IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC00-247

JEFFREY LEE WEAVER,

Appellant/Cross-Appellee,

VS.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

****

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

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SECOND AMENDED ANSWER BRIEF OF APPELLEE
INITIAL BRIEF OF CROSS-APPELLANT

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PRELIMINARY STATEMENT

Appellant/Cross-Appellee, defendant below, Jeffrey Lee Weaver, will be referred to as "Weaver". Appellee/Cross-Appellant, State of Florida, will be referred to as "State". References will be by the symbol "R" for the appellate record, "T" for the transcript, "SR" and "ST" for the supplemental record or transcripts, and "IB" for the initial brief, followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Historical overview - Given the nature of this case and the inflammatory allegations leveled against the trial court and prosecutor here and at trial the State believes a historical overview is warranted. Weaver's initial brief and trial record are replete with his attempts to manipulate the proceedings. The record reflects Weaver moved to recuse the court, Judge Mark Speiser, disqualify State Attorney Michale Satz and his entire office, and discharge court-appointed defense counsel, Edward Salantrie, because of a strategy disagreement. Even when warned of the consequences of his decision to discharge Salantrie and that a continuance would not be granted merely because of the discharge, Weaver persisted. When Salantrie was discharged, Weaver, nonetheless, sought a continuance. Simply put, he moved

to have the judge, prosecutor, and defense counsel removed from the case. The lawyer he wanted was his second court-appointed counsel, Hilliard Moldof, who was appointed on 2/27/96 and told the court two years later, on 2/19/98, it would take another "two years to get to trial" due in part to another case he had, State v. Penalver, 94-13062 CF10A (T1 182). Given the result of Penalver, it was likely Weaver's trial would not have commenced until after July 2000, the date Penalver concluded as detailed below and in the record for State v. Penalver, case no. SC00-1602 before this Court.

Trial Proceedings - Near 8:00 p.m. on 1/5/96, Weaver attempted an armed burglary of Graciela Ortiz's car as she waited at a light. Unsuccessful, Weaver made his way south. Ms Wilcher spotted him lurking in the bushes and putting a gun down his pants. Two hours later, King Irving saw a man near a vocational school on Federal Highway wearing a shirt meeting the description of Weaver's shirt. Shortly thereafter, Officers Bryant Peney ("Peney") and Ray Myers ("Myers") saw Weaver at that location appearing suspicious, and stopped him. (T30 5132-39, 5223-32, SR14 403-92, 596-629)

During their encounter, Weaver became concerned Peney would search him and find the concealed .357 revolver so Weaver bolted with Peney and Myers giving chase. When Weaver was on the east

side of the highway and Peney near the median, Weaver spun around, crouched in a shooting position, and fired at Peney. As Meyers approached, Weaver aimed at him. Fearing he would be shot, Myers fired his 9mm weapon which was loaded with Golden Saber hollow point bullets, but missed Weaver. Again, Weaver ran. When he heard the police response, he eluded the officers and successfully made his way into Cliff Lake where he spent the night hiding in the water (T23 3899-3929, 3952-57, 4200-09, 4334-50; T26 4404-19, 4612-28, 4630-34; T29 4730-84; 4884-85; SR14 665-82).

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

Within minutes, the paramedics arrived and as they lifted Peney onto the gurney, a .357 bullet fell to the ground which contained his blood and DNA. At the hospital, Peney was treated for a single gunshot wound which went through his right arm into his chest, passed though his lungs, and perforated the aorta and vena cava. During the operation, Peney died (T23 3802-06; T25

4174-90, 4240-74, 4302-12, 4275-97, 4325-34; T31 5516-225).

Weaver was indicted for first-degree murder, along with counts of aggravated assault, armed resisting an officer with violence, carrying a concealed firearm, and attempted armed burglary of an occupied conveyance (Ortiz's car). After discharge of his Public Defender based on conflict, Hilliard Moldof ("Moldof") was appointed. When Moldof's schedule prohibited a reasonable and fair trial date, he was replaced by Edward Salantrie ("Salantrie") (guilt phase) and Raag Singhal (penalty phase) counsel. A few days before trial, in response to Weaver's motion to discharge Salantrie over a disagreement about the defense strategy, the court held Nelson and Faretta hearings. Salantrie was found to be rendering competent assistance and Weaver was permitted to discharge him with the understanding other counsel would not be appointed. Weaver, conducted the guilt phase pro se, but retained Singhal for the penalty phase. (R1 5-6, 221, 396, 498; T1 28-29; T13 2039-2244).

The majority of the discovery and pre-trail motions were handled by Salantrie and Weaver's indication otherwise (IB 3) is misleading. While represented by Salantrie, the attempted armed burglary count was severed and the State was precluded from arguing felony murder, but was permitted to introduce inextricably intertwined evidence. Salantrie successfully argued

for suppression of much of the arsenal found in Weaver's car and for the suppression of his audio and video taped confessions, however, the court did not suppress the oral statements. Although the court ruled on the admissibility of alleged medical malpractice evidence while Weaver was pro se, Salantrie had conducted the evidentiary presentation. (T6 782-90; T11 1565-1765).[1]

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

Following the Spencer hearing and denial of a new trial, the court found four aggravators: (1) contemporaneous violent felony convictions, (2) victim was law enforcement officer engaged in his official duties, (3) avoid arrest, and (4) disrupt or hinder law enforcement officer. Aggravators two through four were merged. (R 1462-65). The court rejected as mitigation "contribution to society/charitable, humanitarian deeds", good parent, religious devotion, "circumstance of the offense",

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[1]Here, the written order does not comport with the oral pronouncement, thus the state relies on the oral findings. Cf. Ashley v. State, 28 Fla. L. Weekly S18, (Fla. 2003) (finding oral pronouncement controls over written).

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

SUMMARY OF THE ARGUMENT

POINTS RAISED BY APPELLANT ON DIRECT APPEAL

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

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

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

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

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

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

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

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

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

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

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

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

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

Point XIV - The override death sentence is constitutional.

ISSUED RAISED BY APPELLEE ON CROSS-APPEAL

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

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

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

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

ARGUMENT

POINT I

DISCHARGING WEAVER'S SECOND COUNSEL WAS A PROPER EXERCISE OF DISCRETION (restated).

Weaver argues his Fifth and Sixth Amendment rights, under the United States and Florida Constitutions, were violated when his second court-appointed counsel, Hilliard Moldof was discharged. He boldly and inaccurately argues "[b]ecause [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" (IB 39). Weaver's inflammatory characterizations are not borne out by the record. Indeed, Moldof's removal was a proper exercise of discretion based upon his unavailability to try the case within a reasonable time.

A court's decision to remove appointed counsel and substitute with another is reviewed for abuse of discretion. Finkelstein v. State, 574 So.2d 1164 (Fla. 4th DCA 1991).[2] Generally, "once counsel has been retained, the court may not unreasonably interfere with the accused's choice of counsel." Harling v. U.S., 387 A.2d 1101 (D.C. App. 1978)(citation

[2]Weaver admits indigents do not have a right to a particular counsel's appointment (IB 39-40). Cantu-Tzin v. Johnson, 162 F.3d 295 (5th Cir. 1998); Yohey v. Collins, 985 F.2d 222 (5th Cir. 1993)(citing U.S. v. Magee, 741 F.2d 93 (5th Cir. 1984)).

omitted). A judge may, in the interest of justice, substitute one counsel for another. Id. at 1105. For example, if retained counsel impedes or disrupts the orderly administration of justice, is grossly incompetent, physically incapacitated, or exhibits some other conduct which cannot be cured, he may be removed even over defense objection. Id.

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

Moldof was removed because of his inability to be ready for trial within a reasonable time. This was a proper exercise of

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

Over the next 17 months (6/20/96 - 11/20/97), 10 more defense continuances were granted by Judge Taylor, **for a total of 11 continuances** (T1 71-72, 76, 91, 121-24, 139, 143-44, 147-50). By the seventh continuance, 2/13/97, the State objected, noting it was in a precarious position and needed a "date certain" or realistic date as to when Moldof would be ready. Moldof responded he was "still a good ways away" from ready and had numerous depositions to take, including the experts. When

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[3]The ethical rules regulating attorneys support the decision. Rule 4-1.3. of the Florida Rules Regulating the Florida Bar, mandates "[a] lawyer shall act with reasonable diligence and promptness in representing a client." A four or five year delay between indictment and trial can give rise to an argument that the constitutional speedy trial rights were violated. Barker v. Wingo, 407 U.S. 514 (1972); U.S. v. Hayes, 40 F.3d 362 (11th Cir. 1994)(discussing four-part test for determining whether speedy trial right violated).

Moldof commented the State had listed 200 witnesses, the State explained many of the officers had nothing to do with the crime, but had to be listed as they had responded to set up crime scene perimeters. The court granted the continuance and asked for agreeable trial dates (T1 88-91).

On 5/1/97, Moldof requested an eighth continuance, stating he was deposing DNA experts. The State replied it was ready for trial and again inquired about the special set trial. Granting the continuance, the court questioned Moldof regarding how many witnesses he had left to depose. He stated 10 depositions were set for the day of the DNA experts and still needed to depose the medical people. The Court told Moldof it needed a "realistic date" agreeable to the parties as it did not want to keep setting status conferences if Moldof was not close to ready. Moldof responded he was starting Penalver, estimated as five to six week homicide trial, and could have a motion to suppress ready by summer's end, but estimated they could "try for July." Noting Moldof had just said he would not be ready in July, the State again asked for a "date certain", even if it were later, so the victim's family would not be getting prepared for nothing. Moldof answered it would be "fruitless" as there had not been pre-trial hearings. The court agreed it was premature to set a "date certain." (T1 123-25).

At the 7/10/97 status, Moldof requested his ninth continuance, informing the court he had been with Penalver since 5/5/97, and it "seems like it will never end." Because of Penalver, Moldof had not been able to "accomplish much" for Weaver and had to cancel depositions. He estimated Penalver would finish by the end of July. The court granted the continuance, setting the case for the September docket (T1 139-40). When Penalver, had not ended by 9/18/97, Moldof requested and was granted a tenth continuance. The State again announced ready for trial and requested a "date certain." The court advised it would set a "date certain" when Penalver concluded (T1 143-44).

When Penalver had not ended by 11/20/97, Moldof requested an eleventh continuance. He advised the State had rested in Penalver, the defense case should take a week, and the jury should get the case near mid-December. Because Penalver was in session half-days, Moldof had taken some depositions here. Granting the continuance, Judge Taylor stated she was leaving the division and Judge Speiser would be taking over the case. (T1 147-50).

On 12/16/97, Judge Speiser held a status hearing at which the State advised the case was two years old. Moldof noted he had been at a dead stop for the last seven months due to

Penalver. While he thought it would end in January, it was unrealistic for him to get Weaver to trial in five months, especially when he had not deposed half of the 280 witnesses. The State responded its case was getting weaker by the delay. When the court inquired how much time Moldof would need after Penalver, Moldof replied it was hard to gauge as lots of judges were waiting for him to finish to try other cases. **Moldof remarked if he were ordered off the case "it would be a relief in [his] life."** He noted it was "selfish", but he would "thank goodness" as Weaver "needs a lawyer to work on this case non-stop for a while yet." Moldof estimated the earliest he could be ready was the summer (SR13 238-39, 242, 254-55).

When asked whether having another lawyer take over would expedite the matter, the State responded it "just want to get this case tried" as it was frustrating to watch its case getting weaker. A week later, at the 12/23/97 status, the court set a trial date for March 1998, but acknowledged Moldof might not be ready. Moldof stated there was "no way" he would be ready as he still had to take 140 depositions and made it clear March was not a "firm" date. Moldof did not want the State to tell the victim's family a date was set. When the court commented the delay was not due to inattention or laziness on Moldof's part, but rather, because of Penalver, the State responded that if

Moldof could not control his caseload, he needed to get off the case. The State did not want to sit by and let its case dissipate until it was convenient for Moldof to try it (T1 159-61; SR 255).

Considering Moldof's backlog once Penalver ended, the judge asked whether he wanted to keep the case. Moldof responded Weaver wanted him to remain, so he would, but noted the nine-month Penalver trial was unanticipated. Weaver agreed he was satisfied with Moldof and wanted him. The judge empathized with the victim's family, but could not force Weaver to trial unprepared (T1 161-63).

