IN THE SUPREME COURT OF FLORIDA

THEODORE ROBERT BUNDY,

Appellant,

v. CASE NO. 57,772

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

JIM SMITH
Attorney General

DAVID P. GAULDIN
Assistant Attorney General

The Capitol, Suite 1502
Tallahassee, FL 32301
(904) 488-0290

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STATEMENT OF THE CASE AND FACTS

Issues A and B:
Jury Selection

The following facts concerning jury selection are crucial to this Court's determination of Appellant's issues "A" and "B", the alleged prejudice inuring from the trial court's failure to close certain pretrial hearings and the alleged deprivation of Appellant's right to be tried in the county where he committed his crimes.

The jury selection commenced in Miami, Florida, on Monday, June 25, 1979, and was concluded there on Saturday, June 30, 1979, with the selection of the final alternate juror. (R-3928-5652). Extraordinary precautions were taken by the trial court to ensure that pretrial publicity did not taint the jurors.

The trial court issued orders to all parties to refrain from unnecessary outside comments. (R-3949-3950). According to Appellant's trial counsel Good, "Very luckily, venue was changed," a reference to the change of the trial from Tallahassee, Florida, to Miami, Florida. (R-3943). Potential jurors were first voir dired generally and then individually. (R-3971). Both sides stipulated that the trial court could voir dire the potential jurors collectively. (R-3975).

To further ensure that Appellant received fair and unpublicity-tainted jurors, the trial court ruled that if necessary, additional peremptory challenges would be granted and that Appellant and his counsel could consult with Dr. Spillman, an "expert consultant in jury selection", who was allowed to remain at counsel table throughout the jury selection process. (R-3932-3944). Both sides were given ten peremptory challenges apiece. (R-4735).

Representative general questions that the court asked the potential jurors may be found at pages 3975-3979, and representative individual voir dire questions asked by the parties may be found at pages 4033 and 4090 of the record.

In alphabetical order, the jurors who rendered Appellant's verdicts were: 1. James L. Bennett, 2. Dave A. Brown, 3. Robert Corbett, 4. Bernest Donald, 5. Mazie Edge, 6. Ruth Hamilton, 7. Floy C. Mitchell, 8. Mary K. Russo, 9. Alan Smith, 10. Estela Suarez, 11. Vernon Swindle, 12. Rudolph E. Treml (foreman). (R-9782-9783).

Because of their importance to the argument in issues A and B, the individual voir dire of each will be discussed separately.

James L. Bennett

Mr. Bennett first makes his appearance in the record at 5278 and was individually voir dired at pages 5463-5486.

While Mr. Bennett had read something about the "Bundy case," he could not, without prompting, recall any of the facts about the case. (R-5468). He didn't know about the specifics about the crime or about Appellant's personal life but he did believe that there were teeth marks "or something" found on the victims. (R-5475-5477). Mr. Bennett thought that there had been comparisons made of these teeth marks but he did not know the results of these comparisons. (R-5477). As will be discussed _infra_, Mr. Bennett was the only _actual juror_ who had any knowledge at all that teeth marks were involved in this case.

Mr. Bennett had no opinion as to the guilt or innocence of Appellant, promised to follow the court's instructions, wouldn't be swayed by anyone else's opinion, wouldn't be swayed by matters which he may have read, and wouldn't be influenced by anything that he had heard about the case outside of the courtroom. (R-5466). Any details that he knew about the case prior to serving on the jury he promised he could put out of his mind, as well as be fair, and render an opinion based on the evidence. (R-5478-5479).

Importantly, _the defense team did not challenge Mr. Bennett for cause_ or exercise one of its remaining peremptory challenges to remove him. (R-5487).

Dave A. Brown

Mr. Brown makes his first appearance in the record at 5040 and was individually voir dired at pages 5231-5346.

Mr. Brown had heard about the case for the first time only a week prior to the jury selection process; he could not remember what he had heard or read. (R-5232; 5239). Mr. Brown had heard some conversations between people going in and out of the courthouse but could not recall the nature of these conversations. (R-5233). Mr. Brown had heard nothing else other than that which has already been detailed, and asserted that he could render a fair verdict. (R-5233-34). Mr. Brown stated that he could put aside anything he might have read in the paper about this case. (R-5240).

Robert Corbett

Mr. Corbett first makes his appearance in the record at 4830 and was individually voir dired at pages 5004-5031.

Mr. Corbett only knew Appellant's name, and had not read about the case (it was not his "cup of tea"--he was "more into sports"--and thought Appellant might have been accused of "kidnapping somebody and possibly murdering somebody.") (R-5005-5006). He could not remember when he first heard about the case or what he had heard. (R-5014). He knew nothing about Appellant's background. (R-5018).

Bernest Donald

Mr. Donald makes his first appearance in the record at 4281 and was individually voir dired at pages 4349-4356.

Mr. Donald stated that he had read and heard nothing about the case and that he had no preliminary opinion about the case. (R-4351-4352).

Mazie Edge

Mrs. Edge makes her first appearance in the record at 5040 and was individually voir dired at 5152-5188.

No one had talked to Mrs. Edge about the case in her presence. (R5152-5160). She might have initially read an article about the case but had retained no facts or details about Appellant or his case. (R-5164). She could not even remember Appellant's name (R-5164).

Significantly, when asked to state how Appellant was prejudiced by Mrs. Edge as a juror, defense counsel Good had no reply. (R-5222).

Ruth Hamilton

Mrs. Hamilton makes her first appearance at page 4830 of the record and was individually voir dired at pages 4915-4930 of the record.

Although she had read about the case, she had not formed an opinion about it, did not remember when Appellant was arrested, could not remember what she had read because her memory was not "very good", and although she had seen something on T.V. about the case, she could not remember what it was. (R-4917-4918; 4921-4922).

Floy C. Mitchell

Mrs. Mitchell makes her first appearance in the record at 4566 and was individually voir dired at pages 4708-4734.

Mrs. Mitchell stated that she had read about the case in the paper one day and forgot it the next; she could remember no details about the case. (R-4716-4717). She stated that she could base her verdict on the evidence presented. (R-4711). Although she had read in the paper that Appellant was accused of killing two girls, she "didn't know" because she "wasn't there." (R-4715).

Mary K. Russo

Mrs. Russo makes her first appearance in the record at 5277 and was individually voir dired at pages 5347-5366.

Mrs. Russo knew nothing about the charges against Appellant nor about his personal life. (R-5321). She had seen only a few headlines about the case but did not have time to read the articles. (R-5327). She had no feelings about the Appellant's guilt or innocence, and felt she could render a fair verdict. (R-5321-5322).

While in the jury room waiting to be called as a potential juror, she had heard Appellant's name once but had heard nothing else concerning Appellant or his case in the jury room (R-5330-5333).

Alan Smith

Mr. Smith makes his first appearance in the record at 3973 and was individually voir dired at pages 4148-4181; 4191-4198; 4199-4201.

Mr. Smith knew very little about the case, knew little about Appellant, and promised that he could be a fair and impartial juror, putting aside everything that he had heard or read, basing his opinion on the evidence. (R-4154; 4174; 4149).

Estela Suarez

Mrs. Suarez makes her first appearance in the record at 3973 and was individually voir dired at pages 4211-4258.

She had not read about the case in the newspapers and had first heard about the case the day before she was questioned as a potential juror. (R-4246; 4221). She had no opinion about the case and believed that everyone was innocent until proven guilty. (R-4221; 4247; 4257; 4251).

While in the jury room, she had shown her innocence about Appellant and his case by asking the other potential jurors "Who is he?" (R-4235). The only conversation she remembers in the jury room concerning the case was about how long the potential jurors, if selected as jurors, might have to spend away from their homes or jobs. (R-4231).

Vernon Swindle

Mr. Swindle makes his first appearance in the record at 4281 and was individually voir dired at pages 4436-4450.

Mr. Swindle had little knowledge of the case, knew nothing about the details of the case, and nothing that he had heard or read gave him an opinion as to Appellant's guilt or innocence.

(R-4438-4439). While Mr. Swindle worked in the mailroom at the Miami Herald, he did not talk to other people about the case at work or hear them talking about it (if they did) because he was too busy. (R-4441-4442).

<u>Rudolph E. Treml (foreman)</u>

Mr. Treml makes his first appearance in the record at 4282 and was individually voir dired at 4451-4467.

Mr. Treml knew nothing about Appellant's case, had heard only one sentence on the T.V. about the trial being transferred from Tallahassee to Miami, and had no opinion on the case. (R-4453-4454).

After Donald, Treml, Suarez, Smith, Mitchell, and Swindle were tentatively selected, they were sequestered. (R-4762-4763). This was prior to the motion to strike by the defense team because of alleged talk about the case where the potential jurors were being held. (R-5161).

Other pertinent facts concerning jury selection are that defense team member Good thought that Miami was the best place in Florida for the case, that the defense was left (by the state's count) with three peremptory challenges after the jury was selected[1], and that the trial judge in open court warned everyone about the consequences of polluting or contacting the jury. (R-5228; 5532). Appellant (personally) expressed his satisfaction with the jury selected (R-10082). The Judge thought that it was an "excellent" jury. (R-10120).

Other facts, concerning not only Issues A and B, but the rest of Appellant's issues as well, will be found where pertinent in the body of this brief.

[1]The defense strikes are accounted for as follows: Eight left after the excusal of Carnathan and Magle (R-4742; 4751; Six left at R-5033; Five left after the striking of Scholsberg; with the final two exercised at 5522-23, leaving the defense team with three peremptory challenges. Immediately thereafter, the defense team accepted the jury. (R-5524)

ISSUE A

APPELLANT WAS NOT PREJUDICED BY THE PUBLICITY THAT PRECEDED HIS TRIAL AND CONVICTION.

Appellant argues that the trial court "erroneously" applied nonapplicable standards to his requested closure of certain pretrial (bite mark) evidentiary hearings and thereby prejudiced his right to a fair trial. According to Appellant, the issue is not "prior restraint, but public access." (Appellant's brief at 42.)

The issue is neither. The issue is whether Appellant can show prejudice to his right to a fair trail by (1) the court's refusal to close these certain pretrial hearings and (2) the pretrial publicity in general.

In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344, 362 (1977), the Supreme Court stated:

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the voir dire examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But under Murphy, extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in

> this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a "trial atmosphere. . . utterly corrupted by press coverage," Murphy v. Florida, supra, at 798. One who is reasonably suspected of murdering his children cannot expect to remain anonymous. Petitioner has failed to convince us that under the "totality of circumstances," Murphy, supra, the Florida Supreme Court was wrong in finding no constitutional violation with respect to the pretrial publicity. The judgment of the Supreme Court of Florida is therefore affirmed. (Emphasis supplied)

See also Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Dobbert v. State, 328 So.2d 433, 440 (Fla. 1976); Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981); Straight v. State, 397 So.2d 903 (Fla. 1981).

As in Dobbert v. Florida, Appellant's argument basically rests on the mass of the pretrial publicity, and not its prejudice. Appellant has failed to point out specifically where in this record, but for one exception which will be discussed below, he is prejudiced by the failure to close pretrial hearings concerning bite mark testimony.

The one exception referred to above is:

> But the Record before the Court reflects four of the actual jurors, including one alternate, were more than aware of the bite mark evidence issue. (R-4109, 4522,

5477, 5604).

*   *   *

> It was the trial judge's responsibility to protect the accused from inherent prejudicial publicity. The bite mark evidence can only be construed as positive identification, conclusive guilt. The preliminary reports were that the bite marks were inflicted by the accused. (R-8-12). <u>Knowledge of such evidence through news chanels could only leave the jury panel with guilt prone tendencies</u>.

(Appellant's brief at 49; emphasis added).

Of the "four actual jurors, including one alternate," only <u>one</u> was an actual juror (Bennett, R-5477), two were excused (Carnathan and Magle, R-4109, 4742, 4522) and one was an alternate (Von Seggren, R-5604, 5652), who did not deliberate and could not have possible affected the outcome of Appellant's trial.

Bennett, the actual juror, as recounted earlier by the State, was only tangentially aware that bite marks were involved in this case; didn't know the specifics about the crimes with which Appellant was charged; didn't know the results of the bite mark comparisons; had no opinion about the guilt or innocence of Appellant; and most importantly, was not challenged for cause nor struck by the defense team by use of one of its three remaining peremptory challenges. (R-5477; 5475-5476; 5478-5479; 5487).

Appellant's long, academic discussion on what standards should have been used in determining whether the pretrial hearing should have been closed is irrelevant. While this is not a "prior restraint case" (only because the Court didn't close the hearings Appellant complains about), Nebraska Press Association v. Stewart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), and State v. McIntosh, 340 So.2d 904, 908 (Fla. 1977), upon which the trial court relied, are helpful here. (R-678).

Taking them in reverse order, in McIntosh, this Court held that any action taken by the Court in restricting the media must relate to the danger sought to be avoided and must not be unconstitutionally overbroad. In Nebraska Press Association v. Stewart, the U.S. Supreme Court listed the following alternatives to protect a defendant's right to fair trial:

(1) Change of trial venue;

(2) Search and questioning prospective jurors;

(3) The use of instructions of each juror to decide the issue only on the evidence presented in the court;

(4) Sequestration of the jury.

Id. at 49 L.Ed.2d 700.

Here, change of venue was granted from Tallahassee, Florida to Miami, Florida, (practically speaking, the most remote geographical point possible); all of the jurors stated that they could decide the issues based on the evidence presented in the court; the jurors were individually voir dired; the jurors were sequestered when the jury was empaneled. (R-3923; 3949-3950;

3971; 5529; see generally the State's Statement of the Case and Facts, supra, relating to issues "A" and "B").

It's difficult to see how the publicity that occurred prior to Appellant's trial prejudiced his right to a fair trial. The available trial management alternatives ensured the selection of a jury which gave Appellant a fair trial without chilling First Amendment interests. Additionally, there is no showing in this record that the other alternatives would have been more effective in achieving trial fairness. Indeed, as the trial court observed, if venue was changed, where could the trial go? If the case was continued, publicity would just start anew. (R-5226-5227).

