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

JEFFREY LEE WEAVER,

Appellant/Cross Appellee,

vs.

STATE OF FLORIDA

Appellee/Cross Appellant.
_____/

AMENDED
REPLY BRIEF/CROSS ANSWER BRIEF OF APPELLANT/ CROSS APPELLEE, JEFFREY 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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CERTIFICATE REGARDING TYPE, SIZE AND STYLE

Appellant, Jeffrey Weaver certifies that this Reply Brief of Appellant is typed in 14 point, Times New Roman.

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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. 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, the use of the stun belt/restraining device, 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 keep 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." By failing to allow Jeffrey Weaver to present his defense, 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 the 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. The judge overrode the majority decision, ordering Jeffrey Weaver's death. In light of *Ring v. Arizona*, 536 U.S. __ (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 REMOVAL OF CONFLICT-FREE DEFENSE COUNSEL

Notwithstanding the State's protestations to the contrary, Jeffrey Weaver's state and federal constitutional rights to chosen counsel were violated when conflict free defense counsel was removed by the judge over Jeffrey Weaver's objections. Jeffrey Weaver felt comfortable with his appointed counsel, Hilliard Moldof. Contrary to the State's assertion on appeal, Moldof was not causing "undue delay" in the preparation of this matter. The case could easily have proceeded to trial with Hilliard Moldof at the helm within a reasonable time in light of the complexity of this case, the vast amount of discovery, and number of potential witnesses disclosed by the State.

Although the State terms Jeffrey Weaver's attack on the constitutional violations which occurred when Hilliard Moldof was terminated as counsel as being "inflammatory" and "inaccurate," the same are borne out by the Record (AB 8-9;

IB 39). Hilliard Moldof, a highly competent and experienced counsel[1] was appointed by the court and acted as a zealous counsel for Jeffrey Weaver beginning from February 27, 1996 for approximately two (2) years. Despite Hilliard Moldof's involvement in the protracted *Penalver* trials, the court abused its discretion by removing Hilliard Moldof as Jeffrey Weaver's trial counsel. Had Hilliard Moldof not been removed as counsel, Jeffrey Weaver would not have been forced to try this case *pro se*, without the availability of constitutionally guaranteed defense counsel. Several of the issues raised on appeal would not even be issues at this juncture had the court not terminated Hilliard Moldof. The Appellant predicts that the outcome of the trial proceedings would also have been different.

The State first responded to Jeffrey Weaver's demand for discovery on February 20, 1996 (R 180-210). Approximately 270 witnesses were listed by the State (R 180-200). Police reports from over 200 law enforcement officials were turned over to Mr. Moldof (R 205-208). Defense counsel immediately commenced his discovery in this case (R 221). Additional discovery ensued (*see e.g.* R 231-348; 257-267; 272-275; 279-80; 83-84; 96-97; 298-99; 303-305; 310; 313; 316-317; 321; 330-332; 340; 342; 362; 367-370; 373-376; 377-378; 379-383; 390-391).

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[1]Mr. Moldof is "AV Rated" by www.Martindale.com at www.martindale.com/xp/Martindale/Lawyer_Locator/Search_Lawyer_Locator/search_result.xml?PG=0&STYPE=N&LNAME=moldof&FNAME=hilliard&FN=&CN=fort+lauderdale&CTY=&STS=10&CRY=1&LSCH=

On April 19, 1996, the deposition of lead detective Steve Palazzo was scheduled to be conducted (R 276). Extensive review of reports, statements, exhibits and other materials continued for approximately two years with Moldof as first chair counsel. Experts were obtained and consulted. Complicated DNA evidence was reviewed and examined.

None of the cases cited by the State for the proposition that counsel can be removed over a defendant's objection are factually akin to the facts at bar. At no point in time did the judge set a firm trial date or tell Jeffrey Weaver that he needed to obtain substitute counsel if Hilliard Moldof was unable to try the case on the date set. This factor distinguishes *United States v. Koblitz*, 803 F.2d 1523, 1529 (11th Cir. 1986), cited by the State (AB 9).

Further, contrary to the State's contention, no speedy trial issues existed at bar (AB 9, n.2). Jeffrey Weaver had repeatedly waived his right to a speedy trial by seeking defense continuances. *Stewart v. State*, 491 So. 2d 271 (Fla. 1986); *Zeigler v. State*, 402 So. 2d 365 (Fla. 1981), *cert. denied*, 455 U.S. 1035, 102 S.Ct. 1739, 72 L.Ed.2d 153 (1982); *Runyon v. State*, 743 So. 2d 619 (Fla. 4th DCA 1999). In any event, speedy trial rights are designed to protect an accused - not to give the State authority to "speed up" a prosecution. And, no one ever suggested prior to the State's Answer Brief that Hilliard Moldof acted unethically by failing to

act "with reasonable diligence and promptness." (AB 9)[2]

The State cites to the many trial dates which were set, implying that the defense "dragged its feet" in this case. In light of the extensive discovery required in this death penalty case, the timing of the trial was far from unusual. Many other inmates had been in the Broward County Jail over 1000 days (T 122). Trial judges routinely set "dates" every month or so to keep a handle on the progress of the parties preparation for trial. This is not an uncommon occurrence. Thus, while several trial dates were scheduled along the way, it was never anticipated that the defense would be ready to proceed to trial the first years of this death penalty case. In fact, many other cases were "older" than this case at the time Hilliard Moldof was ordered to withdraw as counsel (T 122). As a result of counsel of choice's forced termination, reversal and imposition of a life sentence is not appropriate at bar; reversal and remand for a new trial is the proper remedy.

A. Jeffrey Weaver Wanted His Appointed Defense Counsel To Remain And Objected To His Forced Removal

Misleadingly, the State argues that Hilliard Moldof wanted to be removed

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[2]Surely, Jeffrey Weaver did not complain that it was taking too long to prepare his case for trial even though Jeffrey Weaver was the individual incarcerated pretrial. The Appellant suggests that had the State believed Hilliard Moldof was acting unethically, the prosecutor or attorney general had an ethical obligation to bring this matter to the attention of the Florida Bar - which no one has done for the obvious reason that Hilliard Moldof did not act unethically. *See* Rule 4-8.3, Rules Regulating the Florida Bar ["a lawyer having knowledge that another lawyer has committed a violation of the Rules of Prosecutorial Conduct . . . . shall inform the appropriate professional authority."]

from Jeffrey Weaver's case (AE 12). On the contrary, Hilliard Moldof wanted to remain as Weaver's lead counsel and had only scheduled a "status," not a Motion to Withdraw when he was discharged by the court at the urging of the prosecutor. Moldof was ensuring that he had ample time to prepare for this important trial. He knew that the State was seeking the ultimate penalty-death.

