evidence suggested that Jeffrey Weaver intended to kill the officer. The sentencing judge should not have overrode the jury. A new trial, or, at a minimum, reversal and remand for resentencing is required.

A. The Trial Court Reversibly Erred by Restricting Defense Evidence and Closing Argument During the Penalty Phase And By Refusing To Consider Evidence.

Jeffrey Weaver maintains that the trial court reversibly erred by restricting his presentation of evidence and defense closing argument during the penalty phase proceedings (T 6476-7; 6660-1). The court further erred by refusing to review evidence in the form of articles submitted by Jeffrey Weaver's prior public defender in determining an appropriate sentence. Because of the undue restriction, reversal and resentencing is necessary.

During closing argument, penalty phase counsel was discussing statutory and non-statutory mitigating factors with the jury, and was arguing that Jeffrey Weaver was not the "worst of the worst," and should not be put to death. Defense counsel compared him to other death row inmates. He began to tell the jurors about a death penalty case in Texas regarding John William King (T 6660).[38] The state objected. The court refused to allow the defense to refer ". . . to a case

[38]Twenty-three year old John King and two other white supremacists murdered a forty-nine year old black man in Jasper, Texas on June 7, 1998. The decedent was beaten, chained to the back of a pickup truck, and dragged two and a half miles down a country road. His mangled torso was found at the end of a bloody trail, his head severed, neck and right arm about a mile away. John King was sentenced to death. *John King to Die for Black Man's Driving Death* at http://abanet.org/cpr/mrpc.

that I have no idea what its about." (T 6661)[39] The court sustained the state's objection (*Id*.).

Sub judice, by restricting the defense evidence and argument, the court impermissibly limited the jury's consideration of mitigating evidence. *Chesire v. State*, 568 So. 2d 908 (Fla. 1990). "A court should not unduly restrict defense counsel's argument even when the state's case is strong and the court believes the defense has very little to argue." *Stockton v. State*, 544 So. 2d 1006, 1009 (Fla. 1989). Jeffrey Weaver claims the error at bar is far more prejudicial than a mere limitation of time allotted for closing argument. *See e.g. Munez v. State*, 643 So. 2d 82 (Fla. 3d 1994) [unreasonable limitation of defense counsel's closing argument warrants reversal]. Here, the undue restriction of the information presented to the jury resulted in prejudice and supports Jeffrey Weaver's quest for resentencing. The law is well settled that the Eighth and Fourteenth Amendments to the United States Constitution and applicable provisions of the Florida Constitution require that the court allow all evidence in mitigation to be presented to the jury. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Prior to sentencing Jeffrey Weaver's former public defender submitted

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[39]The case received national attention a few months before Jeffrey Weaver's trial.

articles from the Georgia State University Law Review entitled *Judicial Review And Judicial Independence: The Appropriate Role of the Judiciary*, 14 Ga.State L.Rev (1998) (T 1417),a copy of the American Bar Association's August 6, 1999 article entitled *Impacts of the ABA's Call for a Moratorium On Executions*, and an article entitled *Breaking the Most Vulnerable Branch*: *Do Rising Threats to Judicial Independence Preclude Due Process and Capital Cases?* to Judge Speiser. The articles were submitted to show how many judges use their "tough stances on crime" in advertising literature seeking re-election and how political the death penalty has become. On August 23, 1999, the court called the parties and counsel into chambers (ST 1-16). The court advised the parties that he had received and reviewed two letters from general members of the public recommending the judge override the jury's recommendation and sentence Jeffrey Weaver to death.

The judge advised the parties that the public defender had come by and dropped off materials and said "don't give him the death penalty." (ST 3) The judge sealed the same and did not look at them (ST 5). The court stated ". . . I just felt that I shouldn't at this time receive anything extraneous that comes from either side." The Judge refused to review the "anti-death" materials.

Ultimately, after the case was on appeal, the court entered an order unsealing the materials. (ST 21). Jeffrey Weaver's appellate counsel advised that he wanted

the Florida Supreme Court to have the opportunity to read the materials Judge Speiser refused to review prior to sentencing. The materials were unsealed without objection from the state (ST 23).

Jeffrey Weaver asserts that reversible error occurred when the court reviewed materials submitted by the public in favor of a death sentence prior to sentencing Jeffrey Weaver and refused to consider defense oriented articles. Reversal and remand is required.