The trial court did not err in refusing to close Appellant's pretrial hearings. This is particularly so because Appellant has failed to point to any specific prejudice as reflected in the record. Cf. Hoy v. State, 353 So.2d 826 (Fla. 1978); Jackson v. State, 359 So.2d 1190 (Fla. 1978); and Knight v. State, 358 So.2d 201 (Fla. 1976). Unlike the facts and circumstances presented in, say, Manning v. State, 378 So.2d 274 (Fla. 1974), Appellant has not demonstrated that:

> [t]he general state of mind of the inhabitants of [the] community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the

courtroom. Id. at 276.

Here, unlike in Manning, the individual voir dire of the jurors who actually rendered Appellant's verdict conclusively demonstrates that they were either virtually unaware of the circumstances surrounding Appellant's case or, in Juror Bennett's case, still so unaffected by it as to render a fair and impartial verdict.

ISSUE B

APPELLANT IS NOT ENTITLED TO A NEW TRIAL BECAUSE VENUE WAS CHANGED FROM LEON COUNTY, FLORIDA TO DADE COUNTY, FLORIDA.

Appellant argues that the trial court failed in controlling the "pervasive prejudicial publicity," which resulted in his venue change from Leon County, Florida to Dade County, Florida, thus forcing him to forego his constitutional right to be tried in the county where the offense was committed.

After an actual test in Tallahassee, Florida, the trial court granted Appellant's motion for change of venue. (R-3922). It was Appellant, and not the State, who sought the change of venue from Leon County, Florida to Dade County, Florida. (R-748-1072).

Venue is a mere personal and technical right which may be waived. Baeza v. United States, 543 F.2d 572 (5th Cir. 1976) and Singer v. United States, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1960). Once a change of venue is granted at the request of the defendant, he waives his right to trial in the county where the crime was committed. Ashley v. State, 72 Fla. 137, 72 So. 647 (1916) and Hewitt v. State, 43 Fla. 194, 30 So. 795 (1901). The county where the trial takes place after a change of venue is granted is the county in which the defendant is constitutionally entitled to trial. Turner v. State, 87 Fla. 155, 99 So. 334 (1924). Cf. Coxwell v. State, 379 So.2d 335 (Fla. 1st DCA 1981), where the defendant was granted a motion for change of venue from Liberty County, Florida to Leon County, Florida, where his trial was subsequently held. Thereafter, on appeal to this Court, his conviction was reversed. Upon retrial, Coxwell attempted to change venue back to Liberty County, Florida, where the crime occurred. The reason venue had been changed in the first place was because of the prejudicial pretrial publicity. On his second appeal, Coxwell argued that he had a constitutional right to be tried in the place where the crime occurred. The First District Court of Appeal disagreed, citing Turner, supra, for the proposition that once a change of venue had been granted, Coxwell's constitutional right to be tried was in Leon County, and not Liberty County, where the crime occurred.

Implicit in the Coxwell decision, supra, is the same argument that Appellant makes here: Publicity forced the change of venue, not the Defendant. If this argument were adopted, and taken to its logical extreme, there could never be a change of venue which could be upheld because the Defendant would always be entitled to discharge because of the prejudicial publicity.

It's interesting to note the cases that Appellant relies upon in fashioning his argument: Hewitt v. State, supra, O'Berry v. State, 47 Fla. 75, 36 So. 440 (1904), Ashley v. State, supra, Beckwith v. State, 386 So.2d 836 (Fla. 1st DCA 1980), Petition for Review Denied, 392 So.2d 1379, Ward v. State, 328 So.2d 280 (Fla. 1st DCA 1976), all of which were occasions where the State attempted to have venue changed over the objection of the defendant.

What Petitioner was constitutionally entitled to was a fair trial. That he got. See the State's Statement of the Case and Facts on this issue.

Finally, in regard to any alleged "prejudice" that inured as a result of the change of venue, the basis of Appellant's complaint concerns a "good negative" which was in the possession of the "Pensacola New Journal," which refused to relinquish the negative to Appellant. (Emphasis added). In addition to the fact that the negative was in Pensacola, not Tallahassee, Appellant was well aware of this evidence at least a year prior to the commencement of his trial. (R-9588). Moreover, the use of this "evidence" would not have affected the outcome of the trial (R-9989).

Appellant's constitutional right to a fair trial was the constitutional right to have the trial in Dade County, Florida, after his motion for change of venue had been granted. Indeed, even if the "media . . . controlled the docket, not the trial judge", Appellant's complaint ought to be against the media, not the State.

As for Appellant's requested relief, that the case should be "reversed for a new trial in Leon County," this was the exact issue decided adversely to the Defendant in Coxwell, supra.

ISSUES C AND D

APPELLANT WAS NOT DENIED A FAIR TRIAL BECAUSE OF THE WAY IN WHICH HE WAS IDENTIFIED BY NITA NEARY.

Appellant argues that he was denied a fair trial because (1) the State's use of hypnosis on Nita Neary impermissibly tainted her recollection and (2) the photographic lineup in which she participated was so suggestive as to corrupt the remaining part of her memory which was not infected by the hypnosis session. Because these issues are merely facits of the identification process, each will be dealt with separately as well as collectively.

HYPNOSIS

Appellant argues that Nita Neary's identification of him was corrupted by virtue of the hypnotic session which occurred on January 23, 1978. (Appellant's Brief at 56). Specifically, Appellant argues that: (1) Nita Neary's hypnotically influenced testimony resulted in "confabulation"; (2) as a result of the hypnotic session, and the environment in which it took place, Nita Neary "came out of the hypnotic session unshakeably convinced of the spontaneity and reliability of her 'memory' and totally unaware of the distortion or confabulation which took place during her hypnotic session." (Appellant's brief at 63); and (3) that the jurors accorded undue weight to her "hypnotically refreshed testimony", and were mesmerized by the scientific aura surrounding hypnosis.

As noted by Appellant, the only Florida case dealing with a witness's hypnotically refreshed memory is Clark v State, 379 So.2d 372 (Fla. 1st DCA 1979) (Appellant's Brief at 56). In Clark, the victim, Charles Wayne Smith, was robbed and shot by two black males. Subsequently, on several occasions, Smith was shown photographs of various individuals suspected by the police to have been his assailants. None of these sets of photographs contained pictures of his assailants.

Thereafter, Smith was placed under hypnosis and told to reconstruct the robbery episode. After coming out of the hypnotic trance, Smith was shown photographs of his assailants, who he then identified.

At trial, Smith testified to the manner in which he identified his assailants, specifically detailing to the jury that he had been placed under hypnosis. In order to allow the jury the opportunity to further evaluate the credibility of Smith, the hypnotist was called, who testified as to the validity of hypnosis.

The First District Court of Appeal held that the victim's identification, which was not made in the hypnotic state, was admissible and his credibility was for the jury to determine. Going further, the First District Court of Appeal held that the trial court did not abuse its discretion in qualifying the hypnotist as an expert witness and in allowing him to testify.

Generally, but with some notable exceptions, courts across the country have allowed testimony of witnesses whose memories have been hynotically refreshed. See, e.g., Annot.: Admissibility of Hypnotic Evidence at Criminal Trial, 92 ALR.3d 442, Section 8; Harding v. State, 246 A.2d 302 (Mary. App.Ct. 1968), cert. den. 395 U.S. 949, 89 S.Ct. 2030, 23 L.Ed.2d 468 (1969); United States v. Awkard, 597 F.2d 667 (9th Cir. 1979), cert. den. 440 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116 (1979); Creamer v. State, 205 S.E.2d 240 (Ga. 1974); People v. Smrekar, 385 N.E.2d 838 (Ill. App. Ct. 1979); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978) and State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971); Chapman v. State, 638 P.2d 1280 (Wy. 1982). As noted by the trial court, Appellant's argument as to the invalidity of hypnosis is one which goes to the weight of the evidence as opposed to its admissibility. (R-6694); United States v. Adams, 581 F.2d 193, 198-199 (9th Cir. 1978); Kline v. Ford Motor Company, 523 F.2d 1067, 1069 (9th Cir. 1975); Wyller v. Fairchild Hiller Corporation, 503 F.2d 506, 509 (9th Cir. 1974).

Before getting bogged down in the academic details of whether hypnosis is reliable, and whether the issue is one of admissibility of evidence, some distinctions in this case should be noted. First, in Clark, supra, the hypnotist was allowed to testify. Here, Dr. Arroyo never testified, stripping Appellant of his argument that the jury would be unduly influenced by the scientific credentials of an expert. Second, unlike Clark, a tape of the hypnotic session was admitted into evidence, which the trial court reviewed before ruling upon the admissibility of Nita Neary's testimony. (R-5936-5937; 6427; 6490)[2] Third, at trial and before the jury, the State disassociated itself from the use of hypnosis, specifically asking Nita Neary what if anything she remembered after the hypnosis session that she had not remembered prior to the hypnosis session. (R-8500-8503). More about this later.

Based on the foregoing, even if Clark were to fall, Nita Neary's testimony would still be proper because hypnosis was not relied upon by her in identifying Appellant.

Moreover, according to the trial court, and supported by the defense team's expert, the use of hypnosis was actually, in a stricter sense, exculpatory to Appellant. (R-6694; 6496-6498). Dr. Kuypers, the defense team's expert who testified at the hearing on the motion to suppress but not at trial, stated that there were four areas of "suggestiveness" that occurred in the hypnotic session: (1) hair (R-6452; 6455-6465; 6493), (2)

[2] In Appellant's case, a tape of the hypnotic session was introduced. (R-9354; See also R-9593, et. seq.)

eyebrows (R-6462; 6493), (3) coat collar turned up (R-6465; 6493) and (4) her view of Ronnie Eng (R-6472; 6482; 6493).

According to the trial court, and supported by the evidence, if the hypnosis process was suggestive, it did not "impact" on the identification of Appellant as none of the above criteria were used. (R-6694; 8500-8503).

Specifically, at trial, Nita Neary stated that while under hypnosis she said something about the person in the foyer having dark hair, after hypnosis she did not remember that the man had dark hair, and could not testify to the color of his hair. (R-8501). Neither the description of the hair nor the eyebrows figured into the identification process (R-6694; 8592 (hair); 8500-8503). The most important identifying features to Nita Neary were the nose and mouth of Appellant. (R-8593).

Appellant's claim that her identification of him because of her comparison of him to Ronnie Eng was tainted is not a factor either. (R-8501-8503). This is particularly so because Appellant, waiving any objections that he might otherwise have had concerning a comparison, purposefully stood next to Eng, who was his witness, before the jury. (R-9328-9329).

Most significantly, except for the hair, eyebrows, coat collar, and view of Ronnie Eng, Nita Neary's identification of Appellant during the hypnotic session was virtually identical with her previous and subsequent descriptions of Appellant. Under hypnosis, she stated that she saw the man in the foyer in profile (R-6451), that he had a knitted, navy blue toboggan cap which came down over his eyebrows (R-6453); that he was dark complected, in his earlier 20's (R-6462); that she couldn't see his eyes (R-6464); that he was clean shaven and that his ears were covered (R-6464); that she couldn't see his neck because his collar was up (R-6465); that he had a pointed nose (R-6467-6468); that he weighed 150 to 155 pounds (R-6470); and that he had on a navy blue jacket that went down below his waist R-6470); that he wore light pants (R-6471) and that he was 5'8" to 5'10" in height (R-6451). Compare this description under hypnosis with her initial descriptions given below under the subheading "Identification".

Based on the foregoing, the trial court found that during the course of the hypnosis Appellant's original description by Nita Neary did not vary nor was Appellant at the time of the hypnotic session even a suspect; chronologically, the hypnosis session occurred on January 23, 1978 and Appellant's arrest was on February 15, 1978. (R-6694; 6787-6795 (arrest); R-4 (indictment); R-5944 (Eng eliminated as a suspect as of January 20, 1978)).

Nita Neary's initial identification and description of the assailant to Nancy Dowdy (R-6361-6362), uniform throughout her testimony, controls. In State v. Freber, 366 So.2d 426, 628 (Fla. 1978) this Court held:

> In our view, an identification made shortly after the crime is inherently more reliable than a later identification in court.[2] The fact that the witness could identify the respondent when the incident was still so fresh in her mind is of obvious probative value. See State v. Ciongoli, 313 So.2d 41 (Fla. 4th DCA 1975), cert. discharged, 337 So.2d 780 (Fla. 1976).
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> * * * *
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> [Footnote 2] This is particularly so because of constitutional safeguards surrounding the identification process. The United States Supreme Court held in Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), that an identification maybe attacked as a denial of due process of law where the circumstances of the identification were unnecessarily suggestive and conducive to irreparable mistaken identification. See Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969); Dell v. State, 309 So.2d 52 (Fla. 2d DCA 1975); Hamilton v. State, 303 So.2d 656 (Fla. 2d DCA 1974).
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> * * * *
>
> The prior identification is reliable evidence of identity, and the declarant's presence in court and availability for cross-examination eliminate the usual danger of hearsay testimony. For these reasons, we hold that testimony of a prior extrajudicial identification is admissible as substantive evidence of identity if the identifying witness testified to the fact that a prior identification was made. [Footnote 3 omitted]

Put another way, hypnosis is a red herring in this case. The hypnosis session neither tainted Nita Neary's identification of Appellant nor was relevant in her identification of Appellant. Whatever the merits of hypnosis in the proper case, it has no place here. Confabulation couldn't have occurred because her identification under hypnosis was substantially similar to her identification of Appellant <u>before</u> and <u>after</u> the hypnosis session. The areas of discrepancy complained about by Appellant (hair, eyebrows, coat collar turned up, and view of Ronnie Eng) were explained, repudiated by Nita Neary and the State, and certainly not factors in the identification process. Tapes of the hypnotic session are available for the Court to review, as the trial court reviewed them. A battle of experts before the jury never ensued and there was no attempt by the State to bolster the credibility of Nita Neary by calling an expert. Neither was there an attempt by Appellant to attack the credibility of Nita Neary by calling Dr. Kuypers to testify <u>before the jury</u>. In short, confabulation didn't occur; Nita Neary's testimony was reliable; and the jury was not lead astray by the weight of scientific authority.