On 2/6/98, Moldof filed a "Motion for Special Status and Determination of Continuous Circumstances," asking for a special hearing "so counsel can confer with the Court regarding a proposed trial date along with the extenuating circumstances and need for additional counsel to assist in the preparation of the defense." The motion stated Penalver ended in a hung jury and re-trial would start 4/27/98. Hence, Moldof would be unable to continue discovery or work on Weaver's case until Penalver ended and he needed additional guilt phase counsel to conduct discovery. On 2/19/98, Moldof admitted "everyone was interested in moving this case," and Penalver had "held things up," he "fully intended" to finish the depositions once Penalver ended.

Yet, with the April re-trial, he anticipated another nine months for Penalver, which would put him that much behind here, where less than half the discovery was done (R 392-95; T1 174). This was Moldof's twelfth continuance.

Although Moldof agreed the case should go to trial, "[b]ut ... if everyone is satisfied that I will do this as quickly as I can, I'll be glad to go forward." Moldof asked for a second **guilt phase** lawyer to complete the discovery. The State reminded the court Weaver's case was more than two years-old and Moldof had already been granted many continuances, five of which were before Penalver started. Noting it had the right to a fair trial, the State complained that its case was weakening through the loss of several witnesses, others with faded memories, and the majority with direct knowledge of the case had yet to be deposed. The State suggested if Moldof could not be ready by August, he either relegate himself to penalty phase counsel or be removed. Moldof replied he would resign if forced to be penalty phase counsel (T1 175-77).

Counsel for Broward County, Bob Hone, opposed appointing a second guilt phase attorney as the law allows for one guilt and one penalty phase counsel. The contract prohibits a lawyer from farming out work to other counsel. He offered that if Moldof was overwhelmed and could not continue, he should withdraw. The

court asked Moldof whether he would consider becoming penalty phase counsel and Moldof refused (T1 178, 180-81).

Moldof agreed if Penalver, starting April 26th, took the same time as the first trial, it would take **two years** to get Weaver's case to trial.[4] Noting "both sides are entitled to a fair trial", one conducted within a reasonable time, the court indicated it was inclined to remove Moldof if Penalver was going to last nine months. The court left the door open for Moldof to remain as penalty phase counsel. Before making its decision, the court asked for case law and whether Penalver was going to be re-tried in full or half-days for nine months. (T1 180-90).

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

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[4]The Penalver nine-month re-trial and preparation time for Weaver including taking the more important, lengthier depositions.

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

Weaver ignores Moldof's **two year** estimate and instead cites the court's concern, at the same 2/19/98 hearing, that Moldof would not be able to try the case for another year (until 1999) (IB 39). Weaver implies the court's concern was disingenuous as his trial did not begin until 4/14/99 (IB 39 n.22). This argument lacks merit as it ignores the fact Moldof stated he would need two years to get ready for trial. Moreover, considering how long it actually took for Penalver to be tried, it is clear even Moldof's estimate was short. The re-trial in

Penalver ended in a mistrial and the third trial started 5/24/99 approximately a month after Weaver's trial. This Court may take judicial notice of its records in Penalver v. State, case no. SC00-1602 (pending capital direct appeal) Penalver was convicted on 11/12/99, penalty phase verdict was returned 12/6/99, and on 7/27/00, he was sentenced. Thus, Moldof would have been in trial with Penalver until 2000 and given his need to complete discovery, would not have been ready for Weaver's trial for at least **three years**. The State's right to a fair trial would surely have been impugned needlessly if it had to wait five years from the January 1996 murder to try this case.

Weaver's brief misleadingly suggests the State had Moldof thrown off the case (IB 39-41, 43). The record shows it was Moldof who first remarked, at on 12/1697, that **"it would be a relief in [his] life" if he was ordered off the case**. Moldof noted Weaver "needs a lawyer to work on this case non-stop for a while yet." (SR13 254). Although Judge Speiser remarked he would not do that,[5] Moldof's comment prompted the court to

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

inquire of the State whether it thought having another lawyer would expedite the matter, to which the prosecutor responded "I just want to get this case tried." (SR13 255). A week later, the court asked whether Moldof wanted to remain and Moldof responded Weaver wanted him to remain so he would. Weaver agreed he wanted Moldof (T1 161-63).

Thereafter, on 2/6/98, Moldof filed a "Motion for Special Status and Determination of Continuous Circumstances," stating Penalver had ended in a **hung jury** and the re-trial would begin 4/27/98. The motion alleged he would be unable to continue work on Weaver's case until after Penalver (R 392-93). Moldof was removed after that. Consequently, it was Moldof, not the State, who filed the motion advising the court of his unavailability which ultimately caused his removal. It is incorrect for Weaver to suggest it was the State that spear-headed Moldof's removal. In fact, his record cite (R 1113), is to the order discharging Salantrie, third appointed counsel, at Weaver's request.

Finally, the cases relied upon by Weaver are inapposite and do not support reversal. Weaver cites to Justice Brennan's concurring opinion in Morris v. Slappy, 461 U.S. 1 (1983), however, the majority opinion held the Sixth Amendment does not guarantee a defendant, indigent or otherwise, "a meaningful attorney-client relationship." Slappy, 461 U.S. at 13-14.

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

Finkelstein is distinguishable as Moldof was properly removed because he could not meet his ethical obligation to be ready for trial within a reasonable time. Likewise, the cases cited in Finkelstein, and relied upon by Weaver, are inapposite. For example, in Smith v. Superior Court of Los Angeles County, 440 P.2d 65 (1968), the decision to remove counsel, over defense objection, was reversed as it was based solely upon the judge's subjective opinion counsel was not competent to try a capital case as he had not tried one previously. Similarly, in McKinnon v. State, 526 P.2d 18 (Alaska 1974) and Kvasnikoff v. State, 535

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

Unlike the cases cited in Finkelstein, the decision to remove Moldof was based on objective facts apparent from the record. The State and Weaver have an equal right to a fair trial and that right would surely have been violated by needlessly waiting five years to try the case while it dissipated. Moldof had been on the case for two years, taken 11 continuances and yet, had done very little work. Due to the nine-month Penalver re-trial, Moldof needed at least two more years to be ready. In fact, we know Moldof would have needed much longer since Penalver had to be tried three times.[6] It is thus no surprise, Weaver, who had moved to throw the judge, prosecutor, and Salantrie off the case, was happy with Moldof, who had requested numerous continuances during his two year tenure. In any event, it is clear the crimes occurred on 1/5/96 and Weaver's trial did not begin until 4/14/99, some three and

[6]The State relies on its Point III respecting the stun belt issue raised in Weaver's footnote 23.

a half years later. The court exercised its discretion properly.

POINT II

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

Weaver argues the court reversibly erred by conducting a Faretta v. California, 422 U.S. 806 (1975) inquiry as he did not make a clear, unequivocal request to self representation[7] and was not competent to represent himself. There was no abuse of discretion in the Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973) and Faretta inquiries, based upon Weaver's motion to discharge counsel, and the conclusion he was competent to represent himself. Kearse v. State, 605 So.2d 534 (Fla. 1st DCA 1992).

On 3/2/99, Weaver filed a "Motion for the Removal of, and Replacement of My Appointed Counsel Edward G. Salantrie", as

[7]Incredibly, Weaver argues "[u]ltimately, as Mr. Satz pushed for the April 1999 trial date, Jeffrey Weaver and Mr. Salantrie had a breakbown over Jeffrey Weaver's defense strategy." This argument is not based upon historical fact. The crimes for which Weaver was charged occurred 1/5/96. Salantrie was appointed 3/3/98 and on 11/2/98 Judge Speiser set the trial date for April 1999 after consulting with Salantrie (T3 411-12). Weaver's motion to discharge Salantrie was filed on 3/2/99 almost three years after the crime occurred, one year after Salantrie's appointment, and four months after the trial date had been set. Weaver's allegation regarding the "push" by the State for an April 1999 trial coinciding with the breakdown of relations between Weaver and Salantrie is historically incorrect and belied by the record.

Salantrie was unwilling to argue the defense Weaver wanted. A few weeks later, Salantrie filed a "Motion to Withdraw" advising he and Weaver were in serious dispute over the defense. The motion stated Salantrie hired experts and performed extensive work to develop support for Weaver's defense theory, but had been unable to find any credible evidence. Salantrie did not want to pursue Weaver's theory and believed a conflict existed (R 396, 921-24, 970-72).

On 4/6-7/99, a hearing was held on the motions (T13 2039-2244). At the outset, **Salantrie withdrew his "Motion to Withdraw."** (T13 2039-40). Contrary to Weaver's assertions (IB 57), the hearing proceeded solely on his motion to remove/replace Salantrie. When a defendant seeks discharge of court-appointed counsel, the court must conduct a Nelson inquiry into the nature of the complaint to see if it is about counsel's competency or another issue. Where there is a clear allegation challenging counsel's **competency**, the court is obligated to determine whether adequate grounds exist for discharge. Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Nelson, 274 So.2d at 256. An inquiry into complaints of incompetence can be only as specific and meaningful as the complaint. Lowe v. State, 650 So.2d 969 (Fla. 1994). If the court finds counsel's representation effective, it must advise the defendant he is not

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

At the *ex parte* Nelson inquiry, Weaver explained he and Salantrie were in conflict over what defense theory to present. Salantrie's theory was lack of intent to shoot Peney (second-degree), while Weaver wanted to argue his bullet did not hit Peney, rather it was Officer Myers's. Weaver believed a physicist would support his theory and a neuropsychologist could hypnotize him so he could remember the details (T13 2060-67, 2074-78, 2104-05).

Salantrie explained there was a great deal of evidence showing the bullet which fell off Peney's gurney, and had his blood on it, matched Weaver's gun, not Myers' and that it was the same caliber, make and model as the other bullets in Weaver's gun. Salantrie's ballistics expert linked the recovered bullet to Weaver's gun. Salantrie noted the real issue was not whether Weaver fired into the ground or at what angle, but rather, whether the bullet, which witnesses saw fall from Peney, came from Weaver's gun. Weaver's answer was to

argue the police “switched” bullets. The court asked Weaver whether the “conspiracy” theory was a good defense, one the jury would believe (T13 2075-76, 2078-81, 2106).

The court recapped: Weaver wanted to argue his bullet did not hit Peney, while Salantrie wanted to argue it hit the officer unintentionally. Weaver stated he had a 65% shot of the jury buying the conspiracy theory if he could present a physicist and learn what two missing witnesses saw. Salantrie noted he had not been bashful about asking for experts, but would not request a neuropsychologist or physicist because they would be frivolous. He spent a lot of time and money on experts, including a ballistics expert, who had “traveled down every single avenue” of any appropriate defense and could find nothing to support Weaver’s theory. A physicist could not negate the ballistics data and a hypnotist was unnecessary as there was nothing Weaver could not recall. Aware of each inconsistency in the testimony Salantrie would bring such out on cross (T14 2104-10).

There was no dispute, only two shots were fired, one from Weaver’s .357 with .357 bullets and casings, the other from Myers’ .9 millimeter with Golden Saber hollow point bullets. All five experts agreed the bullet which hit Peney was a .357, not a Golden Saber. Regarding eyewitness Steven Pinter,

Salantrie questioned what he saw because he claimed there were two .25 shell casings on the ground, but no one had a .25. Salantrie was not going to advance a "mystery shooter" defense (T14 2113-20).

The court found Salantrie, who had done more than 20 first-degree murder cases with "an impeccable reputation" respecting "his legal effectiveness" and "competence", was providing effective assistance. Salantrie had expended numerous hours preparing a defense and his theory was reasonable and consistent with the evidence. It was not unreasonable to refuse to call a physicist considering the ballistics expert's opinion and there was absolutely no indication a hypnotist was needed. Salantrie was found competent, rendering effective assistance under Nelson, thus, Weaver was not entitled to substitute counsel if he discharged Salantrie (T14 2138-44).

Weaver does not challenge the adequacy of the Nelson inquiry or the finding of effective assistance, rather, he argues a Faretta inquiry should not have been done as he never made an unequivocal request to represent himself and claims he was not competent to do so (IB 45-48). A defendant who persists in discharging competent counsel is not entitled to substitute counsel and is presumed to be exercising his right of self-representation. Jones, 449 So.2d at 258; Hardwick, 521 So.2d at

1074. That is precisely the case here. Hence, Weaver's argument a Faretta inquiry unwarranted lacks merit. Also, "'the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.'" Hill v. State, 688 So.2d 901 (Fla. 1996), citing Godinez v. Moran, 509 U.S. 389 (1993). Contrary to Weaver's position, the inquiry is on the competence to waive counsel, not competence to represent oneself. Hill, 688 So.2d at 905 (noting defendant does not need technical legal knowledge of attorney before proceeding pro se).