Jeffrey Weaver was pretrial detained. He was not going anywhere. While the prosecutor criticized the time it was taking the defense to prepare, no Record evidence support the prosecutor's statement that the State was "losing witnesses" or that people's memories were fading (AB 12; 14). Contrary to the State's argument, the State's case against Jeffrey Weaver was not "getting weaker by the day." This is a fallacy not borne out by the Record. The State likewise distorts Hilliard Moldof's position concerning remaining as lead counsel on Jeffrey Weaver's case. At no time did Mr. Moldof seek to be replaced. Mr. Moldof was simply advising the court of the status of his preparation and of other matters pertaining to a potential trial date. No firm trial date had been set. The State's argument to the contrary takes Hilliard Moldof's statements to the court out of context.

Further, the State's brief misleadingly states that had Hilliard Moldof remained on Jeffrey Weaver's case he ". . . would not have been ready for Weaver's trial for at least ***three years***." (IB 17) The State conveniently ignores the

fact that Weaver's trial could have started before *Seth Penalver*'s sentencing, which commenced eight months after his guilty verdict. The State skips over the fact that Weaver's case could have gone to trial between *Penalver's* second and third trials, or even before the second trial, thus freeing Hilliard Moldof up to try Weaver much earlier.

Hilliard Moldof's participation in the *Penalver* trial did not warrant his removal in Jeffrey Weaver's case. *Penalver* commenced on May 5, 1997 and was estimated to be a five to six week homicide trial. Judge Speiser advised Jeffrey Weaver that he would set a "date certain" trial date only after *Penalver* concluded (T 1-143-44). Additionally, the unanticipated length of *Penalver* was not caused by Hilliard Moldof. The trial judge in *Penalver* decided to conduct court only half days, and mid-trial, counsel for a co-defendant became ill. Surprisingly, the State ignores the fact that Mr. Moldof told the court if he were able to get a continuance of *Penalver's* second trial date (April 27, 1998 - which he got), he could try Jeffrey Weaver's case in 1998. In fact, *Seth Penalver*'s second trial date was continued and did not actually commence until much later.

Hilliard Moldof was not removed because of "his inability to be ready for trial within a reasonable time" as represented by the State (AB 9). On the contrary, Jeffrey Weaver's counsel of choice, who had been at the helm for in excess of two years, was removed because of the prosecutor's zealous quest for a swifter

resolution. As such, the trial judge abused his discretion by removing defense counsel over Jeffrey Weaver's objections, and violated Weaver's State and Federal constitutional rights, requiring a retrial.

Here, Hilliard Moldof did nothing to impede or disrupt the orderly administration of justice. He was not incompetent, physically incapacitated, and did not exhibit any conduct which warranted his removal. Accordingly, he should not have been terminated as Jeffrey Weaver's counsel over defense objection. *See e.g., Harling v. United States*, 387 A.2d 1101 (D.C. App. 1978). Jeffrey Weaver deserved to be represented by his appointed counsel. Reversal and remand for a new trial is required.

B. The Trial Judge Reneged On His Promise Not To Order Hilliard Moldof Off the Case.

In direct contravention of an earlier ruling, Judge Speiser reneged on his guarantee to Jeffrey Weaver in open court that he would not remove Hilliard Moldof from Weaver's case (SR 13-255). The State skirts the issue, saying in a footnote that Jeffrey Weaver's reliance upon the judge's promise is misplaced and is being viewed out of context (AB 17, n.5).

Jeffrey Weaver lacked the funds to privately retain counsel in this case. He should not be punished or deprived of chosen counsel because he lacked funds to

privately retain private counsel[3] in a first degree murder case prosecuted by Michael Satz, State Attorney for the Seventeenth Judicial Circuit. Because Hilliard Moldof had represented Weaver for over two years, the two were on great terms and had bonded, and because no conflict existed, the trial court had a responsibility to protect the attorney/client relationship which had fostered as the relationship between Moldof and Jeffrey Weaver grew. Counsel in a case such as this cannot be easily substituted or interchanged. Jeffrey Weaver was entitled to rely upon and place his trust in his attorney - Mr. Moldof. He lost confidence in Judge Speiser's impartiality when the judge discharged Moldof over Jeffrey Weaver's objection. No extenuating circumstances warranted the violation of the attorney/client relationship at bar. 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*

The Appellant maintains that the court reversibly erred by conducting a

[3]Based upon the amount of hours required to represent an indigent defendant in a death case, the county paid approximately $50,000, and private counsel could have easily charged five times that amount.

Faretta[4] inquiry even though he never lodged a clear, unequivocal request to represent himself, and was not competent to represent himself. As if it were not harmful enough when Moldof was removed over Jeffrey Weaver's objection, Jeffrey Weaver was forced to represent himself even though he clearly did not want to. Jeffrey Weaver wanted the aid and assistance of defense counsel. The only "catch" was that Jeffrey Weaver wanted counsel to advance his theory of defense and seek an acquittal rather than admit to all of the elements of a lesser murder charge which would, in all probability, result in his incarceration for the rest of his life. Jeffrey Weaver never knowingly determined that he should be tried *pro se* with a stun belt strapped to him at all times. Reversible error requires a new trial.

The State mischaracterizes the dispute over Jeffrey Weaver's defense between Weaver and his appointed counsel, Edward Salantrie (IB 20-27). Jeffery Weaver did not want to pursue a "mystery shooter" defense as the State insinuates. Salantrie wanted to admit that Jeffrey Weaver's bullet hit the officer but that it was unintentional. Jeffrey Weaver wanted to maintain that Officer Meyers fired the bullet which hit Peney (AB 24). Jeffrey Weaver was adamant that he did not want to go forward with Salantrie's proposed defense. Jeffrey Weaver had no problem with Salantrie being his counsel - only with the defense Salantrie insisted on

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[4]*Farretta v. California*, 422 U.S. 806 (1975)

pursuing.