Moreover, this Court would do well to read and adopt the common sense suggestions of <u>Chapman v. State</u>, <u>supra</u>, at 1283 <u>et seq</u>. if it believes that hypnosis is implicated in this case. But one final point. Even in such states as California, which refuse to allow hypnotically induced testimony, hypnosis is still allowed for the purpose of investigation. E.G., People v. Shirley, 30 Cr.L.Rptr. 2485 (Cal. S.Ct. March 11, 1982) at 2487 ("[W]e do not undertake to foreclose the continued use of hypnosis by the police for purely investigative purposes.")

Here, the hypnosis was used only for investigative purposes. As mentioned earlier, no attempt was made by the State at trial to bolster the credibility of Nita Neary by its use. Indeed, after the hypnotic session was over, Nita Neary disclaimed any extraneous details extracted by Dr. Arroyo during the session. (R-8500-8503).

IDENTIFICATION

The Supreme Court in Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243 53 L.Ed.2d 140 (1977) found that the "per se rule" concerning suggestive identification is too rigid. Cf. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) and Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). It keeps evidence from juries that is reliable and relevant. The standard to be used is one of "fairness" as required by due process. Reliability is the key determinant in ascertaining the admissibility of identification testimony. In determining reliability, the following factors are to be considered:

suggestiveness "per se" vs. "fairness"

(1) The opportunity of the witness to view the criminal at the time of the crime.

(2) The witness's degree of attention.

(3) The accuracy of the witness's prior description of the criminal.

(4) The level of certainty demonstrated by the witness at the confrontation.

(5) The time between the crime and the confrontation.

Id. at 114, 53 L.Ed.2d at 154.

Against these criteria the corrupting effect of the suggestiveness of the identification itself is weighed. Applying the Manson v. Brathwaite criteria to the facts of this case:

(1) The opportunity to view. Nita Neary saw the assailant only for a short period of time (about three seconds) but for a long enough period of time to describe his prominent, straight bridged protruding nose; (R-8480; 8481; 8520); his dark complexion (R-8480); his slight build, around 5'8"-5'10" (R-8479); his approximate weight of 160 pounds[3] (R-8480); his race and sex (white male) (R-8479); his (dark navy blue) jacket extending below the belt (R-8480); his light colored pants (R-8480); his stocking cap pulled down over the eyebrows (R-8480); his clean shaven face (R-8480); his age (somewhere in the mid-20's) (R-8480).

[3]Nita Neary admitted that she was not very good at approximating weight. (R-8480).

As found by the Court and supported by the evidence, there was sufficient light for the witness to make these observations. (R-6692; 8475; 5854 "quite a few lights on"; 5812 "sufficient . . . to write."; 7292 "Chandelier . . . pretty bright.")

(2) The degree of attention: Nita Neary, in the Court's opinion, was not a casual observer. (R-6692). She was an art student attending college who was not surprised at the time of her view. (R-6692; 8470; 8485 (sketch procedure outlined). She thought, in fact, it was a boyfriend staying over at the house or the houseboy. (Ronnie Eng) (R-8482; 8502). It was not Ronnie Eng. (R-8503). Immediately thereafter, she gave the description in paragraph one above to her roommate (Nancy Dowdy; R-6358) and maintained that description without significant variance from its first utterance. (*Cf*. R-6358; 6361-6362 with, say, R-8482).

Nita Neary saw Appellant from about 12 feet away (R-5873-5874). Although she had had a few beers that night, she was definitely not intoxicated. (R-8473).

(3) The accuracy of the description: Appellant possesses all of the above descriptive characteristics and did not contest the accuracy of these characteristics at trial. Although Appellant is slightly taller, and somewhat older, the Court found that none of the predominant identifying characteristics shown were not descriptive. (R-6692). As mentioned earlier, Appellant, waiving any complaint that might otherwise have existed, compared himself to Ronnie Eng before the

jury. (R-9329-9330).

(4) <u>The witness's level of certainty</u>: At the risk of repetition, there was no deviation by the witness in her descriptions since her first utterance of it. Nita Neary was concerned about what happened, and did not appear to be sick or overly excited shortly after her encounter with Appellant. (R-5878; 5887). She described to what the Court called "an army of police officers" her encounter with Appellant and underwent hypnosis. (R-6693). The only significant varying factor after her hypnotic session was the hair testimony heard by the trial court and repudiated by her at trial. (R-8501). The hair testimony was of no aid in the identification of Appellant. (R-8501; 8519). confrontation

(5) <u>The time before the confrontation</u>: The witness was shown a picture lineup on April 7 after Appellant's arrest on February 15 of the same year. (R-8586; 8613). The trial court found that this period of time was not too remote to invalidate the identification. (R-6693). incident was Jan. 15

The description of Appellant was given within minutes after having seen Appellant in the Chi Omega house. (R-5702-5703; 5706-5707; 5776; 5800). The identification three months later was based on the same description that was given immediately after having originally viewed Appellant and there were no material variances between the descriptions over any time period. (R-6693; 5702-5703; 5706-5707; 6358; 6451; 6462; 6464;

5800 (as told to Officer Brannon); 6467-6468; 6361-6362 (as told to and by Nancy Dowdy, Nita Neary's roommate); 6375 (as told to Artist Kenniston, who drew the sketches which form a part of this record); 6388-6390; 5730-5731; 5776; especially 5778-5779; 5804; 5809; 5856; 5859; 5863-5866; 5886; 8479-8481).

Testimony adduced conclusively shows that there was no coercive pressure on Nita Neary in order for her to make an identification of a particular individual. To the contrary, she was warned to be careful, warned not to look at news photos, and in a conversation to the police department related that she could not promise anything. (R-6412-6413). Any newspaper photos that she might have viewed previously to the photo identification lineup were not corrupting because they (1) did not influence her and (2) were not profile photos. (R-8590-8591). This is significant because Nita Neary had only seen a profile view of Appellant in the Chi Omega foyer. (R-8591).

Of significance to the Court was Nita Neary's statement in the telephone conversation related above that she couldn't promise anything because it guaranteed to the Court the "absolute purity in [sic] her intentions." Any identification that she made was made with reflection and care. (R-6694; 8506; 8508).

The photographic lineup session was taped, the tape offered into evidence, and played before the Court. (R-8589-8590 et seq.). See also R-8503 and (for a transcription of the tape) (R-5948-5952).

Ten pictures were used in the photographic lineup. (R-6695; 8584). The pictures were all profile views. (R-5946). Nita Neary was not told by Captain Poitinger that Appellant's picture was one of the ten. (R-5946). (See also R-8592; 8598).

Initially, she apparently singled Appellant's picture out along with one other picture. (R-6695; 8592-8593). On second reflection, after some deliberation as indicated by the tape of the identification process, she singled out Appellant's picture. (R-6695; 8592-8593).

The trial court found that if there was any attempt to taint the identification process by virtue of indicating Appellant's presence, (by his picture in the lineup) it was not communicated to Nita Neary, and she was deliberate and careful in evaluating her selection and giving her opinion. (R-6695; 8592-8593).

In considering the totality of the circumstances, the trial court found that there was no substantial likelihood of irreparable misrepresentation by Nita Neary or by the identification process. (R-6695).

As reflected by Manson v. Brathwaite, supra, at 116, 53 L.Ed.2d 155:

> Surely, we cannot say that under all the

> circumstances of this case there is "a very substantial likelihood of irreparable misidentification." Id., at 384, 19 L.Ed.2d 1247, 88 S.Ct. 967. Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

As noted by the trial court, the hypnosis and identification issue resolves itself to whether the witness was identifying Appellant fully on the basis of her memory of the events at the time of the crime or whether she was merely remembering the person she picked at the pretrial identification procedure. (R-6696).

As found by the trial court[4], considering the totality of the circumstances, and the likelihood of irreparable misidentification concerning the testimony of all the witnesses, Nita Neary saw Appellant exit the house, carefully described what she saw, and did not deviate from that description from her first observation through and including her testimony in court. (R-6697).

[4]Who was even so patient and careful in his judgment as to <u>consider</u> the testimony of Appellant's and Mr. Haggard's "eyewitness identification expert," Dr. Buckhout who, of course, was not present when Nita Neary first saw Appellant in the Chi Omega foyer. (R-6206-6266).

ISSUE E

COUNTS ONE THROUGH FIVE AND COUNT SIX AND SEVEN WERE PROPERLY JOINED. CONSEQUENTLY, THE TRIAL COURT DID NOT ERR IN REFUSING TO SEVER COUNTS ONE THROUGH FIVE FROM COUNTS SIX AND SEVEN.

Appellant argues that Counts One through Five were separate and distinct crimes from Counts Six and Seven, that they were improperly joined, and that his rights to a fair trial were abridged when the trial court refused to sever the former from the latter.

As Appellant's two arguments (improper joinder and prejudicial denial of his motion to sever) are facets of the same argument, they will be dealt with together.

The burden is clearly upon Appellant to show that he did not receive a fair trial because of the denial of his motion to sever. See Stripling v. State, 439 So.2d 187 (Fla. 3d DCA 1977), reversed on other grounds; cert. den. 359 So.2d 1220 (Fla. 1978). Appellant must demonstrate that the trial court abused its discretion in denying his motion for severance. Dove v. State, 287 So.2d 384 (Fla. 1st DCA 1973), cert. den. 294 So.2d 655 (Fla. 1974). Appellant has failed to do so.

Fla.R.Crim.P. 3.150(a) provides for the joinder of offenses and Fla.R.Crim.P. 3.152 provides for the severance of improperly joined offenses. The former rule provides that offenses which are triable in the same court may be charged in the same indictment in a separate count for each offense where the offenses are based on the same act or transaction or on two or more connected acts or transactions. The latter rule provides for severance where two or more offenses are improperly charged. Basically, offenses are improperly charged if there is a showing (before trial) that a severance is appropriate to promote a fair determination of the defendant's guilt or (during trial) where, upon the defendant's consent, a severance is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

The joinder of Counts One through Five with Counts Six and Seven was proper because:

(1) The crimes committed in those counts were part of one continuous action, and

(2) They were part of the same common scheme, plan, and course of conduct, admissible under Williams v. State, 110 So.2d 654 (Fla. 1959), *cert. den.* 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86. (R-7078).

According to the prosecutor, and as supported by the evidence, the similarities between the crimes are as follows:

FACTUAL BASIS OF COUNTS ONE THROUGH FIVE
(THE CHI OMEGA CRIMES)

(1) The offenses at Chi Omega took place between 3:00 and 3:15 a.m., the morning of January 15, 1978. (R-7060; 7166; (crime discovered around 3:14 a.m. R-7293); officers arrived around 3:23 a.m. R-7194).

(2) All four victims at the Chi Omega House were female; young; white; FSU students. (R-7060; 7780-7781 (identification of the two deceased Chi Omega victims)).

(3) All four victims were assaulted while asleep in their bed. (R-7061; 7223 (Margaret Bowman); 7299 (Lisa Levy); 7323 (Karen Chandler); 7226 (Kathy Kliner). All four victims were beaten severely about the head, apparently by a burgler, with a blunt object. (R-7061; 7223; 7323; 7327; 7192; 7788-7796; 7797-7806).

(4) One victim was strangled with pantyhose and pantyhose was found in Lisa Levy's bedroom. (R-7061; 7481; 7689; 7551; 7553 and see state's exhibit 33.)

FACTUAL BASIS OF COUNTS SIX AND SEVEN
(THE CRIMES COMMITTED AT THE DUNWOODY RESIDENCE)

(1) Forty-five minutes later, at approximately 4:00 a.m. on the same morning, a young, white female FSU student, asleep in her bed, was beaten about the head severely, apparently by a burgler. (R-7458; 7061; 7462). The

Dunwoody residence where Cheryl Thomas was beaten was approximately eight blocks from the Chi Omega House (about two miles). (R-7360). The Dunwoody residence was a small residential area near the college campus. (R-7409).

(2) Beside the bed, in Cheryl Thomas' apartment, pantyhose was found, apparently used as a mask, which did not belong to the victim. (R-7426; 7360; 7369; 7427; 7434; 7446).

(3) In the pantyhose mask apparently left by the burgler, lab experts found hair similar to Appellant's hair (R-7061; 8074).

(4) Cheryl Thomas' neighbors apparently heard the beating while it was being administered to her and called her apartment, which resulted in the fleeing of Appellant prior to the consummation of what would have been indubitably a lethal act. (R-7061; 7332-7333; 7353).

All victims were bludgeoned with a blunt object. A stick with blood on it was found at the Dunwoody residence and the assailant at Chi Omega (as described by Nita Neary) had a stick or club in his hand. (R-7454-7455 (Dunwoody); R-7167; 8478 (Chi Omega)).

Appellant's activity at the Chi Omega house and the Dunwoody residence was a continuous course of criminal activity that started at the one and was consummated at the other. His criminal signature was indelibly imprinted in the victims with blood, bludgeons and sticks, and pantyhose. The fact that Cheryl Thomas was not strangled with the pantyhose found is irrelevant; Appellant was obviously interrupted in the course of his criminal activity, which resulted in his premature fleeing. The fact that the Dunwoody crime occurred later, (albeit only 45 minutes later as opposed to concurrently) is irrelevant to its admissibility under Williams. It still would have been admissible in the Chi Omega murders. See Talley v. State, 36 So.2d 201 (Fla. 1948) and Andrews v. State, 172 So.2d 505 (Fla. 1st DCA 1965).