B. The Trial Judge Reversibly Erred in Overriding the Jury's Eight to Four Recommendation for Life.

Jeffrey Weaver asserts that the trial court reversibly erred by overriding the jury's eight to four life recommendation and sentencing him to death. At the outset of trial, the *venire* was informed:

> As a matter of fact, I am mandated, I am legislatively mandated to give great and substantial and significant weight to the recommendation that the jury makes to the court with respect to the sentence that is to be imposed. All right. I cannot take it lightly and I do not take it lightly. I take it with a great degree of significance and respect because you folks sitting here are the conscience of our community and your verdict represents a cross-section of this community and is one that I must give great weight to and great significance to.
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> (T 2468).

Jeffrey Weaver contends that the judge ignored his responsibility when he overrode the jury's recommendation.

In *Mills v. State,* 786 So. 2d 547 (Fla. 2001), this Honorable Court

discussed judicial overrides. Clearly, judicial overrides cannot be "predicated upon an erroneous application of the rules of *Tedder v. State*, 322 So. 2d 908 (Fla. 1975)." *Id*. at 553.

As set forth in *Mills*:

> Our refusal to act upon our acknowledgment of error in *Cochran*, and to properly apply *Tedder* to sustain the trial jury's determination that Mills' life be spared, has resulted in a patently arbitrary decision that Mills be executed while other similarly-situated defendants who received a jury vote for life will live. *See Keen v. State*, 775 So. 2d 263 (Fla. 2000). Pariente, J., concurs.
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> *Id*. at 553 [Justice Anstead, concurring specifically with an opinion in which Justice Pariente concurs].

The same inconsistent execution should not occur herein.

Proportionality review is not a simple comparison of the number of aggravators versus mitigating circumstances. The trial judge must consider the totality of the circumstances, and compare it with all other capital cases. *Terry v. State*, 668 So. 2d 954 (Fla. 1996). It must be remembered that "death is a unique punishment. . . reserved for only those cases where the most aggravating and least mitigating circumstances exist." *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973). "By insuring death not be imposed as punishment for a murder in cases similar to those in which death was deemed an improper punishment, proportionality prevents the imposition of 'unusual' punishments contrary to Article I, Section 17 of the Florida Constitution." *Voorhees v. State*, 699 So. 2d 602 (Fla. 1997).

In *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001), the court found that the trial court erred in overriding the jury's recommended sentence, which was nine to three in favor of life imprisonment. The *Ramirez* court, *citing Tedder* stated:

> A trial court cannot override a jury's recommendation of life imprisonment unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.' *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).
>
> *Id*. at 852.

It is well established that the Florida Supreme Court conducts a proportionality review in capital cases by performing "a comprehensive analysis in which it determines whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby providing for uniformity in the application of the sentence." *Rose v. State*, 787 So. 2d 786, 804 (Fla. 2001). Based upon a reasonable analysis, Judge Speiser's judicial override and sentence of death cannot be sustained.

Jeffrey Weaver maintains that his sentence of death is disproportionate to the crime he committed. He maintains that a sentence of death must be proportional to a defendant's culpability. In this case, under these facts and circumstances, death is not proportional.

C. The Trial Court Failed To Properly Assess Aggravating and Mitigating Circumstances.

Jeffrey Weaver asserts that the trial court erred in weighing the aggravating

and mitigating circumstances in his case. The court did not act within its discretion in making its determinations. In reviewing the trial judge's order, this court must determine whether there is substantial, competent evidence in the Record to support the aggravators and mitigators found to exist. *See Gordon v. State*, 704 So. 2d 107 (Fla. 1997).

Undisputedly, Jeffrey Weaver had never previously been convicted of any capital felony or personal threat of violence. However, because of the contemporaneous conviction of aggravated assault on a law enforcement officer, and armed resisting an officer[40], because the victim in the contemporaneous conviction was different than the victim of the capital felony.

The jury found Jeffrey Weaver guilty of first degree murder and recommended that he spend his life in prison without parole as a penalty. The principal announced in *Tedder*, *supra*, regarding a judicial override of a life recommendation has been consistently interpreted to mean that when there is a reasonable basis on the Record to support the jury decision, an override is improper. *See Ferry v. State*, 507 So. 2d 1373, 1376 (Fla. 1987). Here, it was entirely reasonable for the jury to recommend life. That decision should stand.

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[40]Jeffrey Weaver, *pro se* moved for a directed verdict as to these convictions because the state had failed to prove the exact wording of the Indictment as those counts. Specifically, it was not proven that Jeffrey Weaver pointed his firearm at reserve officer Myers or that the reserve officer was attempting to arrest Jeffrey Weaver. Rather, his primary task was to go to his partner's aid (T 4889).