Further, the State ignores the fact that Steven Pinter stated that he saw two bullet parts on the road before Officer Peney was transported to the hospital. This statement was confirmed at trial by an independent witness. Pinter was shown the cartridges by detectives and although stated he did not know much about caliber sizes of bullets, picked out the .25 caliber. His testimony would have fully supported Jeffrey Weaver's defense.

Jeffrey Weaver should not have been forced to represent himself over his objections. He was not "persisting in discharging competent counsel" as the State contends, but was merely insisting that his assigned counsel follow the defense Jeffrey Weaver chose (AB 24). The presumption that Jeffrey Weaver was exercising his right of self-representation did not arise. The cases cited by the State, *Hardwick v. State*, 521 So.2d 1071 (Fla. 1988) and *Jones v. State*, 449 So.2d 253 (Fla. 1984), are easily distinguishable.

The fact that Jeffrey Weaver filed *pro se* motions and had gone to traffic court without a lawyer is not dispositive of this issue. Jeffrey Weaver's competency to waive counsel and competency to try the case himself are not inseparable issues as the State asserts. Jeffrey Weaver was not competent to try

this case himself, even with "standby counsel"[5] based upon this Record. He never competently waived his right to be represented by counsel.

Further, if the trial court properly forced Jeffrey Weaver to represent himself, it violated *Faretta* based upon the appointment of standby counsel and his role in the case. The State tries to characterize his assistance as "active," apparently forgetting this court holding in *State v. Knight*, 853 So.2d 380 (Fla. 2003), which states:

> If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the *Faretta* right is eroded.
>
> *Id*. at 390

Further, as set forth in *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984),

> Participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself. The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear pro se exists to affirm the accused's individual dignity and autonomy.
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> *Id*. at 178

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[5]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 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) Counsel did not review the file (T 2598).

The Supreme Court has recognized that excessive involvement of standby counsel in front of the jury:

> Will destroy the appearance that the defendant is acting pro se. This, in turn, may erode the dignitary values that the right to self-representation is intended to promote and may undercut the defendant's presentation to the jury of his own most effective defense.
>
> *Id*. at 181-82.

Based upon the facts and circumstances surrounding the trial court's discharge of Mr. Moldof, the removal of Mr. Salantrie, the forced self representation of Jeffrey Weaver, and the appearance of stand by counsel whom the court urged to be "more active," reversal and remand for a new trial is required.

III. JEFFREY WEAVER'S STATE AND FEDERAL RIGHTS WERE VIOLATED WHEN HE WAS FORCED TO WEAR A STUN BELT DURING TRIAL AND WHILE HE TESTIFIED

Sub judice, the trial court's use of a stun belt[6] to restrain Jeffrey Weaver during trial was improper and reversibly prejudicial.

The instant case is strikingly similar to the recent case of *Gonzalez v. Piller*, 341 F.3d 897 (9th Cir. 2003). In *Gonzalez*, the court stated:

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[6]A magazine article promoting the stun belt reported that "[o]ne of the great advantages [of the stun belt], the company says, is its capacity to humiliate the wearer." "After all, if you were wearing a contraption around your waist that by the mere push of a button in someone else's hand could make you defecate or urinate yourself," the brochure asks, "what would that do to you from the psychological standpoint?" (Schulz, *Cruel and Unusual Punishment* (Apr. 24, 1997) N.Y. Review of Books, p. 51).

A stun belt is an electronic device that is secured around a prisoner's waist. Powered by nine-volt batteries, the belt is connected to prongs attached to the wearer's left kidney region. When activated remotely, 'the belt delivers a 50,000 volt, three to four milliampere shock lasting eight seconds.' *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1234 (9th Cir. 2001). Upon activation of the belt, an electrical current enters the body near the wearer's kidneys and travels along blood channels and nerve pathways. The shock administered from the activated belt 'causes incapacitation in the first few seconds and severe pain during the entire period.' *Id.* 'Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal.' *People v. Mar*, 28 Cal. 4th 1201, 124 Cal. Rptr. 2d 161, 52 P.3d 95, 103 (Cal. 2002)(internal citation and quotation marks omitted). Activation of a stun belt can cause muscular weakness for approximately 30-45 minutes and heartbeat irregularities or seizures. *Id.* Accidental activations are not unknown. *See, e.g., United States v. Durham*, 219 F. Supp. 2d 1234, 1239 (N.D. Fla. 2002) (reporting a survey that showed 11 out of 45 total activations [24.4%] were accidental, but noting the low percentage of accidental activations on general usage).

Stun belts are a method of prisoner restraint, used as an alternative to shackles. As with all forms of physical confinement during trial, the use of stun belts raises a number of constitutional concerns. As the Supreme Court noted in *Illinois v. Allen*, 397 U.S. 337, 344, 25 L.Ed.2d 353, 90 S.Ct. 1057 (1970), the sight of physical restraints may have a significant effect on the jury and may impede the defendant's ability to communicate with his counsel and to participate in the defense of the case. The use of physical restraints may also 'confuse and embarrass the defendant, thereby impairing his mental faculties,' and it 'may cause him pain.' *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995)(internal citations and quotation marks omitted). To avoid unnecessary implication of these concerns, the Court concluded in *Allen*, 'no person should be tried while shackled and gagged except as a last resort.' 397 U.S. at 344.

Id.

The issue presented is two-fold: first, is there an adequate Record to support the court's decision requiring Jeffrey Weaver to wear a stun belt; and second, did the court abuse its discretion by ordering him to wear the stun belt at trial and while he testified over his objection, without considering other alternatives.

As a *pro se* Defendant, Jeffrey Weaver was even more susceptible to fear the belt - especially after it went off "accidentally" during jury selection. Further, as a testifying defendant, Jeffrey Weaver should have been permitted to testify in front of the jury without being strapped to a stun belt. Because the court failed to make any findings as to the effect of the belt on Jeffrey Weaver's ability to defend himself,[7] or consider any other less severe alternatives, reversal and remand for a new trial is required. *See United States v. Durham*, 287 F.3d 1297 (11th Cir. 2002).