Instructive in this context is this Court's decision in Ruffin v. State, 397 So.2d 277, 280-281 (Fla. 1981), citing Smith v. State, 365 So.2d 704, 707 (Fla. 1978), holding that collateral crimes may be admitted under the Williams' Rule where they go to establish the entire context out of which the criminal action arose:

> In our recent decision of Smith v. State, 365 So.2d 704 (Fla. 1978), relying upon Ashley v. State, we recited that among the other purposes for which a collateral crime may be admitted under Williams is

establishment of the entire context out of which the criminal action occurred. We said:

> At trial the state's theory was that, as Johnson testified, the two murders occurred during one prolonged criminal episode. The three perpetrators met together and planned a robbery. The rest of the night was devoted to the robbery, its concealment, and the allocation of the proceeds. From the time the parties met and conspired to commit robbery, there was an unbroken chain of circumstances relating to and flowing from the robbery. Because of the robbery two related murders occurred within a short time of one another.
>
> Additionally, the testimony concerning the second homicide is relevant to place Smith at the scene of the first, since it shows that he was with the people involved in the initial homicide just an hour after it took place. He was also placed by this evidence in a car which was directly linked to the scene of the first murder.

Similarly, in Malloy v. State, 382 So.2d 1190 (Fla. 1979), the Defendant was prosecuted for murder, kidnapping, and robbery. This Court held the testimony regarding a prior incident at a lounge where Malloy pulled out a rifle from the car in which he had been riding was properly admitted since it was one incident in a chain of chronological events relating to the commission of the crime. Id. at 1192.

Likewise, in Antone v. State, 382 So.2d 1205 (Fla. 1980), testimony was admitted in the Defendant's trial implicating him in criminal activity other than the activity for which he was being tried. This Court held that activity properly admitted as part of the primary arrangement regarding Antone's involvement in contract murder and was therefore relevant to show the existence of a conspiracy. Id. at 1213.

Here, evidence in this case is obviously part of one single continuous criminal episode. Appellant started his murderous criminal activity at the Chi Omega house and consummated his criminal activity at the Dunwoody residence. Appellant's identity and presence was established at both. (At Chi Omega, by Nita Neary's description and the scientific evidence; at Dunwoody, by the scientific evidence.)

Moreover, Paul v. State, 385 So.2d 1371, 1372 (Fla. 1980), quashing Paul v. State, 365 So.2d 1063 (Fla. 1st DCA 1979) is helpful. In Paul, the Florida Supreme Court determined that the events were not related in terms "of time or sequence."[5] Paul adopted Judge Smith's dissent, which is of interest here. In Paul, sexual battery occurred on April 9, and then again on May 14. Because of the disjointed time sequence, Judge Smith reasoned, and the Florida Supreme Court agreed, that the rapes were too unrelated to have been properly joined. Not at issue were the rapes committed on the same day within an hour of each

[5]Unlike here, where the events that occurred were both related in terms of time and (spatial) sequence.

other against different victims, residents of nearby dormitories, on the Florida State University campus:

> Paul appeals from convictions in the Circuit Court of Leon County on information No. 77-425, charging attempted sexual battery by vaginal or anal rape of a young woman resident of a Florida A & M dormitory early in the morning of April 9, 1977, and on count one of information No. 77-560, charging sexual battery by vaginal and anal rape of another young woman resident of a Florida State University dormitory about 5:00 a.m. on May 14, 1977. Counts two and three of No. 77-560 charged attempted sexual battery and battery of still another young woman visitor to another Florida State dormitory on the same early morning, May 14, 1977; and on counts two and three, lacking positive identification testimony, the jury acquitted Paul.
>
> The informations were consolidated for trial on motion of the State, over objection by the defendant. <u>There is no questions here of the propriety of charging and trying together, in Case No. 77-560, the sexual offenses committed within an hour on different victims in nearby FSU dormitories</u>. At issue is the propriety of consolidating Paul's trial for a sexual offense committed on April 9 with those committed May 14. I dissent from the court's decision which apparently holds that consolidation was authorized by Fla.R.Crim.P. 3.151. (<u>Id</u>. at 1065; emphasis added)

Here, as in the criminal activity which occurred in <u>Paul v. State</u>, on May 14, 1977, Appellant's crimes at Chi Omega and Appellant's crimes at Dunwoody occurred within 45 minutes of each other on the perimeter of the same campus.

Further, Appellant has failed to establish that the trial court abused its discretion in refusing to allow the severance (or by improperly joining the counts in the first place) because he's failed to show that he was prejudiced by his joint trial on all counts. Appellant's argument in the lower court was that there was more evidence against him in the Chi Omega counts than there was in the Dunwoody counts. Appellant planned to put on scientific evidence in the Chi Omega counts but not in the Dunwoody counts. Appellant planned to testify on the Dunwoody counts but not the Chi Omega counts. Consequently, because of the procedural trial rules of Florida, were the trials separate, Appellant could take the stand in the Dunwoody counts, present no other evidence, and have the right to opening and closing argument before the jury. As Appellant's argument goes, he was unable to do so because the offenses were joined and the trial court refused to sever them, resulting in "procedural prejudice."

Appellant's argument of prejudice is not legally substantial. In Alvarez v. Wainwright, 607 F.2d 683 (5th Cir.), after reviewing Florida law on the subject, the Fifth Circuit rejected a similar argument. There, the Defendant had been charged with two counts of manslaughter by culpable negligence, two counts of manslaughter by an intoxicated motorist, temporary unauthorized use of a motor vehicle, and larceny of a firearm. Arguing that he was prejudiced by the severance because he wished to testify on some counts and not others, the Defendant sought habeas corpus relief.

In rejecting that relief, the Fifth Circuit noted that severance for this reason, as for any other reason, remains in the sound discretion of the trial court and that the simultaneous trial of more than one offense must actually render a defendant's state trial fundamentally unfair before the failure to sever is violative of due process. Id. at 685.

Appellant improvidently relies upon United States v. Foutz, 540 F.2d 733 (4th Cir. 1976), Ashley v. State, 265 So.2d 685 (Fla. 1972) and Rubin v. State, 407 So.2d 961 (Fla. 4th DCA 1982). These cases are distinguishable.

In Foutz, the robberies were not part of one continuous course of action. They took place two and one half months apart and were so dissimilar that one of the robberies was committed by one individual, and the other by three individuals. Id. at 735.

In Ashley, it was the Defendant seeking a motion to consolidate, not the State. In order to be successful regarding the motion to consolidate, the burden was on the Defendant to show that he was not prejudiced by the trial court's failure to consolidate the crimes. As noted by this Court in Ashley, consolidation rests in the sound discretion of the trial court and the Defendant in Ashley failed to show that he was prejudiced in the preparation of his defense (which is what he alleged) by the failure to consolidate. Here, Appellant's action was one continuous course of conduct, he was not legally prejudiced by the joinder, and the crimes were committed in a similar manner (by burglary and bludgeoning).

In Rubin, the eight counts of sexual battery committed by the Defendant occurred on three separate incidents, on October 21, 1979, February 23, 1979, and June 9, 1979. They were obviously not one continuous course of events related to each other in either time or sequence.

Appellant was not legally prejudiced by the joinder of the offenses and the trial court did not abuse its discretion in refusing to sever the offenses.

ISSUE F

THE JURY SELECTION PROCESS DID NOT VIOLATE THE WITHERSPOON DOCTRINE.

Appellant argues that the rejection of potential jurors Westbrook and Constance violated the principles of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Potential jurors under Witherspoon can be excluded if it is made unmistakeably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Under Witherspoon, the death penalty must be set aside if any juror was excused for cause just because he opposed the death penalty. Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). A potential juror may be challenged for cause when his death penalty views would prevent or substantially impair the performance of his duties as a juror in accordance with his oath. The state does not violate the Witherspoon doctrine when it excludes potential jurors who are unable or unwilling to accept that in certain circumstances death is an acceptable penalty. Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

In Maggard v. State, 399 So.2d 973 (Fla. 1981) this Court noted that if a defendant does not want a potential juror excused, he should make his objection known prior to the excusal of that potential juror.

Additionally, the trial court and both sides extensively discussed the law surrounding a "Witherspoon" challenge. (R-4029-4032). The court stated:

> So, the Court is clearly understood, we will exercise cause only for prospective jurors who indicate they could not and would not reach a verdict of guilt if the penalty might result in death. I think that's the criteria in that standard that we are going to follow. (R-4032).

With these general principles in mind, the circumstances surrounding each potential juror's Witherspoon inquiry will be dealt with separately.

POTENTIAL JUROR WESTBROOK

Pursuant to the principles set forth in Witherspoon v. Illinois and its progeny, the prosecutor thoroughly examined potential juror Westbrook:

> MR. MCKEEVER: Does the death penalty cause you a problem you would not be able to reach a verdict in the first phase?
>
> MISS WESTBROOK: Yes, it would.
>
> MR. MCKEEVER: Judge, I would ask she be excused for cause.
>
> (R-4266-67). (Emphasis added).
>
> * * *
>
> MR. MCKEEVER: I feel like I already asked

you this question. Under Florida law if it's murder in the first degree, guilty of that crime --

THE COURT: Mr. McKeever, I think this is where the problem is. The question to propound to the juror I think really could she return if the evidence warranted it a verdict of first degree knowing that that might subject the defendant to the death penalty. That's the question.

MISS WESTBROOK: No.

MR. MCKEEVER: Thank you very much.

(R-4271). (Emphasis added).

* * *

THE COURT: Let me ask the question, madam juror. The Court again asks the question would you be able to return a verdict of guilty of first degree murder if the evidence warranted it knowing that that crime has a punishment, a possible punishment of death?

MISS WESTBROOK: No.

THE COURT: All right. The Court will excuse her for cause.

Let's call the next juror.

State your objection in the record.

MR. HAGGARD: All right.

(R-4273-4274). (Emphasis added)

Pursuant to Maggard v. State, supra, this Court should refuse to reach the merits of the Witherspoon issue because Appellant's counsel refused to specifically state his objection on the record. When asked to state his objection on the record, Appellant's counsel said "all right." (R-4274). See also Brown v. State, 381 So.2d 690 (Fla. 1980).

If this Court does reach the merits of the Witherspoon issue, the State submits that the foregoing exchanges between the potential juror and her questioners were sufficient for her excusal. Juror Westbrook's attitude toward the death penalty would have prevented her from making an impartial decision as to Appellant's guilt. (R-4266; 4271; 4274). It was made perfectly clear to potential Juror Westbrook that death was only a possible punishment if Appellant was found guilty. (R-4274).

Potential Juror Westbrook was properly excused. See Brown v. State, supra, at 694 and cases cited therein.

POTENTIAL JUROR CONSTANCE

Likewise, Appellant's counsel failed to properly preserve his objection to any violations of Witherspoon v. Illinois in regard to Juror Constance (R-5394-5395).

On the merits, potential Juror Constance indicated that the possible imposition of the death penalty would impair his ability to decide Appellant's guilt or innocence:

MR. MCKEEVER: And that the penalty for murder in the first degree, should your verdict be guilty, might be the imposition of the death penalty by the Judge. Does that give you any hesitation at all?

JUROR CONSTANCE: Yes, sir, it does.

MR. MCKEEVER: Could you explain that to me?

JUROR CONSTANCE: Well, I am not a very deeply religious person, but I don't believe anyone has the right to take another life.

MR. MCKEEVER: Okay.

(R-5390).

* * *

My question to you is: Knowing about the death penalty, second phase, could you return a verdict of guilty of murder in the first degree if you were satisfied we had proven the case? Could you return that verdict knowing that it might lead to the imposition of the death penalty?

JUROR CONSTANCE: I don't know. I really don't know if I could.

MR. MCKEEVER: Well, take a few minutes and decide because we need to know.

JUROR CONSTANCE: Well, possibly not because of my own beliefs.

(R-5391).

* * *

THE COURT: Would you be able to return a verdict of guilty of murder in the first degree, assuming that the evidence that you found to be credible beyond and to the exclusion of a reasonable doubt, brought you to that conclusion, knowing that by that finding, you would be subjecting

> someone to the death penalty?
>
> JUROR CONSTANCE: No, sir, I don't believe so.
>
> THE COURT: Grant the motion.
>
> MR. MCKEEVER: Thank you, Judge.
>
> THE COURT: You may be excused. And thank you for your candor and frankness. And you don't need to be afraid of the law, in all candor.
>
> (R-5394-5395).

As in Williams v. State, 228 So.2d 377, 381 (Fla. 1969), vacated on other grounds, 408 U.S. 941, 92 S.Ct. 2864, 33 L.Ed.2d 765 (1972) potential Juror Constance made it clear that his decision as to guilt or innocence might well be affected by his attitude towards the death penalty.

The excusal of potential Juror Constance pursuant to the principles of Witherspoon v. Illinois was proper.

The jury selection process did not violate the Witherspoon doctrine.

ISSUE G

THE COURT DID NOT ERR IN DENYING APPELLANT'S CHALLENGE TO THE GRAND JURY NOR WAS APPELLANT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN REGARD TO APPELLANT'S GRAND JURY CHALLENGE.

Appellant seeks to entrap the State in a circular argument which works as follows:

(1) Section 905.05, Florida Statutes (1979 et seq.) requires a challenge to the grand jury to be lodged before its impanelment.

(2) Because he was not notified that the grand jury that convened on or about June 5, 1978 was going to indict him on his capital charges, his grand jury challenge subsequent to that time was timely.

(3) If, as Judge Rudd held, he was placed on notice that the grand jury was convening for the purpose of indicting him for his captial crimes because "of the bite mark search and seizure, 26 April, 1978," he had a right to counsel at that point because it was a critical stage of the proceedings.

(4) If his counsel who had been appointed on related charges did not perfect his rights at that point, his counsel was obviously ineffective. Thus, no matter how the coin is tossed, the result is the same: heads, Appellant wins; tails, the State loses.