Upon determining Salantrie was providing effective assistance, the court asked whether Weaver wanted to continue with Salantrie:

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

(T14 2147). Weaver responded he could not proceed with Salantrie's defense; he did not want Salantrie with that defense (T14 2148). After deciding Weaver could not afford a private attorney, the court explained it would be conducting a Faretta inquiry to determine whether Weaver was knowingly and

intelligently waiving his right to court-appointed counsel. Before doing so, the court reexplained Weaver would not be getting a court-appointed attorney if he discharged Salantrie, rather, the question would be whether Salantrie represented him or he represented himself (T14 2150).

The court conducted a Faretta inquiry, following the rule 3.111(d), Florida Rules of Criminal Procedure model colloquy, during which it outlined the benefits of a lawyer, disadvantages of going pro se, and advised it was unwise to represent oneself. Weaver noted he had read the Indictment, understood the charges, and that the armed burglary count had been severed. He was advised about the maximum penalties faced. Weaver had ample contact with his lawyers and did not have any questions to ask. The court determined the waiver was knowing and intelligent noting that Weaver read and wrote English, was not under the influence of drugs/alcohol, had never been diagnosed or treated for mental illness, did not have a physical impairment, and had not been threatened to forego counsel (T14 2151-76, 2190-91, 2194-99).

Significantly, Weaver had filed several pro se motions to discharge the judge and prosecutor prior to his request to discharge Salantrie. In deed, Weaver told the court he had successfully represented himself on two speeding tickets, one

which he "won hands down." Weaver reiterated he did not want Salantrie, even after the court advised him he was making a grave mistake and asked him to reconsider (T14 2201-05). After a final plea for Weaver to rethink his decision, the court found Weaver's waiver knowing and intelligent concluding:

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

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

Finding Weaver competent to waive counsel is supported by the record. Potts v. State, 718 So.2d 757 (Fla. 1998). The inquiry was thorough and exhaustive. The record shows Weaver knew what he was doing and the ramifications. The court was familiar with Weaver's capacity to understand and make this decision. The record evinces Weaver was extremely involved in his defense, so much so he was discharging Salantrie because he would not present the defense Weaver wished. The Nelson hearing

proves Weaver was well versed with the discovery, familiar enough to request Salantrie bring certain depositions to court (T13 2040-41). Weaver's interactions demonstrated his knowledge of the case and intelligence. In light of the record, the court did not abuse its discretion in finding Weaver's waiver of counsel both knowing and voluntary. Again, the focus of the inquiry is not on Weaver's competency to represent himself, but rather, on his competency to waive counsel. Porter v. State, 788 So.2d 917, 927 (Fla. 2001).

POINT III

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

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

A decision to require restrains is reviewed for abuse of discretion. Bryant v. State, 785 So. 2d 422, 428 (Fla. 2001); Derrick v. State, 581 So. 2d 31 (Fla. 1991); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Harrell v. Israel, 672 F.2d 632, 635-36 (7th Cir. 1992). Substantial deference is paid to the

ruling and it will affirmed unless it is arbitrary or unreasonable. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000).

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

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

A new belt could not be used as Weaver was able to escape it. Before recommencing after the recess, Weaver reported ready. Over the lunch-hour he was seen by a nurse and was fine (T17 2717-23, 2798-99, T18 2803).

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

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

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

Requiring restraints was proper as Weaver, acting pro se and on trial for the murder and attempted murder as well as his intimate knowledge of firearms as established by the cache of weapons found in his car, would be moving about the courtroom, approaching the jury, witnesses, and court personnel with access to firearms and ammunition evidence. The court was informed of the belt's workings, concealability, saw it modeled, and rejected other more visible and restrictive devices. The belt

was selected as the least visible/cumbersome restraint. While it was activated once, such was not in the jury's presence, Weaver was unharmed, and after a short recess, was ready to proceed.[8] He now claims he became subdued, but points to no record evidence. In fact, the record refutes the claim. It shows he was a zealous advocate, competently arguing legal points and questioning police and lay witnesses with equal vigor, even taking the stand to face the State Attorney.

Weaver's reliance on United State v. Durham, 287 F.3d 1297 (11th Cir. 2002) does not further his position. In Durham, 287 F.3d at 1306-07, the conviction was reversed because the court failed to make findings regarding the belt's operation, the interest it served, whether a less restrictive method was available, and the rationale for requiring a stun belt. Conversely, here the judge heard of the belt's operation, size, visibility, and utility in permitting Weaver to remain mobile, yet under a deputy's control. Options were considered and the court announced its rationale. The concern in Durham that the belt would interfere with the defendant's ability to confer with counsel is not present here as Weaver was pro se. Moreover, while the belt was activated accidentally, it did not cause

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

Weaver pain or loss of control of his bowls as suggested in Durham. Weaver reported he was fine after the unintentional shocking, cogently argued legal issues, examined witnesses, and testified. The judge investigated the error and authorized steps be taken to avoid another accident. Any unvoiced concern Weaver may have had was assuaged. The decision to utilize a belt was a proper exercise of discretion given Weaver's ability to walk around the courtroom, approach the participants, and access the firearm evidence.

POINT IV

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

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

It is well-established, the decision to grant a continuance lies within the sound discretion of the judge and will not be disturbed unless there has been a palpable abuse of discretion. Sliney v. State, 699 So.2d 662 (Fla. 1997). Weaver's request

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

Immediately thereafter, Weaver asked for a continuance advising the court he had not looked through most of the discovery and did not know how long he would need. While the court denied the continuance, he delayed the trial by two days, giving Weaver a week to prepare. The court noted the case's age and Weaver's intimate involvement with it for the entire three years. Weaver was notified the final deposition was scheduled for the next day, 4/8/99, and all remaining motions would be heard April 9th. Contrary to Weaver's assertions (IB 59), he had the witness' statement, all he needed was to take her deposition. Also, he was given the State's responses to the motions and was provided copies of the motions on April 8th (T14 2221-22; T15 2225-66).

On 4/9/99, with penalty phase and stand-by counsel present, the court asked Weaver if he wanted Salantrie re-appointed. Weaver declined, but requested new counsel. When the court declined, Weaver said he was unprepared. The court reminded him he had been informed, before Salantrie's discharge, the motions would be heard that day and he would not be entitled to a continuance. Weaver asked whether Salantrie could be re-appointed to argue the motions, which the court considered to be a "mockery of the system and abuse of process." The court inquired why Weaver had not filed the motion to discharge until three weeks before trial. Weaver received the discovery boxes at 9:00 p.m. 4/9/99 (T14 2240, 2254-61, 2266-69; T16 2404-05).

Before voir dire on 4/14/99, Weaver moved for a continuance, arguing there was an enormous amount of discovery which he had not had an opportunity to review. The State objected, stating: the case was three years, four months old; Weaver had been at every hearing; the court had explained, during the thorough Faretta inquiry the difficulties of preparing a case in jail; yet Weaver knowingly chose to represent himself despite those difficulties. The court denied the continuance, reasoning it had a "tough" time believing Weaver was not familiar with the facts as he had been at every hearing and actively participated in his defense with his attorneys. The court also noted Weaver

had been advised Salantrie's discharge would not be a basis for getting a continuance and had decided to represent himself with full awareness of that fact (T16 2404-05, 2408-10).

Jury selection was held 4/14/99 through the morning of 4/19/99 (T16-T22). Penalty phase counsel was present and questioned the jury. Stand-by counsel was also present, as was a jury expert to advise Weaver. Weaver had almost two weeks to prepare before any witness examination (4/7/99-4/19/99). Weaver reserved his opening and after the State's direct of its first witness, Weaver indicted he had not read the witness' deposition, and the court recessed until the next day to allow Weaver time to read that deposition. The court required the State tell Weaver the next four or five witnesses it would call (T21 3464-73).

The same thing happened the next day when the State attempted to call Officer Magnanti. Thus, the court recessed to give Weaver time to prepare and again required the State to list the witnesses it intended to call the next day. On 4/21/99, Weaver informed the court he had spoken with the expert physicist, and would not be calling him. Weaver stated he was unprepared, could not represent himself, and requested an attorney, even Salantrie. The State responded it was being "whipsawed by [Weaver's] indecision," and he was talking out of

both sides of his mouth. The court decided to keep Weaver pro se, but elevated stand-by counsel's status to "active" stand-by, meaning he was to do more than just answer questions. The court ordered the State to list its next several witnesses and recessed until 4/27/99, giving Weaver another **six days** to prepare. Thereafter, the judge gave a **four day**, a **five day**, and numerous half-day recesses so Weaver could prepare before cross-examination. (T22 3662, 3664, 3671, 3694-97, 3713-14, 3725; T25 4352; T33 5659-60).

Given the foregoing, the court's denial of the continuance does not constitute a palpable abuse of discretion. Florida courts have upheld denials of motions for continuances where a defendant has argued lack of adequate and reasonable opportunity to prepare for trial. Langon v. State, 791 So.2d 1105 (Fla. 4th DCA 1999) (upholding denial of continuance for defendant who chose month before trial to discharge counsel); Miller v. State, 764 So.2d 640 (Fla. 1st DCA 2000) (holding defendant who discharged counsel close to trial was not entitled to continuance for new counsel to prepare. Berriel v. State, 233 So.2d 163 (Fla. 4th DCA 1970) (upholding denial of continuance where counsel had five days to prepare); Smith v. Hamilton, 428 So.2d 382 (Fla. 4th DCA 1983) (affirming denial of continuance where counsel offered no excuse for waiting until trial to move

for continuance based on inability to find/tell clients of trail which had been set for six months).

A judge is charged with the responsibility of running his docket and seeing cases get an early trial consistent with a fair and orderly disposition. Fuller v. Wainwright, 268 So.2d 431 (Fla. 4th DCA 1972). Particularly in criminal cases, where the defendant has a constitutional right to speedy trial, it is incumbent upon the court to try cases in a timely fashion. Here, Weaver's discharge of Salantrie on the eve of trial was nothing more than a delay tactic. The sole reason Weaver discharged Salantrie was because he refused to pursue Weaver's outrageous "conspiracy" defense which was not supported by any evidence. Proof this defense was not viable legally is shown by Weaver's later abandonment of it. Twice before Salantrie's discharge, Weaver was advised he would not be entitled to an a continuance. Further, this case was over three years-old and had been continued many times. The court questioned why Weaver waited until three weeks before trial to move for counsel's discharge as the dispute over the defense theory existed from day one. Moreover, there was no undue prejudice to Weaver from the denial of the continuance. As the court noted, from the beginning, Weaver was involved actively in his defense and intimately aware of his case and knew what witnesses would be

called by the State ahead of time. The court took numerous recesses throughout the trial, even four to five days at a time, in order to give Weaver time to read depositions and prepare. Weaver was given all forms of assistance including stand-by and penalty phase counsel, a jury selection expert, investigator, aa well as other experts. The record demonstrates he was able to present a cogent defense. Based upon these facts, it cannot be said the judge committed a flagrant or palpable abuse of discretion by denying a continuance.

The cases relied upon by Weaver are distinguishable. In Fasig v. Fasig, 830 So.2d 839 (Fla. 2d DCA 2002), the court found the denial of a continuance to the wife in a divorce proceeding, denied her due process. In the instant case, Weaver was not in any way prohibited from presenting his defense; he was afforded every expert or other assistance requested. Silverman v. Millner, 514 So.2d 77 (Fla. 3d DCA 1987), is also distinguishable as the defendant had a stroke the day before trial and his testimony was required for a fair and adequate presentation. Based upon the foregoing, the State submits this decision should be affirmed.

POINT V

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

Weaver argues his case was treated differently and he feared

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

The denial of a motion to recuse is reviewed for abuse of discretion. Arbelaez v. State, 775 So. 2d 909 (Fla. 2000). The reviewing court is to determine the motion's legal sufficiency based on whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial...proceeding." Hayes v. State, 686 So. 2d 694 (Fla. 4th DCA 1996), rev. dismissed, 691 So. 2d 1081 (Fla. 1997). "[S]ubjective fears...are not 'reasonably sufficient' to justify a 'well-founded fear' of prejudice." Fischer v. Knuck, 497 So. 2d 240 (Fla. 1986).