The State incorrectly asserts that *Durham* "does not further his [Weaver's] position" (AB 30). Nothing could be farther from the truth. In *Durham*, the Eleventh Circuit held:

> That when a trial court without making adequate findings improperly requires a defendant to wear a stun belt, the error is of Federal constitutional dimension and 'reversal is required unless the State proves the error was harmless beyond a reasonable doubt.' *Id.* at

[7]Further, the Record fails to indicate how many armed deputies were assigned to the court room for trial. Nothing suggests that law enforcement had anything except full control over this courtroom.

> 1308. Because the error in the present case was prejudicial even under the *Watson* standard, this court need not determine whether the trial court's error in requiring Defendant to testify while wearing a stun belt, without an adequate showing of danger, constituted Federal constitutional error that is subject to a more rigorous prejudicial error test.
>
> *Id*.

Jeffrey Weaver never attempted to escape. He had not acted out in court. He had not lodged threats against any witnesses. Accordingly, the trial court erred by failing to conduct a hearing on the necessity of using the stun belt. *See State v. Flieger*, 91 WN. App. 236, 955 P.2d 872 (1998)[error in failing to conduct hearing on the necessity of using a "shock box."] The court compounded the error by failing to consider reasonable alternatives to using a stun belt. *See People v. Mar*, 28 Cal. 4th 1201, 1230, 124 Cal.Rptr.2d 161, 183-84, 52 P.3d 95, 114-115 (2002)["before a trial court approves the use of [a stun belt] in the future, the court must consider the foregoing factors and may approve the use of stun belt only if it determines that the use of the belt is safe and appropriate under the particular circumstances."] The court's error was magnified when Jeffrey Weaver was forced to wear the stun belt during his trial testimony. No restraints whatsoever were required while Jeffrey Weaver testified. Jeffrey Weaver did not act out or speak out. He was always a gentleman before and after court proceedings. How can we ensure he received a fair trial in light of the fact he was forced to proceed

pro se and was stunned during voir dire[8]?

Factual descriptions of stun belts and of instances in which stun belts have been activated have been reported in numerous articles. *See, e.g.,* Hinman, *Stunning Morality: The Moral Dimensions of Stun Belts* (Winter/Spring 1998), 17 Crim. J. Ethics 3; Welsh, *Electroshock Torture and the Spread of Stun Technology* (Apr. 26, 1997) 349 The Lancet 1247; Shaver, *New Tool in Courts: Stun Belts*, Washington Post (Dec. 29, 1998) p. B1; Mahtesian, *A Shocking Way to Keep Order in Court* (Jan. 1995) Governing Magazine. Jeffery Weaver maintains that the stun belt and its threat to his safety prohibited him from focusing on his trial. While strapped to the "torture belt," Jeffery Weaver had to defend himself of charges that he intentionally killed a police officer. At the same time, he was forced to act as his own defense attorney. He even had that "stunning reminder" of governmental control strapped around his body while he testified and was cross examined.

The trial court's comments suggest its ruling ordering Weaver strapped to a stun belt was based at least in part upon the court's determination that the use of the belt would be in the defendant's best interest because the belt would help the

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[8]The stunt belt affixed to Jeffrey Weaver was not the model demonstrated to the judge immediately prior to trial (T 2252). It was placed upon Jeffrey Weaver based upon a court deputy's "concerns" (T 2251).

defendant control his emotions and not act in a manner which would be detrimental to his case. Respectfully, that rationale is ludicrous. The court never found that Jeffrey Weaver posed a significant danger of violent conduct in the courtroom demonstrating a manifest need for the use of any restraint. Even if the use of such a device objectively was in the defendant's best interest,[9] the trial court should not have compelled the defendant to wear the device over his objection during trial and more importantly during his testimony, absent a proper showing and determination.

Sub judice, the State failed to dispel Jeffrey Weaver's assertions that the Record did not support the trial court's decision to compel the use of a stun belt. Absent a showing of manifest need and a finding memorializing the same, the trial court could not properly compel the defendant to bear the burden of acting as counsel or testify while strapped to a remote-controlled stun belt that he objected to wearing. Accordingly, the trial court abused its discretion in rejecting the defendant's objection to the use of a stun belt.

The *Durham* court stated:

> Because its psychological consequences pose a significant risk of impairing a defendant's ability to participate and assist in his or her defense, a court order compelling a defendant to wear a stun belt at trial over objection bears at least some similarity to the forced administration of anti-psychotic medication to a criminal defendant in

[9]The Appellant maintains it was not.

advance of, and during trial.

Id.

In considering the constitutional validity of the forced use of the stun belt, the Eleventh Circuit in *Durham* analyzed *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed. 2d 479 (1992), in which the United States Supreme Court noted "the possibility that the substance of [the defendant's] own testimony, his interaction with counsel, or his comprehension at trial were compromised by the forced administration of [the anti-psychotic medication] 138 [112 S.Ct. at 1816])." The United States Supreme Court held that "[w]hile the therapeutic benefits of anti-psychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects.' (*Id*. at 134; 112 S.Ct. at 1814], *quoting Washington v. Harper* (1990); 494 U.S. 210, 229, 110 S.Ct. 1028, 1041, 108 L.Ed. 2d 178]." *See also, People v. Mar* 28 Cal. 4th 1201 (Cal. 2002).

The *Mar* court concluded that:

> In sum, the compelled use of a stun belt as a security measure in a criminal trial, over a defendant's objection, raises significant questions that generally have not been addressed by trial courts asked to approve the use of this relatively novel type of security device. Before a trial court approves the use of such a device in the future, the court must consider the foregoing factors and may approve the use of a stun belt only if it determines that the use of the belt is safe and appropriate under the particular circumstances.
>
> *Id*. at 1230-31.

No such determination was made *sub judice*.

From the cold record, it is, impossible to determine with any degree of precision the effect of the stun belt had on the substance of Jeffrey Weaver's ability to represent himself, *pro se*, or on his demeanor on the witness stand. The Appellant contends that after objecting to being required to wear the stun belt, the device made it difficult for him to think clearly and that it added significantly to his anxiety. The trial transcripts infer that Jeffrey Weaver was nervous while testifying at trial (T 5891-6010). It is, of course, not unusual for a defendant, or any witness, to be nervous while testifying, but in view of the nature of the stun belt and the debilitating and humiliating consequences that the belt can inflict, it is reasonable to believe that any reasonable person would experience increased anxiety if compelled to wear a stun belt while testifying at trial. Moreover, Jeffrey Weaver had to be "afraid that somebody would push the button." In light of the fact that Jeffrey Weaver was on trial for having killed a law enforcement officer, and that control over the activation of the stun belt was controlled by another law enforcement officer, anxiety in this regard, was clearly plausible and reasonable. *See Hawkins*, *supra*. On these facts, it is reasonable to conclude that requiring Jeffrey Weaver to wear the stun belt had at least some effect on his ability to defend himself and on his demeanor while testifying.