The trial court held two significant hearings concerning Appellant's entitlement to challenge the grand jury. The first, took place July 21, 1978, before Judge Rudd, and the second, May 16, 1979, took place before Judge Cowart (SR-266 _et seq_. and R-2640-2676).

At the first hearing, Appellant argued that he was entitled to challenge the impanelment of the grand jury retroactively because it was a critical stage of the proceedings, for which he was entitled to counsel (SR-274); that a grand jury impanelment challenge is an adversary proceeding; and that his circumstances fit within the exception of the statute which allows a belated attack upon the impanelment of the grand jury. (SR-271-277).

Appellant's challenge to the grand jury was filed on July 20, 1978. (R-714). The grand jury was apparently impaneled n June 5, 1978. (R-716). Appellant had filed other motions concerning the grand jury on July 18, 1978. (R-706; 708; 710).

The Court orally entered its order at the end of the hearing, denying Appellant's attack on the grand jury and refusing to appoint Appellant public assistance counsel. (SR-276-278).

Subsequently, the Court reconsidered its position concerning the appointment of public counsel and entered an order on July 24, 1978 appointing the public defender to Appellant for purposes of any grand jury challenges that Appellant might pursue.

Thereafter, on August 1, 1978, _nunc pro tunc_ July 25, 1978, Judge Rudd entered his written order denying Appellant's challenge of the impanelment of the grand jury. (R-716-717). (_See also_ SR 285-286). The subtstance of that order was:

(1) Appellant knew or had reason to believe by virtue of a search warrant served on him April 27, 1978, that he was being investigated by the grand jury in connection with the Chi Omega homicides.

(2) The grounds for Appellant's grand jury challenge were known to him by virtue of Appellant's Motion for Change of Venue detailing pretrial publicity from January through May, 1978.

(3) As the grounds for Appellant's challenge of the grand jury were known prior to its impanelment Appellant was estopped from raising such a challenge belatedly. The trial court relied upon _Seay v. State_, 286 So.2d 532 (Fla. 1973), _cert_. _den_. 419 U.S. 847, 95 S.Ct. 84, 42 L.Ed.2d 77, and Sections 905.02 - 905.05, Florida Statutes. (R-717).

Subsequently, and before Judge Cowart, Appellant was allowed to reopen his grand jury challenge _in toto_. (R-2759).

At the hearing before Judge Cowart, Appellant's lawyer(s) admitted that (1) they first presented the grand jury challenge to Judge Rudd and the request for appointment of counsel on July 21, 1978 (R-2655); (2) that they were aware of the purpose and grounds for the grand jury challenge in May and June of 1978, prior to the impanelment of the grand jury (R-2650); (3) that no courtroom proceedings took place between Friday, July 21, 1978, when Judge Rudd denied appointment of counsel and Monday, July 24, 1978, when he reconsidered his earlier decision and appointed counsel for Appellant (R-2657); (4) that Appellant was abandoning all other challenges other than his primary challenge concerning publicity affecting the grand jury and that they (defense counsel) agreed that the panel as constituted was not tainted (R-2674-2675).

At the conclusion of the hearing, Judge Cowart denied Appellant's motion to quash the indictment.

Replying to Appellant's "heads I win--tails you lose argument," several points should be noted. First, grand jury proceedings are <u>not</u> adversary in nature. <u>Antone v. State</u>, 382 So.2d 1205 (Fla. 1980). <u>See also Gerstein v. Pugh</u>, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) and Annotation, "Accused's Rights to Assistance of Counsel at or Prior to Arraignment," 5 A.L.R.3d 1269-1351 and 1981 pocketpart at 174.

Second, failure to timely raise objections to the composition of the grand jury constitutes a waiver of the right to attack the grand jury's composition. Dykman v. State, 294 So.2d 633 (Fla. 1973, on remand 300 So.2d 695, cert. den. 419 U.S. 1105, 95 S.Ct. 774, 42 L.Ed.2d 800. Third, there must be a sufficient factual showing to raise a reasonable suspicion that the panel was improperly drawn. Rojas v. State, 288 So.2d 234 (Fla. 1973), transferred to 296 So.2d 627, cert. den. 419 U.S. 851, 95 S.Ct. 93, 42 L.Ed.2d 82. As noted earlier, if Appellant did have a colorable claim for the challenge of the grand jury's composition, he in effect abandoned it at the hearing on the motion to quash.

Going further, Appellant had no right to appointed counsel prior to his indictment although he had appointed counsel on other charges. United States v. Halley, 431 F.2d 1180 (9th Cir. 1970). Nothwithstanding this, after reconsideration, Judge Rudd allowed Appellant appointed counsel. In light of this, had Appellant raised his grand jury challenge in a timely fashion, (i.e., prior to the convening of the grand jury), Appellant would have been allowed to challenge the grand jury. Certainly, Judge Rudd's reversal on the appointed counsel situation -- regardless of whether Appellant was entitled to appointed counsel or not -- is a prima facie indication that Judge Rudd was (1) reasonable and (2) determined to err if err at all on Appellant's side. There certainly is no question but that Appellant's counsel was well aware that the grand jury was going to convene on June 5, 1978 (SR-280); the only remaining question is why Appellant didn't timely exercise his challenge.

This brings us to the trap that Appellant has laid for the State. Counsel, so Appellant's argument goes, must have been ineffective because if the State is right, counsel erred in not challenging the grand jury.

The truth of the matter is that Appellant's challenge to the grand jury was sheer speculation, a shot in the dark, a tactical decision engaged in to (1) preserve the issue for appeal and (2) turn up whatever prejudice that it could. Dykman, supra. Looking at the issue from the opposite end, it's obvious that notwithstanding all the documents and clippings incorporated by reference as a part of Appellant's motion to challenge the grand jury, Appellant didn't have any evidence whatsoever that the jury itself, notwithstanding this publicity, was tainted. This is particularly so because Appellant's attorney (who wasn't even his attorney at the time) didn't have anything at the time that he filed the motion or he wouldn't have asked for the five day continuance that he asked for, which was denied. (R-2660).

Comments on two of Appellant's cases are necessary. Appellant, on Page 92 of his brief, states that "A grand jury proceeding is not itself an adversary proceeding, but the challenge to a grand jury is", relying upon State ex rel Ashman v. Williams, 151 So.2d 437 (Fla. 1963). The State has carefully read that case and cannot find any statement that supports

Appellant's position within the case. Presumably, Appellant is arguing that by implication the case supports his proposition that the challenge to a grand jury is an adversary proceeding because an order to show cause was issued to the Attorney General as respondent. Whether issued or not to another party, the presence of an order to show cause ipso facto does not change a nonadversarial hearing into an adversarial hearing.

Appellant's reliance upon Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed 77 (1955) is misplaced. In Reece, the Defendant was an illiterate unable to challenge the grand jury himself. Subsequent to his indictment, counsel was appointed who attempted to challenge the grand jury in the face of a procedural rule which prohibited challenge to a grand jury after its impanelment. Strong evidence was presented that the grand jury's constitution was improper. Because of the strong showing of the evidence that the composition of the grand jury panel was tainted, and because Appellant was not afforded an opportunity to challenge the grand jury prior to its impanelment, the Supreme Court allowed Reece (through counsel) a belated challenge of the grand jury impanelment.

Here, Appellant had every opportunity to challenge the grand jury panel prior to its impanelment. Appellant was on notice by virtue of the search and seizure incident that the grand jury was going to consider the capital crimes that he committed, he was notified that the grand jury was going to meet on or about June 1, 1978, and he was aware prior to that date of the basis of his challenge. (R-716-717). Appellant made no effort to have counsel appointed for him on his behalf during this period of time for this purpose. Judge Rudd's willingness to reconsider his order is a good indication that had Appellant been timely with his challenge, he would have been appointed counsel and he would have been allowed to challenge the grand jury. Further, Appellant has made no showing that he would have been successful in his challenge of the grand jury, thus eliminating any prejudice and "ineffective assistance of counsel" that he otherwise believes existed.

The trial court did not err in denying Appellant's grand jury challenge nor was Appellant deprived of the effective assistance of counsel in regard to that challenge.

ISSUE H

THE TRIAL COURT DID NOT ERR IN ADMITTING THE BITE MARK IDENTIFICATION OPINION TESTIMONY.

Appellant attacks the admissibility of the bite mark identification opinion testimony on five grounds:

(1) Admissibility _vel non_;

(2) Qualifications;

(3) Factual basis;

(4) Opinion on guilt;

(5) Standards.

Each attack will be dealt with separately and concisely.

1. ADMISSIBILITY VEL NON

Appellant admits that the authorities are legion which support the admissibility of bite mark evidence. The State sees no reason to repeat Appellant's laundry list of courts which have allowed bite mark evidence.

Prior to admitting the bite mark evidence, the Court took testimony from both sides' experts, heard argument from opposing counsel, and considered the various and sundry authorities regarding bite mark evidence. (R-2685-3343). The Court specifically considered the following legal authorities before ruling that the bite mark evidence was admissible: _People v. Milone_, 356 N.E.2d 1350 (Ill. 2nd Dist. Ct. App. 1976); _People v._

Allah, 376 N.Y.S.2d 399 (SCNY 1975); People v. Marx, 126 Cal. Rptr. 350, 54 Cal. App.3d 100 (Cal. 2d Dist Ct. App. 1975); People v. Slone, 143 Cal. Rptr. 61, 76 Cal. App.3d 611 (Cal. 2d Dist. Ct. App. 1978); Miller v. Harvey, 566 F.2d 879 (4th Cir. 1977); Coppolino v. State, 223 So.2d 68 (Fla. 2d DCA 1968), cert. den., 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970); Frye v. United States, 54 App. D.C. 46, 293 Fed. 101 (1923); State v. Kendrick, 572 P.2d 354 (Ore. App. 1977); People v. Palmer, 145 Cal. Rptr. 466, 80 Cal. App.3d 239 (Cal. 1st Dist. Ct. App. 1978); State v. Johnson, 289 N.E.2d 722 (Ill. 3d Dist. Ct. App. 1972); People v. Watson, 142 Cal. Rptr. 134, 75 Cal. App.3d 384 (Cal. 1st Dist. Ct. App. 1977); State v. Garrison, 585 P.2d 563 (Ariz. 1978). (R-3340-3341).

The Court's decision that the science of odontology has reached a position of general acceptance among the profession is supported by the cited authorities. Bite mark evidence is as probative as say, hair analysis, which never results in the positive identification of an individual and which this Court has found admissible. Jent v. State, 400 So.2d 1024, 1029 (Fla. 1982) and Peek v. State, 395 So.2d 492 (Fla. 1980). The science of odontology was certainly more developed at the time the trial court allowed the introduction of the bite mark evidence than was the science of determining the presence of succinylcholine chloride at the time the trial court in Coppolino v. State, supra, admitted Drs. Helpren and Umberger's testimony against

Carl Coppolino. _Cf_. the foregoing cases, and particularly the appendix at the end of _State v. Sager_, 600 S.W.2d 541, 578-579, (Mo. West. Dist. Ct. App. 1980), _cert_. _den_. 450 U.S. 910, 101 S.Ct. 1348, 67 L.Ed.2d 334.

The only question before the Court is whether the science of odontology is so unreliable and scientifically unacceptable as to have precluded its admission by the trial court. _Coppolino v. State_, _supra_; _Jent v. State_, _supra_, at 1029. A trial court has wide discretion regarding the admissibility of evidence and its ruling should not be disturbed on appeal unless an abuse of discretion is shown. _Jent v. State_, _supra_, at 1029; _Turner v. State_, 388 So.2d 254 (Fla. 1st DCA 1980).

As no abuse of discretion by the trial court has been demonstrated by Appellant, the bite mark identification testimony was properly admitted.

2. QUALIFICATIONS

Appellant, in launching his attack upon the bite mark evidence, has adopted the three-part rule found in _State v. Sager_, _supra_, at 561:

> (1) Has the science of bite mark identification developed to such a degree as to its reliability and credibility to permit its use as evidence in criminal proceedings?
>
> (2) Does the evidence show or establish the qualifications of the state's

> witnesses as experts, enabling them to render an expert opinion?
>
> (3) Was the factual basis which served as the basis for expert opinions herein supported by reliable and credible evidence?

Appellant, virtually conceding that the first requirement of the Sager Court has been met, hones in under this subheading on the qualifications of the State's chief witness, Dr. Souviron, to testify. Specifically, Appellant's attack under this subheading does not seem to go so much to Dr. Souviron's qualification *per se*, as it does towards Souviron's impartiality as a witness because of an incident that occurred at a professional conference in Orlando.

First, Dr. Souviron's credentials as an expert odontologist were impeccable. (R-8652-8665). Among other qualifications, Dr. Souviron was one of the founding members of the Odontology Section for the American Academy of Forensic Scientists as well as a diplomat of the American Board of Forensic Odontology. At the time of trial, Dr. Souviron was also Chairman of the Examining and Credentialing Committee for the American Board of Forensic Odontology. (R-8655). Dr. Souviron was the only expert Odontologist in Florida. (R-2694). Further discussion of Dr. Souviron's credentials is unnecessary and mention is made of them only to show that the second prong of the Sager Test was met by the State's chief witness.

Second, Dr. Souviron was as fair and impartial a witness as any expert witness could be expected to be, notwithstanding the publicity surrounding the professional conference in Orlando.

Prior to trial, Appellant argued a Motion to Strike Dr. Souviron's testimony. (R-3346). In attendance at a professional conference at Orlando, Dr. Souviron had discussed the extraction of bite mark impressions from Appellant's mouth before the professional body but without mentioning Appellant's name. (R-3348-3349).

Before making its ruling, the Court (1) viewed the tape of the proceedings of the professional conference, (2) heard argument from counsel, and (3) reserved its ruling until it took testimony from Dr. Souviron. (R-3346; 3355-3357).

Prior to the actual testimony of Dr. Souviron, Appellant renewed his motion. (R-8634). Prior to the renewal of Appellant's motion, the Court reviewed the tape again. (R-8634).