Initially, the State points out the motion to recuse Judge Speiser was filed pro se although represented by counsel and that certain grounds Weaver argues here were not presented below. These include: (2) leaked attorney/client information

during 4/9/99 hearing,[9] (4) judge had been an Assistant State Attorney, (5) In Re: Inquiry Concerning a Judge-Mark A. Speiser, (2/84 opinion),[10] and (6) 12/3/98 rulings regarding the attempted burglary evidence. The State submits the inclusion of the "leaked" attorney/client information on appeal by current appellate counsel amounts to an utter fabrication of the events which transpired below. The argument, along with the citation to a 1984 opinion by this Court regarding the conduct of Judge Speiser before he was a judge to suggest a proclivity to divulge confidential information, is yet another example of Weaver's and appellate counsel's unwarranted personal attacks which have no place here. Nassetta v. Kaplan, 557 So.2d 919, 921 (Fla. 4th DCA 1990). These four newly raised arguments are unpreserved. In fact, the motion and supplemental motion for recusal were filed on 4/30/98 and 11/2/98 respectively, with the court ruling on 11/2/98 (R4 409-14; R5 528-32; T3 329-32). The 12/3/98 and 4/9/99 events occurred after the ruling, were not part of the motion to recuse, and no further action was taken. Steinhorst v.

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

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

State, 412 So.2d 332 (Fla. 1982).

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

Weaver points to events which became known on 2/2/84 (In Re: Inquiry Concerning a Judge-Mark A. Speiser), 12/16/97 (case retained by Judge Speiser where he disclosed he spoke to Chief Judge Ross), 12/3/98 (felony murder ruling), and 4/9/99 (alleged attorney/client information). On 4/30/98, Weaver filed his motion to recuse the court and a supplement on 11/2/98 which was ruled on the same day (R4 409-14; R5 528-32; T3 329-32). They were legally insufficient, legal nullities, Burke v. State, 732 So. 2d 1194, 1195 (Fla. 4th DCA 1999) as they were filed pro se, beyond the 10 day limit, were unsworn, and did not allege the grounds for disqualification as required by Rule 2.160 (d) and (e). As mandated by Bundy v. Rudd, 366 So.2d 440 (Fla. 1978), the court did not look beyond the legal sufficiency, and did not abuse its discretion in denying the request.

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

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

The record developed when Judge Speiser took over the case, and at the hearing on the motion to disqualify the prosecutor, establish nothing to put a reasonable person in fear of bias. At the 12/16/97 status hearing the parties discussed whether Judge Speiser or another judge would preside over Weaver's trial. Judge Speiser recognized Weaver's case had been assigned blindly to Judge Taylor's docket which he was covering because she was elevated to the district court. Due to that, and Judge Hinkley's retirement, Chief Judge Ross was evaluating assignments and wanted Judge Speiser to keep the case; Judge Speiser agreed. The State, concerned with the case's age, was interested in having a judge assigned who would remain with it until resolution. Moldof was given the chance to discuss the issue with his client. A week later, Judge Speiser reported Chief Judge Ross rejected Weaver's suggestion to have the case assigned to Judge Backman and determined Judge Speiser should keep the case as he was in Judge Taylor's division. Moldof replied: "And we're at the Court's disposal." (T1 153-57; T3 373-75; SR13 235-57).

Weaver's instant allegations of *ex parte* discussions between two judges about the docket, "with or without" Mr. Satz is insufficient, especially where Weaver can offer only "possibly other *ex parte* discussions" took place. It is clear from the

record only Judges Ross and Speiser conversed. Mr. Satz testified he had been losing witnesses due to continuances, and did not speak to the court *ex parte* (T1 153-57, T3 340-42, 346-47; SR13 235-46). That Judge Ross was concerned with division assignments based upon recent judicial vacancies and determined a judge who had been handling a case should retain it is not the type of matter which would put a reasonably prudent person in fear. Livingston, 441 So.2d at 1086; Lusskin v. State, 717 So.2d 1076 (Fla. 4th DCA 1998) (affirming denial of recusal where judge retained case to hear sentencing issues after leaving criminal division); Willie v. State, 600 So.2d 479 (Fla. 1st DCA 1992) (noting judge not divested of authority to preside over criminal case after reassignment to non-criminal division); Kruckenberg, 422 So.2d at 994.

The allegation Judge Speiser was a former prosecutor would not put a reasonable person in fear. Cf. Arbelaez v. State, 775 So.2d 909, 916 (Fla. 2000) (finding recusal unnecessary); Kearse v. State, 770 So.2d 1119, 1129 (Fla. 2000). At the time of Weaver's 1998 motion to recuse, it had been at least 14 years since the judge left the State Attorney's employ and the release of the opinion in In Re: Inquiry Concerning a Judge-Mark A. Speiser. These facts would not give a reasonable person pause especially where this Court saw no need to take further action.

This is an example of Weaver's slash and burn advocacy and an attempt to disparage the court. Nassetta, 557 So.2d at 921. It would be unreasonable to bar the court from hearing criminal cases under these circumstances and is not a basis for recusal here.

For his claim of "leaked" attorney/client information, Weaver cites pages 2273-75 (IB 61). Such is incorrect factually. First, no privileged information was disclosed, second, the matter was discussed because Weaver asked to have counsel appointed, and third, Weaver announced the basis for counsel's withdrawal.[11] During the 4/9/99 request for counsel, well after the motion to refuse was denied, Weaver reported, in the State's presence, Salantrie "would definitely not be willing to do my defense." The State noted it was operating in a vacuum, thus, the court asked Weaver: "there's a difference in strategy as to the defense, right?" and Weaver clarified the disagreement was due to the "[p]resentation of the defense." (T15 2269-71). Without question, the court did not disclose

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

privileged information. Moreover, Salantrie's motion to withdraw admitted as much.

As for the argument that: "Jeffrey Weaver knew both the judge and prosecutor would soon face reelection or retention. He feared that his case was becoming more about politics than justice" (IB 62), the State must again take issue with counsel's unsupported and scurrilous allegation. The crime in this case occurred on 1/5/96. At the time the prosecutor had been the elected State Attorney since 1976. The prosecutor and judge were not up for re-election for four years after the crime, i.e., the year 2000. Further, the claim the court allowed Weaver to be prosecuted under a felony murder theory is belied by the record (T6 790-93; T30 6248). Even if the court had so ruled, it would not form a basis for recusal. Tafero v. State, 403 So.2d 355, 361 (Fla. 1981).

POINT VI

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

Weaver claims the State Attorney's Office should have been disqualified and "actual prejudice" resulted from its involvement in Moldof's removal[12] (IB 64-65). The conviction

[12]Weaver has abandoned his argument that the State had *ex parte* communications to get the case on the "fast track." (T3 335).

should be affirmed as Weaver has failed to show actual prejudice, as Moldof's removal was proper. Weaver faced nothing he would not have faced otherwise.

Review of a denial to disqualify a State Attorney's Office is abuse of discretion. Rogers v. State, 783 So.2d 980 (Fla. 2001). To disqualify an office, Weaver must show actual prejudice resulting from the prosecution. Downs v. Moore, 801 So.2d 906, 914 (Fla. 2001); Rogers, 783 So.2d at 991; Farina v. State, 679 So.2d 1151, 1157 (Fla. 1996), receded from on other grounds, Franqui v. State, 699 So.2d 1312 (Fla. 1997); Bogle v. State, 655 So.2d 1103 (Fla. 1995). "Actual prejudice is something more than the mere appearance of impropriety." Meggs v. McClure, 538 So.2d 518, 519 (Fla. 1st DCA 1989). Disqualification "must be done only to prevent the accused from suffering prejudice that he otherwise would not bear." Id.; Kearse, 770 So.2d at 1129.

Weaver points to Moldof's discharge as actual prejudice, but Moldof was replaced correctly - see Point I reincorporated here.[13] Denying *ex parte* discussions, Mr. Satz explained he had lost witnesses to defense continuances. In refusing disqualification, the judge noted the random case assignment and

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

recalled it remained with him at the Chief Judge's direction (T3 340-47, 373-76). Such cannot form actual prejudice as the State was merely seeking to prosecute the case and had no *ex parte* contact. Weaver faced nothing he would not have faced had the Office been disqualified.

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

POINT VII

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

Citing Donohue v. State, 801 So. 2d 124 (Fla. 4th DCA 2001),

rev. denied, 821 So. 2d 301 (Fla. 2002), Weaver complains it was error to preclude him from presenting evidence of medical malpractice resulting in Peney's death. The State submits there was no malpractice sufficient to relieve Weaver of liability as he inflicted the lethal wounds which were the "actual" and "proximate cause" of Peney's death. The evidence was excluded properly as it was irrelevant to any legally recognized defense. Johnson v. State, 59 So. 894 (Fla. 1912); Hallman v. State, 371 So.2d 482 (Fla. 1979), abrogated on other grounds, Jones v. State, 591 So.2d 911 (Fla. 1991); Rose v. State, 591 So.2d 195 (Fla. 4th DCA 1991). See, Melynda L. Melear, Intervening Causation as a Defense, 33, No. 1 Fla. Crim. L. J 6 (Fall 2002) (copy attached). Further, Donohue was decided wrongly and is distinguishable.

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

The State filed a motion in limine regarding "alleged intervening cause of death" (SR13 320-24) and while represented by counsel, testimony was taken from Drs. Constantini and

Tabry,[14] the cardiothorasic surgeons who operated on Peney, and Dr. Wright, a forensic pathologist (T7 868, 949-50, 1015). The three agreed the injuries to the vena cava and aorta were lethal; untreated, they are uniformly fatal (T7 885, 890-93, 896, 929-31, 937-39, 961-62, 964-67, 972-73, 975, 994, 998-99; T8 1027-28, 1049-50, 1060). Per Dr. Tabry, death is usually instantaneous when the vena cava is torn in the area Peney's was (T7 961-62, 964-67, 970, 972-75, 994).

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

The fact Dr. Constantini's suffered a heart attack during the operation was unknown to Dr. Tabry at the time as he thought Dr. Constantini was excusing himself because of cramps, so he

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

carried on with the surgery (T7 960-61). The doctors explained the testing done was required before operating, because Peney had been shot through the center of the chest and they needed to know the structures involved as such dictated the entry point (T7 876-80, 895, 913, 928-29, 932, 955-56, 959-60, 983-84, 988). The wound placement precluded simultaneous repair as the aorta injury was behind the heart which required entering the chest from the back/left side and the vena cava necessitated entry through the right (T7 876-82, 890-91, 914-18, 959-60). Cracking the chest from the mid-line could not be done as it required the use of a bypass machine and Heparin, a blood thinner counter-indicated as it would cause more bleeding (T7 883-84, 892-93, 915-18, 968-72, 1003-04).

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

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

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

In Rose, 591 So.2d at 199-200, evidence of malpractice was excluded by relying on Hallman and Barns v. State, 528 So.2d 69 (Fla. 4th DCA 1988). "[T]he evidence showed that the head injuries suffered by the child were themselves lethal and were caused by child abuse. Although medical treatment might have saved the child's life, it did not excuse the defendant's act." Id. at 196. "[B]ecause such evidence [is] irrelevant and

immaterial unless it could be shown that as a matter of law, the malpractice was the sole cause of death" it is inadmissible. Id. It was uncontroverted the victim suffered a lethal blow to her head and died of the injury. The "alleged failure to diagnose and treat this injury in no way contradicted the fact, that left untreated, it was a mortal wound." Id. at 200. "[A]s a matter of law, the subsequent alleged misdiagnosis and failure to treat was no defense to defendant's liability for the acts with which he was charged." Id. With the exception of Donohue, Florida law is clear, neither malpractice from an affirmative act nor a failure to act relieves a defendant of criminal responsibility where it was his action which produced a wound "dangerous to life."[15] Donohue is a departure from the settled law and cannot form a basis for reversal here.

Donohue claimed evidence of "mal-intubation" should have been admitted because the injuries were not life-threatening and the treatment may have contributed to the death. Id. at 125. The court found the evidence admissible by distinguishing Rose on two fronts. First, the injuries in Rose were life-

[15]Klinger v. State, 816 So.2d 697 (Fla. 2d DCA 2002); Nunez v. State, 721 So.2d 346 (Fla. 2d DCA 1998)(holding only were intervening negligence was sole, proximate cause of death will it relieve liability); State v. Smith, 496 So.2d 195 (Fla. 3d DCA 1986)(reinstating charges even though malpractice may have caused death); Karl v. State, 144 So.2d 869 (Fla. 3d DCA 1962).

threatening and second, the cases relied upon in Rose, did not involve the admissibility of evidence, but rather, the sufficiency of the evidence. Id. at 126. Donohue erred in its analysis of Johnson by asserting Johnson was not intended to apply to admissibility of evidence issues, but, instead, was limited to cases where the defendant was seeking an acquittal. Although Johnson argued death was caused by malpractice, it is unclear how the point was argued. While this Court noted "much of the brief" was devoted to the argument, it did not specifically address the evidentiary claim, opting for an announcement "...that, where the wound is in itself dangerous to life, mere erroneous treatment of it or of the wounded man suffering from it will afford the defendant no protection against the charge of unlawful homicide." Johnson, 59 So. at 895. This Court did not limit its holding to sufficiency of the evidence as other arguments were offered, but not discussed. Likewise, Hallman, 371 So.2d at 485 did not limit itself to a sufficiency of the evidence matter when opining, "even if the hospital's negligence had contributed to the victim's death, this fact would not entitle Hallman to a new trial on his conviction." Id. at 486. Donohue was decided wrongly[16] and is

[16]The Donohue court erroneously relied on Rivera v. State, 561 So.2d 536 (Fla. 1990); Vannier v. State, 714 So.2d 470 (Fla. 4th DCA 1998); Butts v. State, 733 So.2d 1097 (Fla. 1st DCA

not dispositive here.