Jeffrey Weaver suggests that the error in this case stemmed from the

improper use of a stun belt, stemming from the trial court's failure to make specific findings, and from the potential adverse psychological effect of the device upon the defendant rather than from the visibility of the device to the jury.

As set forth in *Hawkins v. Comparet-Cassani*, 251 F.3d 1230 (9th Cir. 2001),

> The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or accidentally), and that will result in a severe electrical shock that promises to be both injurious and humiliating, may vary greatly depending upon the personality and attitude of the particular defendant, and in many instances may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury. Promotional literature for the REACT stun belt provided by the manufacturer of the belt reportedly champions the ability of the belt to provide law enforcement with ''total psychological supremacy . . . of potentially troubling prisoners'.' (*REACT Security Belt, supra*, 30 St. Mary's L.J. 239, 248, citation omitted), and a trainer employed by the manufacturer has been quoted as stating that 'at trials, people notice that the defendant will be watching whoever has the monitor.' (Cusac, *Life in Prison: Stunning Technology: Corrections Cowboys Get a Charge Out of Their New Sci-Fi Weaponry* (July 1996). The Progressive, p. 20.) n8. Other courts have noted that the psychological effect of a stun belt may affect adversely a defendant's participation in the defense (*see, e.g., Hawkins v. Comparet-Cassani, supra*, 251 F.3d 1230, 1239-1240), and, indeed, the Supreme Court of Indiana recently held that stun belts should not be used in the courtrooms of that state at all, because other forms of restraint 'can do the job without inflicting the mental anguish that results from simply wearing the stun belt and the physical pain that results if the belt is activated.' (*Wrinkles v. State, supra*, 749 N.E.2d 1179, 1194-1195 (Ind. 2001).)

Id. at 1234

Jeffrey Weaver urges this court to follow Indiana's recent decision prohibiting the sheriff from deciding to place a stun belt on a Defendant during trial, finding the same to constitute reversible error. *Wrinkles v. State*, 749 N.E.2d 1179, 1194 (Ind. 2001); *Stevens v. State*, 770 N.E.2d 739 (Ind. 2002).

As the Eleventh Circuit observed, "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." *Durham*, 287 F.3d at 1306. "The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely" hinders a defendant's participation in defense of the case, "chilling [that] defendant's inclination to make any movements during trial - including those movements necessary for effective communication with counsel." *Id.* at 1305. Jeffrey Weaver's situation was far more risky - he was his own defense counsel. What greater "chill" could exist?

For similar reasons, a stun belt may "materially impair and prejudicially affect" a defendant's "privilege of becoming a competent witness and testifying in his own behalf." *Mar*, 52 P.3d at 104. "In view of the nature of a stun belt and the debilitating and humiliating consequences that such a belt can inflict," however, "it is reasonable to believe that many if not most persons would experience an increase

in anxiety if compelled to wear such a belt while testifying at trial." *Id.* at 110 This "increase in anxiety" may impact a defendant's demeanor on the stand; this demeanor, in turn, impacts a jury's perception of the defendant, thus risking material impairment of and prejudicial affect on the defendant's "privilege of becoming a competent witness and testifying in his own behalf." *Id.* at 104 (*quoting People v. Harrington*, 42 Cal. 165, 168 (1871)).

For these reasons, "a decision to use a stun belt must be subjected to at least the same close judicial scrutiny required for the imposition of other physical restraints." *Durham*, 287 F.3d at 1306 (citations and internal quotation marks omitted). And for these reasons, before a court may order the use of physical restraints on a defendant at trial, "the court must be persuaded by compelling circumstances that some measure [is] needed to maintain the security of the courtroom," and, as noted, "the court must pursue less restrictive alternatives before imposing physical restraints." *Morgan v. Bunnell*, 24 F.3d 49, 51 (9th Cir. 1994).

At bar, the record demonstrates that the trial court failed to adhere to the relevant constitutional standards by forcing the defendant to wear the restraint. First, the decision to force Jeffrey Weaver to wear the stun belt during trial was not made by the Court in the first instance; it was made by correctional officers. The

use of physical restraints is subject to close *judicial*, not law enforcement, scrutiny. It is the duty of the trial court, not correctional officers, to make the affirmative determination, in conformance with constitutional standards, to order the physical restraint of a defendant in the courtroom. This requirement was not satisfied at bar. Second, the trial court did not determine "by compelling circumstances that some measure was needed to maintain security of the courtroom." *Id.* The record is completely devoid of any action taken by Jeffrey Weaver in the courtroom which could be construed as posing a security problem. Jeffrey Weaver did not create any disturbance at trial. He did not try to escape. He made no threats. Despite this, the trial court did not even hold an evidentiary hearing before ordering the use of the stun belt. This procedure did not satisfy the safeguards required by the state or federal Constitution.

Further, the trial court made no attempt to "pursue less restrictive alternatives before imposing physical restraints." *Morgan*, 24 F.3d at 51. The trial court simply found that the belt was not visible. No alternatives were discussed or considered, and the trial proceeded with the stun belt affixed to the defendant, even during his testimony. As a predicate matter, the trial court failed to meet even minimal constitutional standards applicable to the use of physical restraints in the courtroom.

Reversal and remand for a new trial is required.

Given the above circumstances - the relative closeness of the evidence, the fact that Jeffrey Weaver was forced to proceed *pro se*, the crucial nature of Jeffrey Weaver's demeanor while testifying, and the likelihood that the stun belt had at least some effect on defendant's ability to defend himself, reversal and remand for a new trial 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

The State attempts to minimize the need for Jeffrey Weaver to have an adequate opportunity to review all of the discovery materials, depositions, and sworn statements before proceeding to trial. Any lawyer assigned to represent Jeffrey Weaver would have had a legal, ethical, and moral obligation to review all of the discovery in the case before going to trial. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). To fail to have reviewed the discovery would have constituted ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If Jeffrey Weaver was an attorney, his failure to review all of the discovery materials would have landed him in a legal malpractice suit. *Zeidwig v. Ward*, 548 so. 2d 209 (Fla.