The question confronting the Court was whether Souviron's lecture was public. (R-8635). The Court carefully examined Dr. Souviron, who stated that the meeting was closed to the public, that he (Souviron) was not aware of Judge Minor's closure order, and that he could testify objectively at trial. (R-8636-8639).

After properly inquiring into the circumstances surrounding Dr. Souviron's lecture at the professional conference, the Court denied Appellant's Motion to Strike, promising to give extra pre-emptory challenges to Appellant to cure any taint that otherwise might still exist. (R-3357; 8640-8641).

As recognized by Appellant in his pre-trial argument, the action taken by the Court was solely within its discretion. (R-3352). Consequently, unless the Court abused its discretion, Appellant's Motion to Strike was properly denied. In Strawn v. State ex rel. Anderberg, 332 So.2d 601, 602-603 (Fla. 1976), this Court had an occasion to comment upon the exercise of discretion by a trial judge:

> However, we cannot agree with the District Court's determination that the trial judge erred in declaring a mistrial and that, therefore, jeopardy attached and the charge against respondent should be dismissed. The constitution does not guarantee a defendant a perfect trial (which would be difficult if not virtually impossible), but it does guarantee a fair trial. The trial judge is the man on the ground in full view of the premises. In the conducting of a complicated criminal trial, he finds it necessary to rule many times and, like the referee in an athletic contest, must rule quickly. Generally speaking, he has neither the time, convenient library, nor a staff to research each legal and evidentiary question with which he is confronted in a fast moving trial. It is, therefore, necessary that he be given broad discretion in disposing of such matters.

Here, like Judge Strawn, the trial judge was the "man on the ground in full view of the premises" and like the referee in an athletic contest, ruled quickly and properly, preserving Appellant's right to a fair trial.

3. FACTUAL BASIS

Appellant argues that the third prong of the Sager Test was not met by the State because no expert in the field of photography authenticated the relationship between the original negatives of the bite mark on Lisa Levy's left buttock, the "one-to-one prints," and the blow ups made from the one-to-one prints.

State's Exhibit Number 96 (3-E for identification purposes) is a one-to-one color photograph of Lisa Levy's buttocks with a yellow ruler in it for scale purposes; State's Exhibit Number 97 (Exhibit 3-F) is a black and white photograph of Lisa Levy's buttocks with a ruler in it for scale purposes. From these photographs, "blow ups" on a six and a half to one scale were made. (R-8693).

Pretrial testimony included testimony by Dr. Souviron on the accuracy of these photographs and how they were prepared (R-2696; R-2716) and testimony by John Valor, the forensic photographer, who testified about how to make "one-to-one" photographs to scale. (R-2719-2721).

Photographs of the crime scene were taken by Sergeant Winkler (R-2776) with a 35 millimeter Pentex camera, which had 50 millimeter lenses, with the lens setting at 16 and the shutter speed at 60. (R-2779). Winkler took the original photographs from a distance of two feet from the body with the use of a strobe light and his camera. (R-2780).

The blow ups were made by Valor at Souviron's direction. (R-2814).

At trial, and before the jury, Dr. Souviron testified that State's Exhibits 96 and 97 were accurate to a scale of "one-to-one" to the original photographs. Souviron compared the ruler which he received in the mail to the ruler in the picture and determined that they were one and the same. (R-8666). The ruler in the picture had a distinct identifying mark as did the ruler in Souviron's possession. (R-8669). Souviron showed the court the identifying mark. (R-8670).

Upon further examination, Dr. Souviron testified that there was a one-to-one relationship with the ruler in the photograph and the ruler that he had in his possession but that it was not necessary for bite mark comparisons for a one-to-one relationship to exist. (R-8672-8675).

The Court, in ruling on the admissibility of the photographs, said the exact relationship that existed between the ruler and the ruler in the photographs was sufficient. (R-8681). Appellant's counsel, Mr. Harvey, was apparently satisfied with the measurements but expressed reservations about the color of the photographs. (R-8681-8682).

Dr. Souviron testified before the jury that six and a half to one blow ups were made to scale from the "one-to-one photos" and were accurate representations, photographically developed under his direction by forensic photographer John Valor. (R-8694-8695).

The Court expressed its concern about how the blow ups were made, and Dr. Souviron allayed the Court's fears by testifying as to how the photos were made. Imposing the blow ups on each other, Souviron conclusively demonstrated that the blow ups were made in a six-and-a-half-to-one-scale. (R-8701-8702).

In arguing that "distortion" was not explained or accounted for, Appellant improvidently relies upon United States v. Sellers, 566 F.2d 884 (4th Cir. 1977) and United States v. Tranowski, 659 F.2d 750 (7th Cir. 1981). Both of these cases are distinguishable.

In Sellers, the Court erred when it refused to allow the Defendant's expert to express the opinion that the Defendant was not the person in the photographs where the Court had allowed the government's expert to express his ultimate opinion that the person in the photographs was the Defendant. Here, both sides' experts were given wide latitude in expressing their opinions (e.g., 9153-9229).

In Tranowski, an expert astronomer was called to determine the date a photograph was taken from shadows within the photograph and which was relied upon by the Defendant to prove his alibi. Using elementary trigonometry, the astronomer computed tangents and cosines from shadows thrown in the picture by a dog and by a corner of the house which was in the background of the picture. From this, the astronomer determined the azimuth of the sun (its angle from true south) and the altitude of the sun (the angle formed by its elevation above the horizon). The astronomer then consulted a chart which had been used in the past to measure the height of lunar mountains in order to determine the date the photograph was taken.

In reversing Tranowski's conviction for perjury, the Seventh Circuit observed that (1) Ciupik (the astronomer) had failed to take into account a possible slope in the ground when he constructed the right angel of the dog's shadow, 2) that the orientation of the backwall of the house, which was necessary to determine the sun's azimuth, had never been verified, and (3) that an examination of the photograph convinced the Court that it was impossible to locate with any degree of accuracy the intersection of the chimney with the backwall from which Ciupik's angles were determined.

Here, the photographs are clear and sharp. Even a layman could take a ruler, compare them to the rulers in the photograph, and determine that they are accurate "one-to-one" relationships or, by a little simple arithmetic, determine that the blow ups were six-and-a-half-to-one relationships. This Court is invited to do so if it has any question about the reliability of the evidence. Of course, Dr. Souviron testified that he did so and Appellant's experts apparently relied upon the accuracy of these photographs without question to reach their conclusions. (R-8739). Appellant was free to bring in his own experts to contest Souviron's measurements or the photographs.

The factual basis for the photographs was supported by reliable and credible evidence.

4. OPINION ON GUILT

Appellant complains about the following quotation, arguing that it was tantamount to an opinion on his guilt and highly prejudicial:

> A. I think it's an unreasonable question. That's the answer.
>
> Q. You think the question is unreasonable?
>
> A. Yes, sir, as I told you before, we're given ancillary evidence. I was given four pictures, has obviously blood in the rectal area here, the individual had been beaten to death, I don't think this is consistent with a 12 year old child.
>
> Q. Did you consider that evidence?

> A. Well, no, because nobody asked me the age of the perpetrator. (R-8788-8789)

The discussion that preceded this answer by Dr. Souviron concerned the age of the victim's assailant. The question propounded by Appellant's counsel, Mr. Harvey, which elicited this answer was unreasonable. (R-8788). In a "statement-question" Mr. Harvey then asked Dr. Souviron why he thought his earlier question was unreasonable. At that point, Dr. Souviron gave his reasons as to why he concluded that the bite mark on the victim was inconsistent with the bite mark of a 12 year old child.

Two points should be noted. First, Appellant's counsel initiated Dr. Souviron's response. Second, Appellant's counsel never objected to the answer by Dr. Souviron. Indeed, Appellant's counsel seemed satisfied with Dr. Souviron's answer, and continued to explore its ramifications. (R-8789).

Assuming but not admitting this was error, Appellant must live with <u>his</u> error. Appellant cannot initiate error and then seek to benefit by it. <u>Jackson v. State</u>, 359 So.2d 1190, 1194 (Fla. 1978).

Moreover, Appellant is foreclosed from raising this issue because he failed to object to Dr. Souviron's response when it was made. <u>Castor v. State</u>, 365 So.2d 701 (Fla. 1978) and cases cited therein. In both Gibbs v. State, 193 So.2d 460, 463 (Fla. 2d DCA 1967) and Johnson v. State, 314 So.2d 248, 251 (Fla. 1st DCA 1975) there were contemporaneous objections at the time the allegedly prejudicial responses were elicited.

Of course, on its face, and within the context in which it was elicited, Dr. Souviron's response was proper. Although entitled to as an expert witness, he did not express his ultimate opinion on the factual basis of the question in this exchange.

The testimony was not improper nor was it prejudicial.

5. STANDARDS

Appellant argues that because the various authorities that allow bite mark evidence propose or use different standards for review and because the experts in this case expressed opinions on ultimate issues of fact, his case should be reversed.

Before proceeding with an analysis of Appellant's argument, it is interesting to note that Appellant's expert, Dr. DeVore, while indicating that his own tests were inconclusive, admitted that the bite mark evidence in this case was consistent with Appellant's bite and that none of Appellant's teeth were inconsistent to the point where he would exclude Appellant as the assailant. (R-9204; 9216-9218).

Taking Appellant's later argument first, Florida law allows an expert to render an opinion on an ultimate issue of fact.

Section 90.703, Florida Statutes (1981) and Ehrhardt, 5 Florida Practice, Evidence, Section 703.1 and authorities cited therein. The mere expression of an expert's opinion on an ultimate issue of fact does not compel the jury to find that fact to be true. It is presumed that the jury will give the expert's opinion as much weight as it feels that the opinion deserves. Behm v. Division of Administration, 292 So.2d 437 (Fla. 4th DCA 1974). Here, the jury was properly instructed as to how to evaluate the experts' testimony. (R-9747-9748). It should be remembered that as Appellant's expert witnesses testified, Appellant's argument cuts both ways.

As for Appellant's specific attack upon the standard used by the experts in reaching their conclusions, four observations are pertinent:

(1) The three pronged test of State v. Sager, as has been argued, was met;

(2) The evidence was consistent with Appellant's having made the bite marks and even Appellant's expert could not exclude Appellant as the assailant;

(3) The State's experts, Drs. Souviron and Levine, both concluded that the bite

marks were "within a reasonable degree of dental certainty" made by Appellant's teeth. (R-8738 and 8952);

(4) The test met the standard of admissibility in this state under Coppolino v. State, supra, in that the evidence was so unreliable and scientifically unacceptable as to have been precluded from admission.

Appellant's argument is somewhat similar to the argument that the First District Court of Appeal was confronted with in Turner v. State, 388 So.2d 254 (Fla. 1st DCA 1980). In Turner, the defendant argued that the Duquenois-Levine Test, a color chemical test for marijuana, was insufficient in and of itself to determine the presence of marijuana. Turner put on an expert witness who testified that the Duquenois-Levine Test used by the State, even buttressed with microscopic examination, was insufficient to identify the substance possessed by the defendant as marijuana. In rejecting that standard, the First District Court of Appeal noted that absolute chemical identification of the substance was unnecessary and that other facts tending to show the identity of the substance, such as its appearance, smell, and the circumstances under which it was seized, were probative to meet the State's ultimate burden of proof (guilt beyond a reasonable doubt).

Here, the scientific evidence was reliable enough to be admitted under any standard. Coupled with the other circumstantial evidence against Appellant, Appellant's guilt was proved beyond and to the exclusion of a reasonable doubt. The mere fact that the science of odontology, and specifically, bite mark identification, is new is not a bar to its introduction into our courts. After all, Drs. Helpern and Umberger had to develop tests in Coppolino to detect succinylcholine chloride. Naturally, in Coppolino, there was no literature extant prior to the development of these tests to determine the standards the experts used. The standards were subject to the trial court's evaluation and are reviewable by this Court only upon a showing of abuse of discretion. Fotianos v. State, 329 So.2d 397, 401 (Fla. 1st DCA 1976).

The standards were sufficiently developed at the time of Appellant's trial for the jury to conclude beyond and to the exclusion of every reasonable doubt that Appellant was the assailant who made the bite mark on Lisa Levy's buttocks. This is particularly so because Appellant's counsel, Ms. Good, argued extensively to the jury 1) the credibility of the state's witnesses versus the defense's witnesses and 2) that the jurors could take the physical evidence back to the jury room, compare it, and see for themselves that Appellant's teeth did not make the bite mark(s). (R-9682-9694).

ISSUE I

THE TERM "FAILURE CONTAINED IN THE FLORIDA STANDARD JURY INSTRUCTION (CRIMINAL) 2.13(h) (R-9478) WAS NOT AN IMPERMISSIBLE COMMENT UPON APPELLANT'S RIGHT NOT TO TESTIFY.

Appellant argues that the trial court erred in instructing the jury that his failure to take the stand should not be held against him. There are three reasons why Appellant's argument should be rejected.

First, while Appellant did submit a proposed instruction which was rejected (R-1522), Appellant acquiesced to the instruction that was given. (R-9478). Simply put, Appellant wanted the best of both worlds. He wanted his modified instruction accepted but in the event that it was rejected, Appellant wanted the standard instruction on failure to testify given. (R-9478).

Appellant is estopped from now complaining about an instruction to which he agreed. See United States v. Williams, 521 F.2d 950 (D.C. Cir. 1975); McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971); Smith v. State, 375 So.2d 864 (Fla. 3d DCA 1979). This is a classic "gotcha!" maneuver which Florida law prohibits. State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980). This is so because the failure to give such an instruction is constitutional error. Carter v. Kentucky, 450 U.S. 288, 101

S.Ct. 1112, 67 L.Ed.2d 241 (1981), on remand 620 S.W.2d 320 (Ky.).