The jury below was capable of reasonably sorting out the facts and applying the law in the guilt phase. There was no reason to believe that the same jury was less capable of applying the aggravating and mitigating circumstances in the penalty phase of trial despite the fact the same were not set forth in the Indictment. See, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). *See Parker v. State*, 643 So. 2d 1032, 1035 (Fla. 1994). The jury correctly determined that a number of statutory and non-statutory mitigating circumstances existed.

Clearly, Jeffrey Weaver had no significant history of prior criminal activity. His criminal history consisted of two historical misdemeanor traffic offenses, and a DUI. None of the criminal history involved violence or personal injury. Several mitigating circumstances should have been given more than "little weight." *See Nibert v. State*, 574 So. 2d 1059 (Fla. 1990). There were many factors in Jeffrey Weaver's background that mitigated against imposition of the death penalty. *See* Section 921.141(g)(h), Fla. Stat. For example, Jeffrey Weaver's extensive employment record should have been given more than moderate weight by the court (R 1469). Substantial evidence was submitted that Jeffrey Weaver was a good worker, who caused no problems. Michael Mykitka testified that he would hire Jeffrey Weaver back (T 6541). Brian Putnam also had positive mitigating testimony concerning Jeffrey Weaver's work habits (T 6589-90). Jeffrey

Weaver's positive employment record was a statutory mitigating circumstance upon which the jury can base a life recommendation. *See Smalley v. State,* 546 So. 2d

720 (Fla. 1989); *Fead v. State,* 512 so. 2d 176 (Fla. 1987) [trial court positive employment record as only mitigating circumstance and the Florida Supreme Court reversed an override]. Jeffrey Weaver maintains that this statutory mitigating circumstance should have been given strong weight.

Jeffrey Weaver presented ample evidence of his contribution to society and to his charitable and humanitarian deeds thereby supporting this mitigator. William Eaton testified having known Jeffrey Weaver for over twenty five years and provided testimony to establish this factor (T 6568-70). Timothy Denton testified that Jeffrey Weaver routinely helpful to others and had a good effect on his life. Jeffery Weaver's contributions to the community and society also included the numerous loving relationships he established with family and friends. Numerous family members testified of Jeffrey Weaver's love for them and many of his friends testified about their long standing friendships. Jeffrey Weaver asserts that his contributions and character rose to the level of a positive statutory mitigator. *See Campbell v. State,* 571 So. 2d 415 (Fla. 1990); Section 921.141(g)(h), Fla. Stat. Based upon the evidence, this statutory circumstances should have been found by the court. *See Nibert, supra*.

Jeffrey Weaver presented evidence in support of the mitigating circumstance that he was a caring parent as well as many others (T 6599-6608). The courts deal with this mitigating circumstance as a weighty mitigator. *Marta-Rodriguez v. State*, 699 So. 2d 1010 (Fla. 1997); Section 921.141(6)(h), Fla. Stat. This statutory mitigating circumstance should have been given great weight.

Jeffrey Weaver established his religious devotion which is a statutory mitigating circumstance which must also be considered in determining a sentence. *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992); *Jackson v. Dugger*, 931 F.2d 712 (11th Cir. 1991). The trial court reversibly erred in finding that said statutory mitigator had not been proven. Cooperation with police has repeatedly been held to be a mitigating circumstance. *See Marta-Rodriguez v. State*, *supra*. The defense termed Jeffrey Weaver's cooperation as being "overwhelming." The court erred in finding his cooperation to only be a moderate non-statutory mitigating factor (R 1348; 1475).

The mitigating circumstance of prospect of rehabilitation was proven when Jeffrey Weaver's family and friends testified that he had a good prospect for rehabilitation and that he had been friendly and helpful to others and good with children. *See Lamb v. State*, 532 So. 2d 1051 (Fla. 1988). Further, the court found that Jeffrey Weaver's adaptation to a life of incarceration was a non-statutory mitigating factor, but warranted mitigation. While incarcerated Jeffrey

Weaver completed his high school education and received his diploma. He developed artistic talents and continued to support his family and friends emotionally. When a defendant can make positive contributions during the life time of incarceration, the death penalty should not apply. *See Furman v. Georgia*, 408 U.S. 238 (1972).

Additionally, Jeffrey Weaver maintained that his remorse and sorrow over the victim's death warranted mitigation. *Booker v. Dugger*, 922 F.2d 633 (11th Cir. 1991). The court found that there was no evidence to support the mitigator, but the court was simply put, wrong. For example, during the re-enactment of the crime, Jeffrey Weaver noticed blood on the ground and asked, concerned about the victim, whether Officer Peney was wearing a bullet proof vest. (T 1590; 1955) Further, during his *pro se* closing argument at the guilt phase of the trial, Jeffrey Weaver turned to the victim's family and offered a tearful apology for the circumstances of the case. (T 6197) This mitigating circumstance should have been found, considered, and weighed.