1989). So why was Jeffrey Weaver, a lay person required to represent himself in a death penalty case without being allowed adequate time to review necessary materials?

In this case, Jeffrey Weaver was prohibited from effectively representing himself when the trial court refused to continue his trial. He had not had an ample opportunity to review the discovery materials. The materials were voluminous. He was given boxes of discovery piecemeal, and only allowed a brief opportunity to review the materials pretrial. In the midst of trial, Mr. Weaver filed with the court an inventory and photographs of the many boxes of materials he was provided at the beginning of trial (T 4226). The photo is compelling - showing the massive discovery in this case which Jeffrey Weaver did not have an opportunity to review. An odd afternoon recess or long weekend did not allow this *pro se* defendant an ample opportunity to fight for his life.

The State tries to muddy the issue surrounding Jeffrey Weaver's request for a continuance by blaming Weaver's lack of time to prepare on his last minute discharge of his court appointed counsel, without acknowledging Jeffrey Weaver's desire to keep his prior appointed counsel, Hilliard Moldof.[10] The State seemingly argues that Jeffrey Weaver was properly denied a continuance and the right to be

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[10]*See Arguments I and II, supra*.

prepared to defend himself because he and attorney Salantrie had a parting of the ways as to Jeffrey Weaver's defense. So much for State and Federal constitutional rights.

Bona fide reasons wholly justified Jeffrey Weaver's request for a continuance of trial. Prohibiting Jeffrey Weaver from being prepared to defend himself violates all of our State and Federal constitutional precepts. This carries even more weight in a case such as this where a jury of Jeffrey Weaver's peers recommended life imprisonment by an 8 - 4 vote, yet the judge ignored the jury's recommendation and ordered Jeffrey Weaver to death. 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

While the State claims Jeffrey Weaver has lodged "unwarranted personal attacks" on the trial judge, the Appellant has merely sought to set forth the facts and circumstances which warranted Jeffrey Weaver's good faith belief that he could not receive a fair trial or sentence from this trial judge (IB 38). Rather than an "utter fabrication of events" which the State asserts form the basis of Jeffrey Weaver's claim, Weaver's fears were well founded and warrant reversal on direct appeal.

First, the State incorrectly contends that Weaver's claim was waived as

unpreserved (IB 38-9). Nothing could be further from the truth. Weaver filed a *pro se* motion to remove Judge Speiser which was specifically adopted by his court appointed counsel (R 409-13; 528-32; T 335). He timely and properly lodged his claim. The Motion was argued, yet denied by the court. It was well known that Jeffrey Weaver wanted Judge Speiser removed from his case.

Second, it is not "slash and burn advocacy" to pursue on appeal a crucial issue raised at the trial court level. As an advocate, it would be imprudent not to advise this appellate court of similar conduct the trial judge engaged in - even if the conduct occurred twenty years ago. It is not as if there is a lack of relevancy. In *In Re: Inquiry Concerning a Judge- Mark A. Speiser*, 445 So. 2d 343 (Fla. 1984), Justice Ehrlich stated in his dissenting opinion (concurred with by Justice Shaw):

> 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.

Id. at 345 (dissent).

The trial judge should not have been permitted to "leak" information learned *ex parte* concerning Jeffrey Weaver's defense, and should not have been allowed to "hand pick" Jeffery Weaver's case and preside over it. At bar, an appearance of impropriety existed. The judge's unilateral decision to retain this case even after a new criminal judge had been assigned to the division Weaver's case was assigned to, was wrong. That, coupled with the leaked attorney/client information and other grounds set forth in Jeffrey Weaver's Initial Brief warrant reversal and remand.

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

Jeffrey Weaver maintains that the trial court abused its discretion by failing to disqualify the Broward County State Attorneys Office from prosecuting this case. *Rogers v. State*, 783 So. 2d 980 (Fla. 2001). As a result of the violation of Jeffrey Weaver's right to chosen counsel based upon the state's insistence, actual prejudice occurred. A new trial should be ordered, with Mr. Satz and the Broward County State Attorneys Office being prohibited from prosecuting this action on remand.

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

The State is, simply put: incorrect in asserting that *Donohoe v. State*, 801 So. 2d 124 (Fla. 4th 2001), *review denied* 821 So. 2d 301 (Fla. 2002), was "decided wrongly and is distinguishable" and that reversible error has not been established as to this issue (IB 46-52). *Donahue* correctly interpreted the law and is clearly analogous to the factual scenario presented at bar. Although the State now attempts to discredit Dr. Ronald Wright, the former longtime Broward Medical examiner, calling him "a non-surgeon" who "last assisted in surgery over thirty years ago," Dr. Wright was declared an expert without an objection (AB 47). His uncontradicted opinion was that Officer Peney died as a result of medical negligence and malpractice. At a minimum, the jury should have weighed in on this issue.

Jeffrey Weaver's assertions of reversible error as to this issue are not as the State claims (IB 48). This was not simply a case where ". . . a surgeon was unable to save Peney's life." (IB 48). Here, a factual issue existed as to whether the medical personnel caused the officer's death. More succinctly stated, the issue became whether the medical personnel's malpractice constituted a superceding intervening act. Jeffrey Weaver alleged it did, and that the jury should have heard the evidence and "made the call."

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 repairable (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 echocardiogram (T 1030; 1035).

In *Donohue v. State,* the Fourth District 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.

Jeffrey Weaver asserts that under *Donohue,* his expert should have been permitted to testify that medical malpractice caused the death of Officer Peney both at trial and during the penalty phase. *See Buenoano v. State,* 527 So. 2d 194 (Fla.

1998); *Butts v. State*, 733 So. 2d 1097 (Fla. 1st DCA 1999). That 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 would have lived. The trial court abused its discretion by excluding any evidence of the medical malpractice which resulted in Officer Peney's death.