Second, Appellant's argument has been repeatedly rejected by the state and federal courts. Until recently, the federal courts gave a virtually identical instruction:

> The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.
>
> As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.[6] (Emphasis added)
>
> Devitt and Blackmar, Federal Jury Practice Instructions, 3rd Edition Section 17.14

In Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978), the Supreme Court considered a similar instruction[7] and found no constitutional error where the trial judge, over the Defendant's objection, had instructed the jury that the Defendant had no obligation to testify and that his

[6]The federal jury instructions have been recently modified to remove the word "failure" from the instruction. Id. 1981 Cumulative Supplement for use in 1982 at Section 17.14

[7]"Under the laws of this State a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilty or innocence." But for the absence of the word "failure," the instruction is similar; it accomplishes the same purpose and is no better or worse than the instruction given here. Id. at 335.

failure to do so could not be used against him.

In Florida, as long ago as 1928, this Court held that an instruction concerning a defendant's failure to take the stand to testify is not error. Fogler v. State, 117 So. 694, 96 Fla. 68 (1928). Indeed, the giving of such an instruction even if the defendant does not request it is not error. Lloyd v. State, 218 So.2d 490 (Fla. 2d DCA 1969) and DeLaine v. State, 230 So.2d 168 (Fla. 2d DCA 1970), certiorari discharged 262 So.2d 655.

In Diez v. State, 359 So.2d 55 (Fla. 3d DCA 1978) the defendant objected to an instruction which stated:

> The defendant, Lazaro Diez, did not take the witness stand and testify. This is a matter of passing interest only since there is no obligation passed upon the defendant to do or say anything. The entire burden is upon the State of Florida to prove the truth of the charge and you are not to draw any inferences from the fact that the defendant did not testify.
>
> Id. at 56. (Emphasis added).

The Defendant's argument that the phrase "this is a matter of passing interest only since there is no obligation passed upon the defendant to do or say anything" was rejected. The court held that it was not an impermissible comment upon his right not to testify when read in context with the rest of the jury instruction. Here, as in Diez, when read in context with the rest of the instructions given, the instruction was proper. This is particularly so because the trial court gave an instruction on the presumption of innocence. (R-9745-9746).

Third, notwithstanding Appellant's assertions to the contrary, even if the giving of the instruction was in error, it was harmless error because, as noted by the prosecutor, when the jury was picked, each potential juror was informed that the defendant in a criminal case is never _required_ to testify on his own behalf. (_See_, _e.g._, R-5078; 5193; 5251; 5322; 5371). The harmless error rule is applicable to a comment upon a defendant's right to remain silent. _United States v. Warren_, 550 F.2d 219 (5th Cir. 1977), _rehearing denied_ 558 F.2d 605, _cert. denied_ _Schick v. United States_, 434 U.S. 1016, 98 S.Ct. 735, 54 L.Ed.2d 762, _on rehearing and reversed in part on other grounds_ 578 F.2d 1058, _on rehearing_ 612 F.2d 887, _cert. denied_ 446 U.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 and _Chapman v. California_, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The trial court did not err in giving the instruction on Appellant's failure to take the witness stand.

ISSUE J

APPELLANT'S RIGHT TO COUNSEL WAS NOT ABRIDGED WHEN THE TRIAL COURT REFUSED TO ALLOW MILLARD FARMER TO REPRESENT HIM.

Appellant argues that his Sixth Amendment right to counsel under the United States Constitution was violated when the trial court refused to allow Millard Farmer to represent him.

This issue is foreclosed by Bundy v. Rudd, 581 F.2d 1126 (5th Cir. 1978) and Leis v. Flint, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979). The former, correctly anticipating the later, ruled that Millard Farmer had no right to represent Appellant and that Appellant's due process rights were not violated by the trial court's refusal to allow Farmer to represent Appellant.

In Leis, the Supreme Court reached the same result when it held that out-of-state lawyers wishing to appear *pro hac vice* had no constitutional right to procedural due process where the state court denied their admission.

Appellant seeks to sidestep the rulings in Bundy v. Rudd and Leis v. Flint by arguing that this was *his* Sixth Amendment right to counsel which was abridged and that these cases do not consider the constitutional questions that he now presents. Of course, the effect of these rulings is the same; denying an out-of-state lawyer the right to appear *pro hac vice* for a client is tantamount to refusing the exercise of a client's Sixth Amendment privilege for that particular attorney. The dissent in Leis v. Flint, although wrong in its outlook, recognized that this in effect was what the United States Supreme Court was holding. See Note 2, Id. at 446, 58 L.Ed.2d 724.

Assume for argument that Bundy v. Rudd and Leis v. Flint do not foreclose this issue. The trial court, under the prevailing case law and the factual situation presented it, was nonetheless still correct in its decision.

Although the right to counsel is absolute, there is no absolute right to particular counsel. United States ex rel. Carey v. Rundle, 409 F.2d 1210 (3d Cir. 1969), cert. den. sub nominee Carey v. Rundle, 397 U.S. 946, 90 S.Ct. 964, 25 L.Ed.2d 127. The right to retain counsel of one's choice is not absolute; such a right cannot be insisted upon in a way that will obstruct the orderly judicial procedure and deprive courts of their inherent power to control the administration of justice. United States v. Burton, 584 F.2d 485 (D. C. Cir. 1978), cert. den. 439 U.S. 1069, 99 S.Ct. 837, 59 L.Ed.2d 34. See also United States v. Poulack, 556 F.2d 83 (1st Cir. 1977), cert. den. 434 U.S. 986, 98 S.Ct. 613, 54 L.Ed.2d 480; Gandy v. State, 569 F.2d 1318 (5th Cir. 1978).

The determination of whether the Defendant's Sixth Amendment right to counsel of his choice overrides the conduct of his attorney is committed to the trial court's discretion. United States v. Kitchen, 592 F.2d 900 (5th Cir. 1979), cert. den. 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56; United States v. Dinitz, 538 F.2d 1214 (5th Cir. 1976), rehearing denied, 542 F.2d 1174, cert. denied 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556. The right of ~~a~~ Defendants in ~~a~~ criminal cases to retain ~~the~~ attorney of ~~his~~ their choice does not outweigh the countervailing public interest in the fair and orderly administration of justice." United States v. Salinas, 618 F.2d 1092 1093 (5th Cir. 1980), rehearing denied 622 F.2d 1043, cert. den. U.S. ______, 101 S.Ct. 374, ______ L.Ed.2d ______.

In Ross v. Reda, 510 F.2d 1172 (6th Cir. 1975), cert. den. 423 U.S. 892, 96 S.Ct. 190, 46 L.Ed.2d 124 this very issue was presented to the Court, where pertinently, the Court stated:

> While the Sixth Amendment right "[i]n all criminal prosecutions" to the "assistance of counsel" implies a degree of freedom to be represented by counsel of defendant's choice, this guarantee does not grant the unconditional right to representation in a state court by a particular out-of-state attorney. To the contrary, in Thomas v. Cassidy, 249 F.2d 91, 92 (4th Cir. 1957), cert. denied, 355 U.S. 958, 78 S.Ct. 544, 2 L.Ed.2d 533 (1958), the Court said:
>
> > [I]t is well settled that permission to a nonresident attorney, who has not been admitted to practice in a court, to appear pro hac vice in a case there pending is not a right but a privilege, the granting of which

> is a matter of grace resting in the sound discretion of the presiding judge.
>
> Moreover, the Sixth Amendment claim is modified significantly by the actual availability and presence of other competent counsel. Id. at 1173

Moreover, the Court went on to say that because of statements made by Ross's proposed counsel to the media, the lower court was well within its discretion in denying Ross his particular choice of counsel. Id. at 1173.

Here, after holding a hearing where both Appellant and the State were afforded an opportunity to put on witnesses, the Court wrote a well-supported, well-reasoned order denying the appearance of Millard Farmer. (R-438-442; R-2022-2156).

The evidence at the hearing substantiated the Court's order. Testimony indicated Millard Farmer had been held in contempt in his native state of Georgia on two occasions within several days. (R-2049-2050). Farmer habitually talked to the press, generated publicity, engaged in disruptive tactics, and accused judges of "collusion". (R-2057-2058). Farmer engaged in Georgia in delaying tactics (R-2073-2089) and at one time had to be physically removed from a judge's chamber because of his conduct. (R-2075).

Here, where Appellant complains about the adverse effects of publicity, and even argues that "the media controlled the docket", Appellant alleges it was error for the trial court to deny the appearance of a media whirlwind, Millard Farmer, who habitually creates publicity by talking to newspaper reporters. (R-2100-2127).

This Court doesn't have to just guess at Farmer's contemptuous conduct; it can review the factual hearing where witnesses testified to Farmer's disruptive tactics and read for itself Farmer v. Holton, 146 Ga.App. 102, 245 S.E.2d 457 (Ga.App. 1978), cert, den. 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979) and Willis v. State, 243 Ga. 185, 253 S.E.2d 70, (Ga. 1979), cert. den. 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116, where Farmer's sordid trial tactics are detailed for all to see. Interestingly enough, the Georgia Supreme Court in Willis held that it was not error for the trial court to refuse to allow an out-of-state attorney, not a member of the Georgia Bar, to represent the Defendant. Id. at 75.

As noted by the trial court, Rule 2.060(b) of the Florida Rules of Judicial Administration makes the appearance of foreign attorneys permissive and the American Bar Association suggests that an attorney who has been held in contempt may and should be prohibited from pro hac vice admission into a foreign court. (R-440-441).

Last but not least, Appellant's Sixth Amendment claim, notwithstanding his argument to the contrary, was modified significantly by the actual availability and presence of other competent counsel. Ross v. Reda at 1173.

Appellant's Sixth Amendment right to counsel was not violated when the trial court refused to allow Millard Farmer to appear *pro hac vice* on his (Appellant's) behalf. God only knows how many more thousands and thousands of pages this record would have been had Millard Farmer been allowed to appear. *See* Willis v. State, *supra* (case which took two and a half days to try the guilt-innocence phase ended up with a record of over 12,000 pages because of hearings instigated by Millard Farmer, disapproved by the Georgia Supreme Court, all of which were unnecessary. *Id.* at 73.)

ISSUE K

THE COURT'S INCLUSION OF A FLIGHT INSTRUCTION TO THE JURORS WAS NOT ERROR.

Appellant argues that the Court erred in instructing the jury that it could "infer consciousness of guilt from flight" (Appellant's brief at 117).

The following instruction was given:

> You are instructed that flight of the defendant is a circumstance to be taken into consideration with all other facts and circumstances in evidence, and if you, the jury, believe and find from the evidence, that the defendant fled for the purpose of avoiding arrest and trial, you may take this fact into consideration in determining guilt or innocence. (R-9744-9745).

Preceding the giving of this instruction, extensive discussion occurred between the parties regarding its form. (R-9511-9518). Appellant's attorney, Ms. Good, objected to the State's proposed instruction and tendered Appellant's proposed instruction. (R-9511-9517). Appellant's Attorney Harvey objected to the giving of any flight instruction, Appellant's or any other proposed instruction. (R-9515).

The Court, after listening to objection and argument by both the State and defense, promised to "get up a good instruction" based on "Hargrett" (R-9518). The Court, true to its promise, promulgated its own instruction, distributed it to the parties, announced that it felt pretty good about its instruction, and observed that both the defense and the prosecution would probably disagree with it. (R-9611). There was no specific contemporaneous objection to the Court's instruction. (R-9626 _et seq_.).

Because of the foregoing, Appellant is estopped from raising this issue. _Lucas v. State_, 376 So.2d 1149, 1152 (Fla. 1979).

Any evidence that an accused in any manner endeavored to escape or evade threatened prosecution, by flight, concealment, resistance to lawful arrest, or any other _ex post facto_ indication of a desire to evade prosecution is admissible evidence. _Mackiewicz v. State_, 114 So.2d 684 (Fla. 1959), _cert. den_. 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 879; _Daniels v. State_, 108 So.2d 755 (Fla. 1959). Such an instruction is proper in a first degree murder case. _Spinkellink v. State_, 313 So.2d 666, 670 (Fla. 1975), _cert. den_. 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221.

The giving of such an instruction has generally been upheld in Florida law. _See_ e.g., _Batey v. State_, 355 So.2d 1271 (Fla. 1st DCA 1978) and cases cited therein; _Villageliu v. State_, 347 So.2d 445 (Fla. 3d DCA 1977); _Williams v. State_, 268 So.2d 566 (Fla. 3d DCA 1972).

The main thrust of Appellant's argument is that in most of the cases where a flight instruction has been given, the defendant's flight occurred almost immediately after the occurrence of the crime. Consequently, argues Appellant, there is a one-to-one-correspondence between the proper giving of a flight instruction and the proximity of the flight to the occurrence of the crime.

In Hargrett v. State, 255 So.2d 298 (Fla. 3d DCA 1971), habeas corpus petition dismissed for failure to exhaust state remedies sub nominee Hargrett v. Wainwright, 474 F.2d 987 (5th Cir. 1973), the defendant was in town prior to the crime, could not be found in town after the crime, and was finally apprehended some two weeks after the crime in another town. The Third District Court of Appeal held that it was proper for the trial court to give an instruction on flight, noting that the above circumstances constituted sufficient evidence for the jury to determine whether the defendant's flight was evidence of guilt or innocence of the crime.

The trial court in this case was well aware of Hargrett (R-9511) and may well have prepared its instruction from the instruction given at Hargrett's trial:

> Ladies and gentlemen of the jury, if you find that the defendant fled to escape or evade apprehension, then you may consider the same in determining the guilt or innocence of the

> defendant, as this tends to show the probability[8] of the defendant being the guilty person. Id. at 299.

Here, the facts were similar to the facts in Hargrett. Appellant was seen in, and, or around the crime scenes immediately prior to (R-7955; 8326-8407), and immediately after the murders (R-8410-8417).

Appellant was seen by Officer Keith Daws on February 11, 1978 a short distance from the Oaks Apartments, whereupon Appellant fled. (R-7920-7929).