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

If it were error to exclude the evidence, such was harmless. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). The defense was not that the doctors hastened Peney's death, only

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1999) for the proposition evidence tending to show reasonable doubt is admissible. Those defendants were attempting to show someone else committed the crime, not that they caused the injury, but through medical error death resulted. Both here and in Donohue, the defendants acknowledged involvement in the crimes, but were attempting to show that had different care been rendered, the result may have been different. Were this Court to permit the evidence suggested by Donohue, then any time a victim reaches a doctor before death, the defendant could reduce his criminal responsibility, as a result of the inability to save the victim. Such could not be the intent of Rivera or Vannier, and was not the intent in Johnson, Hallman, or Rose. Similarly, Buenaono v. State, 527 So.2d 194 (Fla. 1994) and Butts were misapplied in Donohue. Where the malpractice evidence is irrelevant to overturn a conviction or sustain dismissal of charges, it is irrelevant no matter what standard is used to determine the medical certainty the death was from a specific cause.

they did not save him. Dr. Perper, opined Peney had three potentially fatal injuries: (1) lung injury (not high survivability), (2) perforated aorta (very high mortality), (3) torn vena cava (most severe and "difficult to repair"). He did not recall anyone surviving a similar vena cava injury. "[T]he combination of the three [wounds] made this a definitely unsurvivable injury" (T32 5524-25). The jury heard Peney's dying declaration and testimony from Myers, and lay witnesses that Weaver shot Peney. Weaver also admitted shooting at Peney. The forensic and ballistic evidence proved it was Weaver's bullet which injured Peney. The overwhelming evidence was Weaver inflicted wounds, which in combination were "unsurvivable." The excluded testimony would not have altered the result and the conviction must be affirmed.

POINT VIII

CONDUCTING A JURY VIEW WAS PROPER (restated)

Weaver asserts it was error to grant a jury view. Under section 918.05, Florida Statues, the viewing is within the court's discretion and may be granted if it appears to serve a useful purpose. Thomas v. State, 748 So.2d 970 (Fla. 1999); Rankin v. State, 143 So.2d 193 (Fla. 1962). The court's ruling is presumed correct absent proof otherwise. Thomas, 748 So.2d at 983; Bundy v. State, 471 So.2d 9, 20 (Fla. 1985). The purpose

of a viewing is to "aid jurors in analyzing and applying the evidence." Rankin, 143 So.2d at 195. Where the scene remains the same, the jury's analysis may be aided. The court's decision met this criteria. It assisted the jury in analyzing the evidence and should be affirmed.

Weaver hid in Cliff Lake following the shooting and was captured on its western bank next to Evergreen Cemetery. While represented by counsel, Weaver objected to a jury view. The State asserted the viewing would assist the jury in its evaluation of the evidence and was necessary as the photographs were inadequate to capture the relevant distances involved and that the cemetery was not the focus of the viewing. The ability to see the cemetery and that the arrest site could not be reached without going through the cemetery were discussed. Weaver admitted the lake was in the cemetery and steps were taken not to highlight it. The court agreed, under the case facts a viewing was necessary (R8 966-68; SR15 775; T12 1820-37; T30 5174-81, 5209; T31 5378-80).

With counsel's assistance the parties planned the viewing, security, and logistics of moving to the various scenes. As the parties agreed, the court identified each location, east and west sides of the lake, the shooting site, and relevant landmarks. At each area, the jurors were permitted to walk

about in silence. (T30 5185-5211; T31 5372-84, 5419-31; T33 5634-37, 5643-45, 5651-55).[17]

Weaver complains the jury was able to view a cemetery and relies on U.S. v. Triplett, 195 F.3d 990 (8th Cir. 1999); U.S. v. Passos-Paternia, 918 F.2d 979 (1st Cir. 1990) and Hughes v. U.S., 377 F.2d 515 (9th Cir. 1967). Merely because the court was found not to have abused its discretion in denying views in cases where the crime scene was described sufficiently through photographic evidence, Triplett, 195 F.3d at 999; Hughes, 377 F.2d at 516, or where the boat scene was too dangerous for the jury to board, Passos-Paternina, 918 F.2d at 986, does not establish an abuse of discretion here. Weaver's court agreed the photos were insufficient to permit the jury to understand the distances discussed and analyze the evidence.[18] This was proper. Rankin, 143 So.2d at 195; Tompkins v. State, 386 So.2d

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[17]Weaver asserts Nick Bogert ("Bogert") put a microphone in his face. The court examined Bogert who explained he did not have a microphone, but had called to Weaver to see if he wished to talk. Bogert thought that he did not need prior approval to talk to Weaver as he was pro se. The court thought Bogert's actions inappropriate, but seemed to accept the apology (T38 6636-38).

[18]While Weaver claims the viewing was cumulative to the photographs, the record establishes otherwise. The State noted the photos failed to adequately depict the distances noted by witnesses, hence, the viewing would permit the jury to make a first-hand assessment and the evidence and would not be cumulative.

597 (Fla. 5th DCA 1980).

In spite of the fact a cemetery was visible, the view was proper. Weaver hid near the cemetery and the cite could not be reached except through the cemetery. Weaver should not be shielded from this fact. Cf. Henderson v. State, 463 So.2d 196, 200 (Fla.), cert. denied, 473 U.S. 916 (1985) (holding defendants should expect confrontation with evidence of their "accomplishments"). Weaver cannot escape the fact he secreted himself in a lake adjacent to a cemetery which was merely visible as part of the overall scene.

Even if the jury view was improper, such was harmless. DiGuilio, 491 So. 2d at 1139. The testimony of Weaver, Myers, Peney's dying declaration, and lay witnesses all establish Weaver shot Peney. Forensic and ballistics evidence confirmed this. The fact the jury saw first-hand Weaver hid near a cemetery does not establish a reasonable possibility it caused the verdict.

POINT IX

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

Weaver wanted to call Detective Macauley as a witness to Weaver's comments he was "sorry" and "it was an accident" (T33 5664-69). Citing sections 90.803(1)(2)(3), Florida Statute,

Weaver maintains the court erred in excluding these statements (IB 73-74). The claim is unpreserved and no error occurred as Weaver's statements were self-serving, exculpatory comments which did not fall within a recognized hearsay exception (T33 5790-5814).

Admissibility of evidence is within the court's discretion, and will be affirmed absent clear abuse. Ray, 755 So.2d at 610; Zack, 753 So.2d at 25; Trease, 768 So.2d at 1053, n. 2. At trial, Weaver argued, with the assistance of stand-by counsel, that his statements to Detective Macauley were against his penal interest and showed his state of mind, thereby, making them exception to the hearsay rule. The court excluding the evidence as self-serving hearsay. The statements did not fall under the section 90.803(18), Florida Statute exception to the hearsay rule (T33 5664-67, 5814).

Now, he claims the comments were admissible as either "spontaneous statements", "excited utterances" or "then existing mental, emotional or physical conditions" (IB 73), yet, he admitted he did not recall making the statements he wished to offer in evidence (T33 5809). Respecting the argument the statements were spontaneous or excited utterances, Weaver has not preserved the issue; it was not raised below. Steinhorst, 412 So.2d at 338.

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

Still, not only did the statements not fall under the section 90.803(1)(2)(3) exceptions, but they were excluded properly for their exculpatory, self-serving nature. Under section 90.803(18), a party may not present his own statements in his case in chief. See Charles W. Ehrhardt, Florida Evidence, section 803.18, at 800 (2002). In Christopher v. State, 583

So.2d 642 (Fla. 1991) the defendant sought the introduction of a statement he made to the witness. Construing section 90.803(18(a), it was determined: "the statute does not allow a party to introduce his own exculpatory hearsay statements. *See Fagan v. State*, 425 So.2d 214 (Fla. 4th DCA 1983) (defendant's self-serving hearsay statement inadmissible)." See, Jordan v. State, 694 So.2d 708 (Fla. 1997) (noting time between first admission of shooting and comment he did not intend to kill "only increase[d] the unreliability of the hearsay").

About 15 hours elapsed between the shooting and Weaver's comments to the booking officer (T33 5809). During that time, he spent the night in the lake, was arrested, confessed, and directed a reenactment. In spite of Weaver's recent admission he did not recall making the statement, he had time to contrive a defense, and was attempting to reduce his responsibility. There is no indicia of reliability for the after-the-fact comments. The statements do not qualify under the hearsay exceptions of sections 90.803(1)(2) and (3). Also, under section 90.803(18), the statements were exculpatory/inadmissible in Weaver case in chief.

Even if the court erred, such was harmless. DiGuilio, 491 So.2d at 1139. The jury had Peney's dying declaration, Weaver's testimony, Myers' account, and lay witness testimony, all of

which show Weaver turned, aimed, and shot Peney. The forensic and ballistics evidence confirm it was Weaver's bullet which mortally injured Peney. The jury was informed Weaver had asked if Peney wore a vest, where he was shot, and if he were alright (T26 4405-06, 4418-19, 4486, 4497-99). The fact the jury did not hear from the booking officer that Weaver said he was "sorry" and that "it was an accident" does not establish a reasonable possibility the jury would not have convicted had such evidence been presented. The conviction must be affirmed.

POINT X

THE CONFESSION WAS ADMISSIBLE (restated)

Claiming police misconduct during the interrogation Weaver asserts it was error not to have suppressed his statement.[19] The court correctly admitted the confession upon a finding of no police misconduct, but rather Weaver knowingly and intelligently waived his Miranda v. Arizona, 384 U.S. 436 (1966) rights.

The review standard is that "a presumption of correctness" applies to a court's determination of historical facts, but a *de novo* standard applies to legal issues and mixed questions of law and fact that ultimately determine constitutional issues. Smithers v. State, 826 So.2d 916 (Fla. 2002); Connor v. State,

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

803 So.2d 598 (Fla. 2001). "When, as here, a defendant challenges the voluntariness of his or her confession, the burden is on the State to establish by a preponderance of the evidence that the confession was freely and voluntarily given." DeConingh v. State, 433 So.2d 501 (Fla. 1983). "In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that there was coercive police conduct." State v. Sawyer, 561 So. 2d 278, 281 (Fla. 2d DCA 1990), citing Colorado v. Connelly, 479 U.S. 157 (1986). "The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained." Sawyer 561 So.2d at 281.

During the suppression hearing, the lead detectives, Weaver, defense expert Dr. Ofshe, and Officer Bronson testified. According to Abrams, at 7:45 a.m. on 1/6/96, he met Weaver at the cemetery adjacent to the west side of the lake as Weaver lay handcuffed. During Weaver's drive to the station, he asked "How's the cop?", but no one answered (T10 1471-78, 1556-57; T11 1761-62).

Palazzo and Weaver completed the Miranda form and Weaver

agreed to talk, but only off-tape.[20] Weaver confirmed he refused to be taped and told the police if they insisted on a recording, he needed a lawyer. Nothing was promised Weaver in return for his confession, nor was he threatened. He agreed to assist the police in finding the gun and doing a "walk-through" of the scene (T10 1481-88, 1494-98; T11 1574-76, 1609-20, 1631, 1717-29; T12 1771).

Several times on the day of his arrest, Weaver asked about Peney and whether he wore a vest. Although the police knew Peney had died, they did not disclose this, but redirected his attention elsewhere. They denied Weaver's allegation that he was told Peney was fine, and Weaver admitted initially the police did not give Peney's condition. Weaver was not informed of Peney's death as the police wanted a truthful statement and wanted him to continue talking. When Weaver saw blood in the area of the shooting, he again asked about Peney's vest and was told one was worn, but he had an injury to his side. Weaver

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

claimed he needed to know the officer's condition as it would impact on whether he gave a statement. Weaver asserted had he known Peney was dead, he would not have talked. (T10 1498-99; T11 1579-91, 1652, 1661, 1700-03, 1720-25, 1763-65, 1777-79).