The State's argument as to the incorrectness of *Donahoe* is illogical. Allowance of evidence as to the actual cause of an individual's death should not have been prohibited. By following *Donohoe*, this court is not opening the door to allow any victim who reaches a doctor before death to reduce his criminal responsibility if the health care provider is unable to save the victim, as asserted by the State (AB 51, n. 16). Distinguishably, following *Donohue*, an accused shall only be responsible for his or her acts, not for the subsequent intervening acts of a third party.

The gunshot wound to Officer Peney was neither the actual nor proximate cause of his death. A factual issue surrounded the actual cause of death, and as a result of the trial court's ruling prohibit evidence concerning the issue from being presented, Jeffrey Weaver failed to receive a fair trial pursuant to either the State or

Federal constitution.

The State's fall back argument as to "harmless error" is a waste of words (IB 52). In light of the specifics of this case, the error caused by the restriction on the presentation of evidence fundamentally flawed this case. Further, ignorance of the medical negligence affected the judge and the jury override. Had the jury known of the medical malpractice, the verdict might well have been more favorable than the 8 - 4 decision favoring life over death. Thus, the trial court would have been prohibited from overriding the jury's decision as to the appropriate sentence. A new trial is required.

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

The trial court abused its discretion by allowing a jury view, over defense objection, when the jurors ended up standing in a cemetery looking at tombstones (T 1822-28; 5382). The State concedes Jeffery Weaver timely and contemporaneously objected (AB 53).[11] Reversal and remand for a new trial is required.

[11]Jeffery Weaver objected to the jury view on several grounds, including the fact that the view was duplicitous, repetitive, and cumulative with other evidence presented (AB 54).

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

Jeffrey Weaver maintains that the trial court abused its discretion by refusing to allow him to call Detective Macauley as a defense witness. The detective would have truthfully testified concerning exculpatory statements made by Jeffrey Weaver during the booking process.

In light of the fact Jeffrey Weaver was representing himself, *pro se*, the Appellant urges this court not to hold that Jeffrey Weaver failed to preserve this issue for appellate purposes. Further, the statements fell within firmly rooted hearsay exceptions as the statements were against Jeffrey Weaver's penal interest, showed his state of mind, were spontaneous statements, excited utterances, or expressed his existing mental, emotional, or physical condition.

Contrary to the State's argument, the fact that Jeffrey Weaver could not recall making the statements does not effect their admissibility (T 33-5809; AB 56). In fact, because the statements were not immediately remembered by Jeffrey Weaver, the reliability of the statements is bolstered.

Finally, the state asserts that if the trial court erred by refusing to allow the exculpatory evidence, the error was "harmless." (AB 58) While the evidence showed Jeffrey Weaver turned and fired a single bullet, Officer Myers likewise

fired. Because of the argument as to which bullet hit Peney and what the actual cause of death was, the error at bar requires reversal and a new trial.

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 post arrest confession (T 1963). The defense maintained that suppression of all of Jeffrey Weaver's statements, admissions, and confessions was required 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 misrepresentations acted as the functional equivalent of express or implied promises 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 statements admitted by the trial court should have been, like the others, suppressed as being violative of the State and Federal constitutions. Reversal and remand for a new trial is required.

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

The Appellant relies upon the argument and authorities set forth in Argument X of his Initial Brief herein, maintaining that reversal and remand for a new trial is required.

XII. THE TRIAL COURT REVERSIBLY ERRED BY ALLOWING THE STATE TO INTRODUCE EVIDENCE CONCERNING AN ATTEMPTED ARMED ROBBERY AND ALLOWING THE SAME TO BECOME THE FEATURES OF THE TRIAL

Jeffrey Weaver maintains that the trial court reversibly erred by allowing evidence of the alleged attempted burglary of Ms. Ortiz, and that the error was exacerbated when it became the "feature" of the trial. The error cannot, as the State suggests, be considered "harmless" in light of the jury override at bar (AB 69). Reversal and remand for a new trial is required.

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

Based upon the argument set forth in Jeffrey Weaver's Initial Brief and Reply, and because of all of the substantive issues raised, a new trial is warranted.

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

Jeffrey Weaver is far from "the worst of the worst." *See Stephens v. State*, 787 So. 2d 747, 763 (Fla. 2001); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). He should not be put to death by the State for his involvement with Officer Peney's death in contravention of the jury's recommendation.

The State's distinction of several of the cases cited on Jeffrey Weaver's behalf interestingly paints the obvious picture that, as this court well knows, every case is different. Every jury has the opportunity to assess the facts and circumstances presented. In this case, the jury's 8-4 determination was ignored by the court. Rather than being sentenced based upon factors determined by a jury, Jeffrey Weaver was sentenced based upon Judge Speiser's whim. *See Ring*[12] and *Apprendi*.[13] Regardless of the retroactivity[14] of *Ring*, Jeffrey Weaver's override death sentence cannot stand.

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[12]*Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

[13]*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[14]The United States Supreme Court has recently granted *certiorari* in *Schriro v. Summerlin*, United States Supreme Court Case No. 03-526.

The case *sub judice,* when analyzed under *Ring,* is unlike any other to come before this court. *See e.g. Randolph v. Crosby*, ___ So. 2d ___ (Fla. 2003)[2003 Fla. LEXIS 2115]. This case was far from the situation where there was "unanimous death recommendation." *See e.g. Davis v. State*, __ So. 2d __ (Fla. 2003)[2003 Fla. LEXIS 1994). This is not a post-conviction motion, and should not be treated as such. *See e.g. Jones v. State,* 855 So. 2d 611, 619 (Fla. 2003); *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002); *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002).

The State's recent Notice of Supplemental Authority, *citing Zakrzewski v. State*, ___ So. 2d ___ (Fla. 2003)[2003 Fla. LEXIS 1989), is equally non-persuasive. In *Zakrzewski*, the *Ring* issue was again raised as a post-conviction matter. The conviction and sentence resulted from a guilty plea (*see* Justice Anstead, dissenting).

Finally, death in this case is wholly disproportionate. Recently, prosecutors in Washington cut a deal with Gary Leon Ridgway, who admitted to murdering at least 48 women which spared him the death penalty. "The list of those who have committed multiple murders yet routinely do receive the death penalty is endless. It

includes mafia hit men, wealthy celebrities, businessmen, and athletes."[15]

Jeffrey Weaver deserves a new trial. Even if this court determines otherwise, he should not be killed by the State of Florida based upon a judge's override determination. Jeffrey Weaver maintains the override sentence violates his State and Federal rights, and that at a minimum reversal and remand for resentencing is required.