Additionally, Jeffrey Weaver's conduct while awaiting and during trial is a mitigating circumstance which should have been taken into effect. *See Demps v. Dugger*, 874 F.2d 1385 (11th Cir. 1989). Judge Speiser found that the Defendant behaved as would be expected, but it is clear from the Record that Jeffrey Weaver's trial behavior and his ability to get along and be respectful to courtroom

personnel and deputies was a valid mitigating circumstance. In this case, based upon the totality of the circumstances, the jury correctly recommended that Jeffrey Weaver be sentenced to life imprisonment.

Seven specific non-statutory mitigating factors were proposed by the defense (R 1347-52). More importantly, the combination of the two mitigators in and of themselves was enough for a jury to recommend life. *See Caruso v. State*, 645 So.2d 389 (Fla. 1994).

The instant case is strikingly similar to that presented in *Jenkins v. State*, 692 So. 2d 893 (Fla. 1997). In *Jenkins*, the Supreme Court held that the trial court could not override the jury's recommendation of life imprisonment because a reasonable basis existed for the recommendation. In *Jenkins*, the defendant resisted arrest by grabbing a police officer's loaded gun and shooting him once in the leg. The officer called for backup and the defendant fled the scene on a bicycle. The officer's femoral artery was pierced by the bullet and he bled to death. Of the offense, this non-statutory mitigating circumstance should have been considered.

Considering this case along with all other cases, reversal is required. The Florida Supreme Court has reversed a death sentence for the same charge as herein. In *Hardy v. State*, 716 So.2d 761 (Fla. 1998), the jury had voted nine to three for death. Still the Florida Supreme Court found that death was improper.

In *Hardy*, the defendant had been involved in two shootings the day before a murder. He told a friend that if he was ever to come down to him and a cop, it was the cop who would go. Hardy knew that the officer would find his gun, so he shot. Additionally, in *Hardy*, there were two shots at close range to the officer's face.

Because of the court's failure to properly assess aggravating and mitigating circumstances, reversal is required.

D. Florida's Hybrid Sentencing Scheme Which Allows Capital Sentencing Fact Finding And The Ultimate Sentencing To Be Left Up To The Judge Is Unconstitutional As Applied.

The judge advised the penalty phase jury that:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. (T 6676).

Unfortunately, none of the aggravating factors were charged by Indictment nor proven beyond a reasonable doubt. Jeffrey Weaver contends that the failure violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002) and *Jones v. United States*, 526 U.S. 227 (1999).

The judge further told the jury that it was:

> Their duty at this time to advise the court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree of a law enforcement officer.
>
> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge.
>
> (T 6673).

The jury was informed that the aggravating circumstances must be established beyond a reasonable doubt (T 6677). Mitigating circumstances need not be proven beyond a reasonable doubt. The judge advised the jury that they must be reasonably convinced that a mitigating circumstance exists (T 6677-8). *Sub judice*, we are left to guess at whether the state unanimously established any aggravating factor. Clearly, as applied to this case, Florida's death penalty statute is unconstitutional based upon *Ring*.

In *Ring*, the United States Supreme Court declared the death penalty statutes in five states unconstitutional, holding that capital defendants are entitled to a jury determination of any fact on which the legislative conditions an increase in the maximum punishment. Florida's death penalty statute is likewise unconstitutional when no aggravating factors are alleged in the Indictment nor found by a jury.

Because Jeffrey Weaver's sentence was increased from life to death by a judge, without any aggravators being charged in the Indictment nor proven beyond a reasonable doubt, the sentence must be overturned.

CONCLUSION

Based upon the foregoing grounds and authority, Jeffrey Weaver respectfully requests this Honorable Court enter an Order reversing the judgment, convictions and sentences imposed, remanding this matter with directions to the trial court to conduct a new trial, or, alternatively, for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of this Amended Initial Brief of Appellant were mailed to the Clerk of the Florida Supreme Court on **May 28, 2003,** and a copy mailed to Assistant Attorney General Leslie Campbell, Office of the Attorney General, 1515 N. Flagler Drive (9th Floor), West Palm Bch., FL 33401-3432.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2), FLA. R. APP. P.

Pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, the Appellant, Jeffrey Weaver certifies that this Amended Initial Brief of Appellant is typed in 14 point, Times New Roman.

Respectfully submitted,

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