Dr. Ofshe testified as a defense expert. He had not reviewed Weaver's police confession nor had he reviewed the audio/video tape of the walk-through, but had talked to defense counsel and read the suppression hearing testimony of Abrams, Palazzo, and Weaver. Of the 101 times Dr. Ofshe testified in criminal trials, **none** were for the State. Dr. Ofshe opined Weaver was manipulated and lied to, but cooperated out of fear of being beaten and hope of better treatment (T12 1867-68, 1879-90, 1895-98, 1906-07, 1911).

In ruling, the judge considered the witnesses' credibility and credited the testimony of Abrams and Palazzo in finding Weaver was given his Miranda rights. Also, Weaver "specifically conditioned" his talking to the police on the fact he not be recorded and this was "a valid condition." The court ruled the officers could testify "as to their recollection as to the statements made by the Defendant" both at the station and during the walk-through, but the tapes of those conversation could not be played because of Weaver's condition he would talk only if not recorded (T13 2028-29, 2033). The judge found "no

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

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

(T13 2030-33).

The court's factual findings are supported by the record and legal conclusions are proper. Moran v. Burbine, 475 U.S. 412

(1986) (finding constitution does not require suspect know and understand every possible consequence of Miranda waiver); Oregon v. Elstad, 470 U.S. 298, 316-17 (1985). Once Miranda warnings are given, official silence cannot cause a suspect to misunderstand the nature of his rights. See U.S. v. Washington, 431 U.S. 181, 188 (1977). As noted in Washington, a defendant who has been advised he has the right to remain silent is in a curious position to complain his statement was compelled. Id. There is no constitutional requirement a suspect be given all the information he may feel useful in making his decision or "might...affect his decision to confess." Moran, 475 U.S. at 422. The police have never been required to help a suspect decide whether or not to talk. Id. It has never been a constitutional requirement the police make sure the defendant's waiver was a prudent decision. Hence, the denial of the motion to suppress Weaver's oral statements was proper and should be affirmed.

However, if it were error, such was harmless as the jury heard Peney's dying declaration along with the accounts of Meyer's and the law witnesses who reported Weaver shot Peney. Such was confirmed by the ballistic and forensic evidence that Peney's blood was on weaver's bullet. Even absent Weaver's confession, there was sufficient evidence to prove Weaver's

guilt. Any alleged error was harmless beyond a reasonable doubt. DiGuilio, 491 So.2d at 1139.

POINT XI

PENEY'S DYING DECLARATION WAS ADMITTED PROPERLY (restated)

Alleging Peney's dying declaration presented through his twin brother Todd ("Todd") was inadmissible because its probative value was out weighed by its prejudicial effect and that identity was not at issue, Weaver seeks reversal. Admission of evidence is within the court's discretion and will not be reversed absent an abuse of discretion. Ray, 755 So.2d at 610; Zack, 753 So.2d at 25; Trease, 768 So.2d at 1053, n. 2. Under this standard and contrary to Weaver's position, the testimony was relevant, not unduly prejudicial, and admitted properly as a dying declaration.

Pre-trial, Weaver's counsel moved to preclude the admission of the dying declaration and to bar Todd from testifying. Weaver relied upon counsel's written motion in arguing to the court. The court ruled the testimony admissible as a dying declaration; Todd was the witness who was privy to the entire conversation. The ruling was based upon Todd's testimony he was with his twin brother at the hospital. They were very close sometimes communicating without speaking. Peney kept telling Todd he loved him, which was something he had never said before,

and that he was shot by the 5'10" white male suspect he was checking. The man had a black .357 gun. In severe pain, critically wounded, and scared, Peney knew he was dying. (T15 2284-90, 2296-2306).

The issue was revisited before Todd testified. During the discussion, Weaver stated he did not object to Todd giving the facts, but it was "highly prejudicial" because "there's no way to ask questions" on cross-examination "without making yourself look bad...." The court reaffirmed its pre-trial ruling (T31 5415-18).

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

The statement was relevant to the crime as Peney identified the person who shot him and the weapon used. The fact this data was disclosed to a twin brother should not preclude the State from using the probative evidence. Weaver, having killed a person with a twin brother should not be shielded from the truth of his actions. Cf. Henderson, 463 So.2d at 200 (holding defendant should expect to be confronted with evidence of "accomplishments").

Even if it were error, such was harmless. DiGuilio, 491 So.2d at 1139. Myers was with Peney when they stopped Weaver and was part of the chase. Further, Myers saw Weaver turn, aim, and fire upon Peney who fell immediately. This was confirmed by eye-witnesses. The bullet containing Peney's DNA was from Weaver's gun. Weaver admitted to the police confrontation and firing his weapon. The mere fact Peney's dying declaration, identified Weaver does not mandate reversal here. With the extensive evidence of Weaver's guilt the conviction should be affirmed.

POINT XII

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

Weaver argues the court erred in admitting evidence of the attempted armed burglary of the conveyance occupied by Graciela Ortiz ("burglary") as "inextricably intertwined" with the

murder. This Court will find the evidence was properly admitted to establish the entire context of the murder and other crimes. Moreover, even if this Court finds error, such was harmless.

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

It is well-established, admission of evidence is within the court's discretion and will not be reversed absent a clear abuse. Thomas v. State, 748 So.2d 970, 982 (Fla. 1999); Sexton v. State, 697 So.2d 833 (Fla. 1997); Heath v. State, 648 So.2d 660 (Fla. 1994). The burglary evidence was admissible under section 90.402, because it was "inextricably intertwined" with the charged crimes and necessary to prove the entire context of the murder.

In Griffin v. State, 639 So.2d 966, 968 (Fla. 1994), this Court distinguished between evidence admitted under section 90.404(2)(a), Florida Statutes - Williams rule evidence - and evidence admitted to establish the entire context of the charged crime and found "evidence of uncharged crimes which are

inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence." Coolen v. State, 696 So.2d 738, 742 (Fla. 1997). "Inseparable" or "inextricably intertwined" evidence includes evidence that is "inseparably linked in time and circumstance," Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990), and which is "necessary to fully describe the way in which the criminal deed happened," T.S. v. State, 682 So.2d 1202 (Fla. 4th DCA 1996). Admissible "inseparable crime" evidence "explains or throws light upon the crime being prosecuted" and allows the State "to present an orderly, intelligible case..." Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986). See Ferrell v. State, 686 So.2d 1324, 1329 (Fla. 1996). "Inseparable" crimes evidence clearly includes evidence describing the events **prior or leading up to** the crime. Zack, 753 So.2d at 16-17; Damren v. State, 696 So.2d 709 (Fla. 1997); Ferrell, 686 So.2d at 1324; Anderson v. State, 841 So.2d 390 (Fla. 2003); Consalvo v. State, 697 So.2d 805, 809 (Fla. 1996); Coolen, 696 So.2d at 742-43; Henry v. State, 649 So.2d 1361 (Fla. 1995); State v. Cohens, 701 So.2d 362 (Fla. 2d DCA 1997).

To admit only the facts of Peney's shooting would have painted an inaccurate and incomplete picture of the events surrounding the crime. Weaver's suspicious behavior, noted not

only by the police, but by private citizens, prior to and at the time he was observed and stopped by Peney, was interwoven with the earlier attempted burglary. The jury was entitled to know the context within which the crime was committed. Here, the record reflects from the time of the burglary to the homicide, Weaver was lurking surreptitiously and concealing a gun in his pants following the 8:00 p.m. burglary of Ortiz which was attempted at gunpoint, the same gun used to kill Penny. Ortiz reported the crime to the police who issued a radio BOLO. Near 10:00 p.m., King Irving saw a man wearing a shirt like Weaver's lurking near the bushes of the Gene Whiddon Vocational School. (SR15 403-23). At 10:30 p.m., Barbara Engle witnessed Weaver shoot Peney and Meyers testified he and Peney spotted Weaver near the Gene Whiddon Vocational School appearing nervous. While detaining Weaver just two hours and 1.6 miles from the burglary scene, he fled when Peney asked if he were armed. During this flight, Weaver turned, took a shooting stance, and fired upon Peney, killing him. Weaver used the same gun for both crimes. The court properly admitted the evidence of the burglary as "inextricably intertwined" with the murder. The homicide was the result of Weaver's continued fleeing from the site of the burglary to his car, which was interrupted by Peney's detention.

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

Finally, even if error, the admission of the burglary evidence was harmless and there is no reasonable probability it affected the outcome of this case. DiGuilio, 491 So. 2d at 1139. The evidence establishing Weaver shot and killed Peney was overwhelming. In addition to eyewitnesses, ballistic, and forensic evidence proving Weaver killed Peney, Weaver admitted he fired his gun in Peney's direction so he could see the flash. Consequently, there is no possibility the challenged testimony

affected the verdict.

POINT XIII

THE NEW TRIAL REQUEST WAS DENIED PROPERLY (restated)

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

In considering the motion for new trial, where Weaver relied upon his written motion, the court noted it had addressed the issues raised both before and during the trial and relied upon those rulings in denying a new trial (R11 1278, 1334; T38 6750-52). With respect to the challenge to the court's rulings on defense (1) continuance, (2) confession, and (3) motion in

limine regarding the attempted armed burglary of a conveyance, Weaver points to nothing more than his argument raised in the individual appellate points (IB 83-84 n. 35-37). The State relies on and reincorporates its analysis presented in Points IV, X, and XII, and thereby, submits the record establishes the court did not abuse its discretion in those matters. Hence, *a fortiori,* there is no basis for a new trial. Wike v. State, 813 So.2d 12, 22 (Fla. 2002)(rejecting claim of cumulative error because no individual errors occurred); Downs v. State, 740 So.2d 506 (Fla. 1999); Zeigler v. State, 452 So.2d 537 (Fla. 1984), sentence vacated on other grounds, 524 So.2d 419 (Fla. 1988); Chandler v. Dugger, 634 So.2d 1066 (Fla. 1994).

Turning to the challenge to proof of premeditation, the motion was denied properly as the weight of the evidence proved Peney was killed with premeditation.[21] In Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), this Court held the consideration in resolving a motion for new trial was not the sufficiency, but the weight of the evidence and the weight is a somewhat subjective concept. See Florida Rule of Criminal Procedure, 3.600(a)(2).

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

As this Court is well aware, it announced and defined the elements of premeditation in Sireci v. State, 399 So.2d 964, 967 (Fla. 1981). See Woods v. State, 733 So. 2d 980, 988 (Fla. 1999); Jackson v. State, 575 So. 2d 181 (Fla. 1991). Weaver's actions here amounted to premeditation. The evidence established Weaver knew he would be arrested when Peney discovered the concealed firearm, thus, he took off running. Recognizing, Peney was gaining on him, and was approximately 25 feet behind, Weaver, pivoted, brought his arms up "point blank" and fired one round from his .357 revolver directly at Peney, hitting him in the chest (T29 4881-82). Although he claimed he did not intend to kill, but merely to frighten the officers, the jury and court were permitted to reject Weaver's excuse. His actions as witnessed by Myers and other lay witnesses established premeditated murder from the fear of arrest, the desire to escape, the decision to produce a .357 revolver, aim, and fire it, hitting Peney in the chest. Evans, 838 So.2d at 1095 (finding premeditation in part on fact defendant aimed gun at victim and fired single shot); Philmore v. State, 820 So.2d 919, 931-32 (Fla. 2002) (recognizing single gunshot to head shows premeditation). The motion for new trial was denied properly.

Also, there was sufficient evidence of aggravated assault.

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

POINT XIV

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

Weaver's first challenge to his death sentence is that the court improperly restricted his presentation of evidence and counsel's penalty phase closing argument by sustaining the

State's objection to counsel's referencing to/reading from a newspaper article about a Texas murder (T38 6660-61).[22] Defense counsel argued it was admissible as the jury's sentencing decision would be based on comparing Weaver with other death row inmates (T38 6660). This Court has recently rejected this argument in Hess v. State, 794 So.2d 1249 (Fla. 2001), holding the court erred by allowing counsel to discuss Ted Bundy, Jeffrey Dahmer, and Charles Manson finding the issue controlled by Herring v. State, 446 So.2d 1049 (Fla. 1984), receded from on other grounds, Rogers v. State, 511 So.2d 526 (Fla. 1987). This Court noted "there is no requirement in [Lockett v. Ohio] for the admission of evidence regarding the circumstances and sentences in other death penalty cases." Hess at 1269. It is not relevant for the jury to consider the cases of other death row inmates because that relates to sentence proportionality, which is an appropriate consideration for the trial court and this Court, but not for the jury. It was irrelevant for the jury to consider the Texas case here.