CROSS APPEAL BY THE STATE

I. THE TRIAL COURT PROPERLY SEVERED THE ALLEGED ATTEMPTED ARMED BURGLARY AND DID NOT ABUSE ITS DISCRETION BY PRECLUDING THE STATE FROM ARGUING FELONY-MURDER BASED UPON SAID OFFENSE.

The State alleges in its cross-appeal that the trial court abused its discretion by severing Count V from the Indictment and precluding evidence of an alleged attempted armed burglary to prove felony murder (AB 92-96). The trial court correctly ruled, properly exercising its discretion by keeping out the evidence relative to Count V of the Indictment.

No evidence refutes the trial court's finding that the burglary and homicide were not meaningfully or significantly related (T 6-782). The court's finding that

[15] www.Sunspot.net "Death and Dispartiy," November 13, 2002.

the offenses lacked any causal connection was supported by the evidence. Based upon the court's findings, the State was properly precluded from arguing felony-murder based upon an alleged attempted armed burglary. The instant case is analogous to that presented in *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992). The severance at bar was pursuant to a motion and notice to the State. It was far from erroneous. The court's ruling in this regard should be affirmed in all respects.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING TAPES OF JEFFREY WEAVER'S CONFESSION

On Cross-appeal, the State contends that the court abused its discretion by suppressing the audio and video tapes of Weaver while he sat in the police car and forensic lab while cooperating with law enforcement officials. Importantly, the State was permitted to elicit testimony via detectives concerning Jeffrey Weaver's other statements, admissions, and confessions. The exclusion of the evidence was subject to the trial court's discretion and should only be overturned if shown to be abusive. *Ray v. State*, 755 So. 2d 604 (Fla. 2000).

Jeffrey Weaver unequivocally and repeatedly stated he did not want to make any recorded statement. Accordingly, his subsequent statements, surreptitiously recorded, were properly excluded. This decision follows established Florida and Federal law. Amend. IV and XIV, U.S. Constit.

The State attempts to rationalize a distinction between the officers' assurances to Jeffrey Weaver that his statements would not be recorded in the police station as opposed to other locales. The State's attempts are misguided. The trial court properly found that Jeffrey Weaver's statements made after a promise by the officers that he would not be recorded were inadmissible. This issue should be affirmed.[16]

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING EVIDENCE UNRELATED TO THE CHARGED OFFENSES.

The trial court did not abuse its discretion by excluding firearm evidence found in Jeffrey Weaver's car subsequent to his arrest. Claiming admissibility based upon a standard "laundry list" of reasons, the State skirts the fact that the evidence was irrelevant and unduly prejudicial. The evidence lacked any connection to the charged offenses. No abuse of discretion was shown.

Evidence must be relevant in order to be admissible. *See* § 90.402, Fla. Stat. (2001). Relevant evidence is defined as evidence "tending to prove or disprove a material fact." § 90.401, Fla. Stat. (2001). While all admissible evidence must be relevant, not all relevant evidence is admissible; Section 90.403 mandates that

[16]Jeffrey Weaver incorporates herein his argument contained in *Argument IX* regarding suppression of other statements he made.

"relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice." § 90.403, Fla. Stat. (2001).

In *O'Connor v. State*, 835 So. 2d 1226 (Fla. 4th DCA 2003), the Fourth District dealt with a similar issue. The court determined that evidence seized from the defendant's bedroom was inadmissible at trial as it lacked relevance to the charged murder. The court stated:

> Where the evidence at trial does not link a weapon seized to the crime charged, the weapon is inadmissible. In *Rigdon v. State,* 621 So. 2d 475 (Fla. 4th DCA 1993), the defendant was charged with attempted murder. We concluded that the trial court erred in admitting into evidence a small semi-automatic weapon which the police found under the defendant's bed. We reasoned that the 'exhibit did not tend to prove or disprove a material fact as it had no connection whatsoever to the charged offense.' *Id.* at 478.
>
> In *O'Connor*, the court concluded that:
>
> Following *Fugate, Rigdon, Huhn,* and *Sosa,* we conclude that photographs of the shotgun, the bullet proof vest, and the quote, were not relevant to the crime charged and were improperly admitted into evidence. The murder was by a handgun with nine millimeter ammunition, not a shotgun, and nothing in the evidence connected the shotgun to the homicide. Similarly, nothing in the evidence indicated that appellant wore the bullet proof vest in the homicide. The state tried to manufacture relevance with the testimony that people who commit drug armed robberies often wear bullet proof vests. This anecdotal testimony 'concerning characteristic patterns in a type of criminal activity was inadmissible.' *Lawrence v. State,* 766 So. 2d 250, 251 (Fla. 4th DCA 2000); *see also Dean v. State,* 690 So. 2d 720, 723-24 (Fla. 4th DCA 1997); *Shelton v. State,* 654 So. 2d 1295,

> 1296 (Fla. 4th DCA 1995). Any marginal relevance in this type of testimony was substantially outweighed by the danger of unfair prejudice. *See* § 90.403. The state may not create relevance by resorting to testimony which is itself inadmissible as proof of guilt.
>
> *Id.*at 1231.

Nothing in the Record establishes that the trial court reversibly erred in this case by refusing to allow the irrelevant evidence. The order entered below should be affirmed.

CONCLUSION

Based upon the foregoing arguments and authorities, as well as those set forth in Jeffrey Weaver's Initial Brief, the Judgment, Conviction, and Sentence should be reversed. The evidence was insufficient to support the charge, warranting reversal and discharge. Alternatively, remand for a new trial is required. Alternatively, the sentence imposed should be reversed. Finally, because the State's cross-appeal is not meritorious, should the need arise to address the issues raised on cross-appeal, each issue should be affirmed in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this **13TH day of February, 2004** the original plus seven (7) copies of the Amended Reply/Cross Answer Brief were mailed to: Clerk of Court, Florida Supreme Court, 500 Duval Street, Tallahassee, FL 32399-1925 and a copy mailed to: AAG Leslie Campbell, Office of the Attorney General, 1515 North Flagler Drive (9th Floor), West Palm Beach, 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 Reply/Cross Answer Brief of Appellant is typed in 14 point, Times New Roman.

Respectfully submitted,

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