Weaver's argument the court erred in "reading" two letters

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

from the public asking him to impose death, but not reading law review and other articles submitted by former counsel, is flawed. This issue is not preserved. Steinhorst, 412 So. 2d at 338. Counsel never argued the court should read these articles because it had inadvertently read the two letters from the public.[23] To the contrary, when asked for his position, defense counsel **took no position** responding "[j]udge, it's a law review article from Boston University Law review. If you have an interest in reading it, that's fine. Whatever, you want to do is fine with me. I've made my arguments in my [sentencing] memo." Defense counsel did request the court not read any more letters from the public and the court explained his secretary was screening his mail (ST1 7-10). Even if the issue were preserved, it is meritless. The court read the letters inadvertently and did not consider them in ruling. There is no authority requiring him to read such materials.

Weaver also claims the court failed to properly consider and weigh all the mitigating evidence. Campbell v. State, 571 So. 2d 415 (Fla. 1990), established the relevant review standards for mitigating circumstances: (1) whether a circumstance is truly mitigating is a question of law, subject to de novo review

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

by this Court; (2) whether a mitigator has been established by the evidence is a question of fact and subject to the competent substantial evidence standard; and (3) the weight assigned to a mitigator is within the court's discretion, subject to the abuse of discretion standard. Kearse, 770 So. 2d at 1134 (observing whether particular mitigator exists and weight assigned are within court's discretion); Trease, 768 So. 2d at 1055 (receding in part from Campbell and holding though a court must consider all mitigation it may assign no weight to established mitigator).

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

The court found Weaver established the statutory mitigator of "no significant history of prior criminal activity" (little weight) and rejected Weaver's "good employment record,"

"contribution to society/charitable and humanitarian deeds," "good parent" and "religious devotion" (R 1466-1473). The "good employment record" was found to be non-statutory mitigation of moderate weight. The three other statutory factors were rejected as not established by the greater weight of the evidence (R 1466-73). Regarding non-statutory mitigation, the court found Weaver's "cooperation with the police" (moderate weight) and adaptation to incarceration/future value to society (little weight) had been established, but rejected the offense circumstances, "potential for rehabilitation," "sorrow over the victim's injury and death," "pretrial and trial conduct," and any other mitigating circumstance within the court's knowledge, as not established by the greater weight of the evidence (R 1473-78).

Weaver argues the court erred by rejecting certain mitigators as not established by the greater weight of the evidence and abused its discretion regarding the weight assigned to the mitigation found. While aggravators must be proven beyond a reasonable doubt, Geralds v. State, 601 So. 2d 1157 (Fla. 1992), mitigators are "reasonably established by the greater weight of the evidence." Campbell, 571 So. 2d at 419-20 (Fla. 1990); Nibert v. State, 574 So. 2d 1059 (Fla. 1990). In analyzing mitigation, the judge must (1) determine whether the

facts alleged as mitigation are supported by the evidence; (2) consider if the proven facts are capable of mitigating the punishment; and if the mitigation exists, (3) determine whether it is of sufficient weight to counterbalance the aggravation. Rogers, 511 So. 2d at 534. Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991); Stano v. State, 460 So. 2d 890, 894 (Fla. 1984). Resolution of evidentiary conflicts is the trial court's duty; "that determination should be final if supported by competent, substantial evidence." Id.

There is substantial, competent evidence supporting the court's rejection of Weaver's "contribution to society/charitable and humanitarian deeds" as a mitigator. The only evidence in support of this mitigator came from family and friends and was general and conclusory in nature. As the court noted, most of the testimony was extremely remote in time (R 1469-70). Similarly, there is substantial, competent evidence supporting the rejection of the "good parent" mitigator. As the court found, Weaver "abdicated his parental responsibility to [his son] Nicholas, by quitting his job where he was capable of financially supporting his son, leaving Nicholas in North Carolina, and ceasing to provide the daily care and commitment

of love to the child, in order to aimlessly travel." (R 1470). The record also supports rejection of Weaver's "religious devotion." Though there was testimony about his religious practices in high school, the record shows thereafter, Weaver was convicted of breaking, entering and larceny of a hotel, larceny of a vehicle, speeding, possession of drug paraphernalia, possession of marijuana, DUI, reckless driving, and illegal discharge of a firearm on Gamelands. Also, Weaver conceived a child out-of-wedlock and abandoned him as a toddler. This behavior does not show a continuing and abiding attachment to religion (R 1470-71).

The court's rejection of Weaver's "potential for rehabilitation" is supported by substantial, competent evidence. Weaver points to testimony from his family and friends "that he had a good prospect for rehabilitation and that he had been friendly and helpful to others and good with children," as proving mitigation, but fails to acknowledge he had been afforded an opportunity for rehabilitation after the series of minor offense, but failed to improve his conduct. Weaver was now found guilty of the "ultimate crime," the murder of an officer.

Likewise, the evidence Weaver asked whether Peney wore a vest (T 1590, 1955) and offered a tearful apology to the

victim's family, does not establish the "remorse" mitigator. As the court found, Weaver's apology was for the victim's family having to endure a trial and for the loss of their son; Weaver never admitted shooting Peney. Further, the court noted Weaver's steadfast claim that it was Myers' bullet that killed Peney served to aggravate the family's grief. The court found Weaver's sorrow to be over his own predicament and noted he expressed no remorse during the guilt or penalty phase. The court questioned the sincerity of Weaver's apology and found it calculated to generate sympathy for himself. The court also found Weaver's concern over whether the victim was wearing a bullet proof vest to be a subtle inquiry to determine the nature and extent of the charges he ultimately faced. Finally, the court properly rejected Weaver's "conduct pretrial and during trial" as a mitigator. Weaver's trial behavior and ability to get along and be respectful in court was attributed to the fact he was given little chance to act out or misbehave. Weaver wore a stun belt and there was extensive security in the courtroom.

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

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

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

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

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

> In the scheme of things, how does the (1) merciless gunning down and murder of this young police officer, in full uniform, while discharging his public duties, on a heavily traveled road, in full public view, and

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

(T 1488-89). In Zeigler, this Court affirmed an override where the defendant had similar mitigation to Weaver: (1) no significant criminal history; (2) good prison record; (3) church/community involvement; and (4) good character. This Court found the mitigation "minuscule in comparison with the enormity of the crimes committed. The defendant not only murdered his own wife in order to obtain insurance proceeds ... but also murdered three other people in an elaborate plan to cover up his guilt." Id. 131.

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

incident and they worked together managing property.

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

Hardy is likewise inapposite. The defendant there was 18, had been physically and emotionally abused as a child, with an impoverished upbringing, and shot himself in the head, inflicting brain damage, after murdering the police officer. Weaver experienced none of these circumstances. Caruso is inapplicable because the defendant may have been on drugs and committed the murders of his elderly neighbors in an irrational, drug-induced frenzy. That factor coupled with his age, non-violent criminal history, testimony that he was a loving person and good employee were found to be a reasonable basis to support the jury's recommendation. Again, there are no similar facts here. Fead (holding several valid mitigators supported life recommendation: (1) under influence of alcohol; (2) under extreme mental and emotional distress; (3) hard worker and supported family; and (4) model prisoner); Ramirez (holding mitigation defendant was subjected to sexual abuse, physically abused by mentally ill father, and was source of emotional

support and encouragement for his family, provided reasonable basis for life recommendation).

Finally, Weaver's death sentence is proportional. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)(holding proportionality is not comparison between numbers of aggravators and mitigators, but is comparison to other capital cases). This Court's function is not to reweigh the aggravators and mitigators, but to accept the trial court's weighing. Bates v. State, 750 So. 2d 6 (Fla. 1999). For proportionality, the State relies upon Franqui v. State, 804 So.2d 1185 (Fla. 2001) (murder of police officer by shooting him in hip during bank robbery, where there were three aggravators--prior violent felony, felony-murder and victim was officer, merged with avoid arrest and hinder law enforcement); Burns v. State, 699 So.2d 646 (Fla. 1997) (murder of officer where avoid arrest and hindering law enforcement aggravators were found, but merged into one and only one statutory mitigator of no significant criminal history was found); Armstrong v. State, 642 So.2d 730 (Fla. 1994) (murder of officer during robbery with three aggravations – prior violent felony, felony-murder merged with pecuniary gain, and victim was officer, merged with avoid arrest and hinder law enforcement and defendant claimed brain injury, but failed to show how it affected behavior and presented several nonstatutory

mitigators); Gonzalez v. State, 786 So.2d 559 (Fla. 2001).

Weaver argues Florida's capital sentencing is unconstitutional warranting vacation of his sentence. He challenges the failure to allege the aggravators in the indictment and to have the jury make specific findings regarding the aggravators.

1. The Ring issue is not before this Court properly- Only one (1) of Weaver's two challenges to the validity of Florida's capital sentencing scheme in section 921.141, Florida Statutes is preserved. Steinhorst, 412 So. 2d at 338. Here, while Weaver argued his Sixth Amendment rights were violated by the failure to allege the aggravating factors in the Indictment (R 979-81), he never argued his Sixth Amendment right to a jury trial was violated by the jury's failure to make specific findings regarding aggravation. While Ring v. Arizona, 122 S.Ct. 2428 (2002) was decided last year, the issue is neither new nor novel. Instead, the Sixth Amendment claim, or a variation of it, has been known prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing); Hildwin v. Florida, 490 U.S. 638 (1989)(noting case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida" and

determining it does not); Spaziano v. Florida, 468 U.S. 447 (1984). The basis for the claim of constitutional error has been available since before Weaver was sentenced. His claim that his Sixth Amendment right to a jury trial was violated by the jury's failure to make specific findings regarding aggravator is not preserved and is barred from review.

2. Ring does not apply to Florida-This Court has rejected the argument Ring implicitly overruled prior opinions upholding Florida's sentencing scheme. Mills v. Moore, 786 So.2d 532 (Fla. 2001) (rejecting claim Apprendi v. New Jersey, 430 U.S. 466 (2000) invalidates Florida's capital sentencing); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) (noting only Supreme Court may overrule its own decision); King v. Moore, 831 So. 2d 143 (Fla. 2002).

Ring does not apply because Florida's death sentencing is very different from the Arizona statute at issue in Ring. The statutory maximum sentence under Arizona law for first-degree felony murder is life imprisonment. Ring, 122 S.Ct. at 2437. In contrast, this Court has held that the statutory maximum sentence for first-degree murder in Florida is death and has repeatedly denied relief requested under Ring. See Porter v. Crosby, 28 Fla. L. Weekly S33 (Fla. Jan. 9, 2003); Duest v. State, SC00-2366 (June 26, 2003); Pace v. State, 28 Fla. L.

Weekly s415 (Fla. May 22, 2003); Jones v. State, 28 Fla. L. Weekly s395 (Fla. May 8, 2003); Chandler v. State, 28 Fla. L. Weekly, s329 (Fla. April 17, 2003); Butler v. State, 842 So. 2d 817 (Fla. 2003); Grim v. State, 841 So. 2d 455 (Fla. 2003); Anderson, 841 So. 2d at 390; Cox v. State, 819 So. 2d 705 (Fla. 2002); Conahan v. State, 28 Fla. L. Weekly S70a (Fla. January 16, 2003); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Doorbal v. State, 837 So.2d 940 (Fla. 2003); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Bottoson v. State, 813 So.2d 31 (Fal. 2002), cert. denied, 122 S.Ct. 2670 (2002); Hertz v. State, 803 So.2d 629 (Fla. 2001), cert denied, 122 S.Ct. 2673 (2002); Looney v. State, 803 So.2d 656 (Fla. 2002); Shere v. Moore, 803 So.2d 56 (Fla. 2002); Brown v. Moore, 800 So.2d 223 (Fla. 2001); Mann v. Moore, 794 So.2d 595 (Fla. 2001); Mills, 786 So.2d at 536-38. Because death is the statutory maximum penalty for first-degree murder, Ring does not impact Florida’s capital sentencing.

Furthermore, Weaver’s claim that the death penalty statute is unconstitutional for failing to require the charging of the aggravators in the indictment is without merit. This issue was not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these

claims. Sweet v. Moore, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); Cox, 819 So.2d, n.17. Moreover, this Court has rejected these arguments post-Ring. See Porter, 28 Fla. L. Weekly S33 (rejecting argument aggravators must be charged in indictment, submitted to jury, and individually found by unanimous verdict); Doorbal, 837 So.2d at 940.

3. Override-Although Weaver challenges the propriety of his override sentence post-Ring in mere conclusory unsupported terms which should be found insufficient to warrant appellate review, Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived), the State addresses the issue and submits Ring does not invalidate Florida's override provision. The rejection of the jury's recommendation was based upon the determination it was flawed as to the weighing responsibilities, not as to whether an aggravator was proven. The jury vote represents the final jury determination as to the appropriateness of the sentence in the case, and does not dictate what the jury found with regard to aggravators. As noted above, the override meets the Tedder standard, thus, there is a constitutionally sound basis to support the court's rejection of the life recommendation. With

such a finding, the override becomes a nullity and the capital defendant is not permitted to seek a second jury review of his sentence. Nonetheless, death eligibility in Florida occurs at the end of the guilt phase, and a flawed recommendation implicates neither the Sixth nor Eighth Amendments.

In Spaziano, the Supreme Court rejected the claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death. That Court noted it was addressing whether "given a jury verdict of life, the judge may override that verdict and impose death." Spaziano 468 U.S. at 458 and expressly upheld, against a Sixth Amendment challenge, the judge's ability to impose a sentence of death, even if the jury recommends life imprisonment, stating: "[t]he fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause...does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial." Id., at 459. In so holding, the Court noted Sixth Amendment protections have never been read to include a binding jury decision on sentencing and denying a jury trial for sentencing does not thwart the goals of "measured, consistent application and fairness to the accused" and having the sentencer consider the special circumstances of a particular defendant. Hildwin (reading Spaziano as upholding override in

face of Sixth Amendment challenge); Parker v. Dugger, 498 U.S. 308 (1991) (reaffirming Spaziano and constitutionality of Florida's overrides); Harris v. Alabama, 513 U.S. 504 (1995) (upholding Alabama's override provision). The Supreme Court has declined to disturb its prior decisions and as in Bottoson, 833 So. 2d at 695, only the Supreme Court may overrule its decisions.

In Martin v. State, 2003 Ala. Crim. App. LEXIS 136 (Ala. May 30, 2003) and Lee v. State, 2003 WL 21480428 (Ala. Crim. App. June 27, 2003) (noting Ring and Apprendi do not require jury weigh aggravators and mitigators), Alabama appellate courts held on direct appeal from an override that Ring does not conflict with Harris v. Alabama, 513 U.S. 504 (1995), which upheld Alabama's judicial-override procedure. The court in Martin reasoned:

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

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

Martin, 2003 Ala. Crim. App. LEXIS 136. Moreover, the Alabama Supreme Court has agreed Ring did not invalidate Alabama's hybrid capital sentencing scheme, which is similar to Florida's, including its override provision. Moody v. State, 2003 WL 1900599 (Ala. April 18, 2003); Duke v. State, 2003 WL 1406536 (Ala. March 21, 2003); Ex parte Hodges, 2003 WL 1145451 (Ala. March 14, 2003); Stallworth v. State, 2003 WL 203463 (Ala. Jan. 31, 2003); Ex parte Waldrop, 2002 WL31630710 (Ala. Nov. 22, 2002). These cases recognize the narrowness of the holding in Ring and conclude Ring does not address judicial overrides:

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

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

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

4. Prior violent felony and felony murder aggravators-One of Weaver's two aggravators was due to prior convictions. Weaver was convicted of the aggravated assault of Myers and resisting Officer Meyers with violence. As the court noted, these contemporaneous convictions on a different victim constituted prior violent felonies. Windom v. State, 656 So.2d 432 (Fla. 1995). Ring did not alter the express exemption in Apprendi for the fact of a prior conviction ("other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."). Thus, even if Ring were found to apply, the requirements of same have been met – the jury found the contemporaneous convection of

[24]Indiana's legislature has eliminated overrides

aggravated assault and resisting arrest with violence.

ISSUED RAISED BY APPELLEE/CROSS-APPELLANT ON CROSS-APPEAL

ISSUE I

SEVERING OF THE ATTEMPTED ARMED BURGLARY COUNT AND PRECLUDING THE STATE FROM ARGUING FELONY MURDER WAS ERRONEOUS.

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

Severance should be granted only when two or more offenses are improperly charged in a single indictment or when severance of properly joined offenses is necessary to achieve a fair trial. Fla.R.Crim.P. 3.152(a)(1) and (2); Bundy v. State, 455 So.2d 330, 345 (Fla. 1984). Under Florida Rule of Criminal Procedure 3.150, offenses are properly charged in a single indictment when they "are based on the same act or transaction or on two or more connected acts or transactions." The phrase

"connected acts or transaction" in rule 3.151(a) means consolidated offense must be "connected in an episodic sense." Livingston v. State, 565 So.2d 1288 (Fla. 1988). In Ellis v. State, 622 So.2d 991 (Fla. 1993), this Court explained in order for joinder to be appropriate, the crimes must be linked in a significant way. The passage of time between the crimes does not, in and of itself, require severance. Brunner v. State, 683 So.2d 1129 (Fla. 4th DCA 1996).

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

The events surrounding the burglary occurred at approximately 8:00 p.m. Ortiz testified Weaver approached her car door, grabbed the handle and pointed a gun at her. Running

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

a red light, she fled. A BOLO was issued based upon Ortiz's description. Near 9:30 p.m. and .6 miles from the scene, Hinkey Wilcher saw Weaver lurking in the bushes shoving what she thought was a gun into his pants. Close to 10:00 p.m., King Irving saw a man near the bushes of the Gene Whiddon Vocational School where a shirt like Weavers. Shortly thereafter, Peney and Myers detained the nervous Weaver near the vocational school before he fled when asked if he had a weapon. At 10:30 p.m., Ms Engle saw Peney's shooting and identified Weaver as the gunman. The homicide occurred 1.6 miles from the burglary.

Under these facts the burglary was an integral part of the criminal episode which culminated in Peney's murder. Burglary is an enumerated offense for purposes of felony murder under section 782.004(a)(2)e, Florida Statutes. A person is guilty of felony murder if the death occurred as a consequence of and while the defendant was engaged in the commission, attempt, or escape from the immediate scene of the underlying felony. Campbell v. State, 227 So.2d 873 (Fla. 1969) (holding "[a]lthough separated by time and space from the original (robbery) felony...the death of Deputy Fish was the inevitable result of and an integral part of the same transaction); Griffin v. State, 639 So.2d 966, 972 (Fla. 1994). In Parker v. State, 570 So.2d 1048 (Fla. 1st DCA), the court found in the case of

flight, a most important consideration is whether the fleeing felon reached a "place of temporary safety." The court found the robbery was not completed at the time of the officer's death even though the time from the robbery to the murder was about an hour, occurred several miles away, and after the defendants got gas and directions, because all were done to accomplish the goal of fleeing to safety. It was reasoned there was a causal relationship between the robbery and homicide which occurred during the flight.

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

Also apparent, is the error in precluding the State from presenting felony murder as a theory of guilt as there was a clear causal connection between the crimes. There is no

evidence Weaver had reached a place of safety. In the event this Court reverses the conviction, it must reverse the court's rulings severing Count V from the indictment and preventing felony murder theory.[26]

ISSUE II

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

The court abused its discretion by suppressing the audio and video tapes of Weaver as he had waived his Miranda rights and had no expectation of privacy as he sat in the police cruiser or in the forensic lab and spoke with detectives describing his actions on the night of the murder. While the detectives were permitted to relate Weaver's oral admissions, the jury was deprived of the more explicit, demonstrative actual voice and video recordings. Should the conviction be reversed, these tapes should be admitted.

Admission of evidence is within the court's discretion and its ruling will be affirmed unless there has been an abuse. Ray, 755 So. 2d at 610; Zack, 753 So. 2d at 25. The court erred by ignoring the fact Weaver had no expectation of privacy in the

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[26]In the event of a reversal, the State must be permitted to argue for the felony murder aggravator as it need not charge and convict a defendant of the underlying felony in order to prove the aggravator. Pietri v. State, 644 So.2d 1347 n. 11 (Fla. 1994); Occhicone v. State, 570 So.2d 902 (Fla. 1990).

cruiser. Although he had asked not to be taped in the interview room, once he entered the cruiser, walked the crime scene in public, or went to the forensic lab, he had no expectation of privacy and his statements/actions could be recorded and used at trial.

The waiver of rights and subsequent confession at the police station were not recorded as Weaver refused to talk on tape even though he was told it would be more accurate than the officers' notes. Although not informed that talking off-tape was incriminating, Weaver was told the officers were taking notes of the conversation in the interview room which would be used against him. After the interrogation, Weaver agreed to accompany the police on a walk through of the crime area. Arrangements were made to surreptitiously tape the walk through. Pre-trial, Weaver asked that his statements and the corresponding tapes be suppressed. The State countered that the Miranda waiver was proper and Weaver had no privacy expectation. The court found no police misconduct, and concluded Weaver's Miranda waiver was knowing, intelligent, and voluntary (T10 1488-90, 1497-98; T11 1563-68, 1573, 1589, 1612-14, 1624-27, 1631, 1648-52, 1709-16; T12 1774-75; T13 1956-2010, 2011-33; SR15 689-94). In addition to the following, the State reincorporates its response to Point X as support.

Florida must follow the law announced by the Supreme Court with respect to Fourth Amendment issues. Perez v. State, 620 So.2d 1256, 1258 (Fla. 1993); Bernie v. State, 524 So.2d 988 (Fla. 1988). The Fourth Amendment protects people rather than places, but "the extent to which the Fourth Amendment protects people may depend upon where those people are." Minnesota v. Carter, 525 U.S. 83 (1998) (drawing distinction between overnight guest who has privacy expectation and daily visitor who does not). For there to be a legitimate expectation of privacy, the defendant must show he has a subjective expectation his activities would be held private and his expectation was "'one that society is prepared to recognize as reasonable.'" Bond v. United States, 529 U.S. 334 (2000); Katz v. U.S., 389 U.S. 347, 360 (1967) (Harlan, J. concurring). There is no reasonable expectation of privacy in a police cruiser. U.S. v. McKinnon, 985 F.2d 525 (11th Cir. 1995); State v. Smith, 641 So. 2d 849 (Fla. 1994); State v. McAdams, 559 So. 2d 601 (Fla. 5th DCA 1990); Brown v. State, 349 So. 2d 1196 (Fla. 4th DCA 1977);. Even where the suspect has invoked his right to remain silent, his conversation in a jail holding cell may be taped and used at trial, where the State fostered no expectation of privacy. Larzelere v. State, 676 So. 2d 394 (Fla. 1996).

The State did not foster an expectation of privacy. While

it agreed not to tape Weaver in the interview room, it made no pact respecting the police car, crime scene walk through, or forensic lab. From the outset, Weaver was told all he said could be used against him. He did not have a reasonable expectation of privacy and the court erred in suppressing the tapes.

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

ISSUE III

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

Weaver filed a motion in limine to exclude firearm evidence found in his car; the State objected (R5 537-54; T4 505-15). The court granted the motion to the extent the evidence not

associated with a .357 gun was not admissible. This ruling was an abuse of discretion as the evidence (firearms, ammunition, pawn tickets, scopes, books, etc.) was relevant to show identity, motive, intent, knowledge of and expertise in weaponry, and lack of mistake. Should the conviction be reversed, on retrial, the State should be able to admit all the evidence collected from Weaver's car.

Admission of evidence is within the court's discretion. Ray, 755 So.2d at 610. Such discretion was abused by excluding evidence which would prove identity and lack of mistake by Weaver in his deliberate shooting of Peney through his marksmanship and knowledge of ammunition (reloads ammunition, keeps velocity records, and logs distances traveled by reloads). Weaver was not someone who just found a gun and was unfamiliar with how it handled or the damage it could cause. The arsenal he had in his car put the episode in context as well as his ability to spin, aim, and fire accurately at his pursuer. The material was inextricable intertwined with the initial burglary and the ability/reason to commit the subsequent homicide. Bryan v. State, 533 So.2d 774 (Fla. 1988) (approving admission of evidence of prior robbery to establish possession of murder weapon); Irizarry v. State, 496 So. 2d 822 (Fla. 1986) (concluding it was proper to admit machetes even though they

were not murder weapon as they showed defendant favored machetes as tools/weapons); Harris v. State, 177 So. 187 (Fla. 1937) (concluding admission of gun found in defendant's car was probative although not same caliber as murder weapon); Irving v. State, 627 So. 2d 92 (Fla. 3d DCA 1993); Dowell v. State, 516 So. 2d 271 (Fla. 4th DCA 1987). This evidence should have been admitted.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Richard L. Rosenbaum, Esq. 350 East Las Olas Blvd., Suite 1700, Las Olas Centre II, Fort Lauderdale, FL 33301 on September 2, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on September 2, 2003.

_____
LESLIE T. CAMPBELL