Appellant was last seen in the Tallahassee area on the Monday or Tuesday of the second week of February, 1978 (R-7959-7962) and was arrested by Pensacola Police Officer David Lee, where a scuffle ensued and Appellant attempted to flee. (R-6792-6794).

The circumstances were detailed by Officers Daws and Lee concerning the stopping and subsequent fleeing of Appellant. (R-7920-7929; 6792-6794).

The circumstances in Hargrett and Appellant's case are almost indistinguishable.

Moreover, flight is only a circumstance of guilt to be

[8] The "probability" of guilt language was probably struck at Appellant's behest. (R-9515).

considered by a jury under an appropriate charge. Williams v. State, supra. The charge given by the trial court allowed the jury to consider the other facts and circumstances concerning Appellant's guilt along with the evidence of Appellant's flight to determine whether Appellant fled for the purpose of avoiding arrest. The jury was informed they could "take this fact into consideration in determining guilt or innocence." (Emphasis added.) As given, the instruction was as beneficial to the Defendant as to the State as the jury could have determined that Appellant's flight was not an indication of guilt and may well have been an indication of innocence.

Certainly, Ms. Good, in arguing to the jury, glibly attempted to dissipate Appellant's flight as a circumstance of guilt. (R-9680-9681).

Finally, the fact that Appellant may have been running from one or more of his crimes does not prohibit the giving of such an instruction or otherwise Appellant would be rewarded for the NUMBER OR ENORMITY of his crimes.

The giving of the flight instruction by the Court was not error.

ISSUE L

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT AN EVIDENTIARY HEARING ON THE EFFECTIVENESS OF HIS TRIAL COUNSEL.

Appellant argues that pursuant to the provisions of Knight v. State, 394 So.2d 997 (Fla. 1981) his counsel were ineffective and he was entitled to a hearing on their lack of effectiveness. Appellant has detailed the alleged acts or omissions which suggest that his counsel were ineffective. These will be dealt with separately later. First, some important preliminary remarks.

When Appellant first raised the issue of ineffective assistance of counsel, he did not request a hearing on the matter. (R-10079). Appellant's court appointed counsel for the motion for new trial (Davis and Hayes) were not prepared to argue the issue of ineffective assistance of counsel without written transcripts. (R-10130-10131). The trial court denied Appellant's request for a hearing based on the fact that he (Cowart) had heard and watched all of the proceedings and thus was in a position to evaluate Appellant's counsel and their effectiveness without a hearing. (R-10134-10135). Indeed, at this hearing, Appellant still wanted his trial counsel (public defenders) to represent him because of their knowledge of the case. (R-10142).

Appellant's attack upon his defense team is so typical of an armchair general's attack upon his professional military staff after a defeat. Appellant, an amateur strategist, called the shots during the trial and in the aftermath now takes his shots at those very professionals that defended him so capably. The trial court specifically allowed Appellant to represent himself in court with the assistance of the defense team. (R-2158-2159; 3651). Appellant, as counsel, could examine anything and anybody that he wanted to at any time during the course of the legal proceedings. (R-3686). Whether to Appellant's detriment or not, he certainly took advantage of this order. (E.g., R-3942; 5797; 9577).

Appellant's defensive army consisted of Appellant (as general); Michael Minerva (The Public Defender, Second Judicial Circuit); Edward Harvey (Assistant Public Defender); Lynn Thompson (Assistant Public Defender); Margaret Good (Assistant Public Defender and a capital appeals specialist); Robert Haggard (voluntary private counsel); (all of whom were either captains or privates, depending upon Appellant's mood). Additionally, at various stages throughout the proceedings he was appointed additional counsel to either oppose strategical decisions of the defense team (i.e., Brian Hayes, who was appointed by the Court to represent Appellant at his competency hearing [R-3613] or Hayes and Cliff Davis, who represented Appellant at his motion for new trial on the incompetency of counsel issue [e.g., R-10,130).[9]

Additionally, Appellant had a jury selection specialist (R-3932-3944), an identification specialist (Dr. Buckhout, R-6206-6266, who was not allowed to testify R-1650) and odontological experts who had more degrees than a thermometer (R-9070; 9153-9154), all of whom assisted in one fashion or another in aiding or defending Appellant.

Moreover, Appellant was even allowed to contact out-of-state counsel (a Mr. Browne) by phone for legal advice (R-9496-9497).

There can be little doubt that Appellant was an intransigent client and an intolerable commander. Appellant, overriding the decisions of his professional staff, insisted on putting on witnesses who Public Defender Mike Minerva refused to put on, with the end result that they were detrimental to Appellant's case. (R-3619).

Because of Appellant's intransigence, delays in the proceedings were inevitable. Some witnesses were deposed twice, once by Appellant, once by his defense team. (R-2239-2240).

Appellant had no right to the hybrid representation that he

[9]Appellant was also initially represented by Assistant Public Defenders Joe Nursey and David Busch (R-1691).

received. State v. Tait, 387 So.2d 338 (Fla. 1980) and cases cited therein.

Appellant must show justifiable dissatisfaction with his appointed counsel. The right to effective assistance of counsel may not be improperly manipulated by an eleventh hour request to obstruct the orderly administration of justice. United States v. Hart, 557 F.2d 162 (8th Cir. 1977), cert. den. 404 U.S. 936, 98 S.Ct. 305, 54 L.Ed.2d 193. As was noted by the First District Court of Appeal in Brooks v. State, 172 So.2d 876, 882 (Fla. 1st DCA 1965):

> The trial of a criminal cause is not a game to see by what legal strategem one may escape punishment for the commission of an offense against the general public. While the right to counsel is absolute, its exercise must be subject to the necessities of sound judicial administration. The constitutional right to be represented by counsel does not, of course, guarantee an attorney with whose advise the defendant can agree. Judicial proceedings providing a forum for a fair and impartial hearing and trial before his peers must be provided by the state to one accused of committing a crime. On the other hand, the public wefare demands that such a procedure be carried forth in an orderly manner; otherwise, the judicial system becomes "farcical and a mockery" and society as a whole reverts to the law of the jungle. To permit a "jail house lawyer" to seize upon every imaginable incident as being a deprivation of a constitutional right and thereby disrupt the judicial processes to such an extent that a final disposition of his cause is postponed beyond the availability of witnesses, is to say in the name of due process that justice is not available to

> the citizens of a state against an individual. To permit a defendant, be he indigent or otherwise, to conduct, on the one hand, the trial of his cause as he deems advisable, but on the other hand to scream that "he" has been deprived of a constitutional guarantee because "he" is not furnished, at the expense of the general public, an attorney who concurs "with him" as to the manner of conducting an appeal is to completely disregard the purposes for which counsel is furnished. Counsel is furnished for the purposes of advising and guiding an indigent defendant and to assist him in preparing his case, taking into consideration his rights as guaranteed by the State and Federal Constitutions. Counsel is not provided for the purpose of serving as a mouthpiece for the defendant, nor is such counsel required to conduct himself as an errand boy to carry out the defendant's legal theories--and once failing so to do, to be summarily discharged by defendant and another appointed for such purpose. We are fearful that the basic function of a lawyer appointed to represent a defendant has, to a great extent, escaped not only indigent defendants but, in many instances, the appellate courts.[10] (Footnotes omitted)

At any rate, the State's purpose in discussing the foregoing matters and citing the foregoing authority is to point

[10]At the time Brooks was decided (1965) the standard for attacking counsel's inefficiency in Florida was "farce or mockery". This case is not relied upon but the State for the proposition that for Appellant to prevail on the issue of ineffective assistance of counsel he has to show that his counsel were so incompetent that his trial resulted in a "farce or mockery." Rather, the language quoted above is done so for the purpose of underscoring the difficulties with which the trial court had to deal concerning Appellant's representation. The parallels are obvious.

out that if any acts or omissions did occur, they were because of Appellant's behavior or misbehavior. Appellant, hoisted on his own petard, should be estopped from raising the issue of ineffective assistance of counsel because of his conduct.

Turning to the specifics of Appellant's complaints, it should be noted that Appellant has made some rather general criticisms (acts or omissions a-g) followed by record citations. It's almost as if a dab of paint became the painting on the ceiling of the Sistine Chapel; Appellant fly specks the record, comes up with a few criticisms, and slaps several record citations down without extended discussion in support of those criticisms.

Appellant's first criticism is that his counsel were insufficiently prepared for the bite mark challenge. (Appellant's citation for this is 2465, apparently an erroneous citation as the bite mark evidence was not discussed on this page in the record.) At any rate, as noted by the trial court and supported by the record, Appellant's expert witness testified in the pretrial hearings that he had considered the bite mark tissue evidence. (R-3769; 3198). Without more, further discussion of this complaint is useless.

Appellant's next complaint is that counsel did not adequately notice its motion to exclude the public to certain depositions taken. (R-2681). First, Appellant's counsel, because of the short period of time between the filing of the motion and the initial hearing to be held on the motion, was not sure that those people entitled to receive a copy of the motion or notice of the hearing received their copies or notices. Consequently, counsel, in the interest of fairness to all parties, asked that other matters be taken up prior to consideration of the motion to seal the depositions. Second, Appellant makes no argument as to how he was prejudiced by this action or as to why this constituted ineffective assistance of counsel. Indeed, on its face it appears to constitute effective assistance of counsel--a concern by Appellant's counsel that all parties entitled to be noticed concerning the motion and hearing to seal the depositions received the motion and were aware of the hearing in time to adequately prepare for it. (R-2681).

Appellant's third complaint is that counsel was not timely in moving to challenge the grand jury which indicted him. (R-2654). This has been discussed in some detail in Issue G, _supra_. Suffice it to say that at this particular time Appellant didn't have counsel on the charges under appeal so he can hardly complain about their effectiveness or lack thereof. _See_ _United States v. Gray_, 565 F.2d 881, 890, n.30 (5th Cir. 1978) [Defendant not entitled to presence of counsel while committing a crime; likewise, the analogy can be drawn that Appellant is not entitled to effective assistance of counsel prior to the appointment of counsel.]

Appellant's fourth complaint is that counsel did not adequately confer and consult with him during the course of the pretrial and trial proceedings. (R-2597, 2959, 3599, 3651, 5337, 8305).[11]

Appellant, in his inimitable fashion, vociferously broached this issue before the trial court during the trial. The court's reply is instructive:

> THE DEFENDANT: Some things are best done by yourself than others.
>
> I think I already have a co-equal, at least in the eyes of the Florida Constitution. I have asserted my right to a co-equal position with my counsel and they are counsel of record and I have also, earlier in Tallahassee, informed the Court that I wished to exercise that.
>
> THE COURT: And the Court has given you that right. You have questioned witnesses. You have participated in motions.
>
> As I said, there must be a hundred conferences with you by counsel, which the record will reflect from its beginning, "Just a moment, please," and their going over and conferring.
>
> I have not seen a witness tendered or a cross-examination ceased that they have not confronted and consulted with you, Mr. Bundy.
>
> If you had anything else--and you have displayed no bashfulness to this Court--if you would have had some serious or founded reservations, you would have

[11] The reference to 8305 must be an error; 8305 is the appearance page of the proceedings held on July 17, 1979.

let me know about it.

(Emphasis added) (R-9041-9042)

*   *   *   *   *   *

And I am not going to hear any more nonsensical information about competency or incompetency of counsel.

Now, you feel free to discuss anything with your counsel. They are here with you.

We have joined issue on it and we are going to proceed with this trial.

THE DEFENDANT: Yes, Your Honor.

I wasn't addressing the issue of competency of counsel, necessarily, but on the otherhand--

THE COURT: Your question is one of just plain submission of counsel.

THE DEFENDANT: Imposition.

THE COURT: No, it is submission and this Court has addressed that.

If they do not do every little single solitary thing you want them to do, they are incompetent.

THE DEFENDANT: No, sir.

THE COURT: And bless your heart, if they do, I am going to fire them. Okay?

And the Court has ruled on it now. Let's proceed on.

(R-9045-9046).

Just as the Court stated, the record reflects that Appellant conferred frequently with members of the defense team. (R-5792 [Haggard] "If I could have just one moment, Your Honor"; R-7440 [Thompson] "Just one moment, Your Honor, please"; R-8467 [Haggard] "Your Honor, could we have a moment?", etc. References to consultations are strewn throughout the record. These are representative. At any point Appellant would have been free to consult with counsel in these pauses).

As noted by the trial court, if Appellant's complaints had any substance to them the trial court would have removed Appellant's lawyers. (R-9042; 9046).

Appellant's fifth complaint is that his counsel were not prepared for trial (R-3960, 6129) despite representations to the contrary (R-9024), that they had not seen certain exhibits (R-5684, 5930)[12] and that their late preparation and production of certain bite mark evidence rendered it inadmissible because it was untimely produced. (R-9830, 9988).

Counsels "representations to the contrary" (R-9024) came long after counsels' representations that they were not prepared for trial. (R-3960); the citation of R-6129 is apparently a mistake as there is no suggestion on <u>that page</u> that Mr. Haggard was unprepared for trial; the earlier citation is merely a demand for further discovery on the part of Counsel Good.) As for the so-called untimely produced bite mark evidence, introduction of

[12]This citation is apparently a mistake.

the evidence is immaterial because it would not have changed the opinion of Appellant's bite mark evidence expert Dr. Devore (R-9989).

Appellant's sixth complaint is that no court-appointed counsel had prior capital case experience (R-3651, 3677, 9037, 9287, 9296) and his case concluded without any counsel having prior capital case experience (R-9822).

First, mere inexperience of counsel is no guarantee of ineffective assistance of counsel. United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975) and United States v. Gray, 565 F.2d 881 (5th Cir. 1978).

Second, Michael Minerva, the Public Defender of the Second Judicial Circuit, represented Appellant throughout his trial. While there were differences between Minerva and Appellant, Minerva oversaw the defense team and their actions. Well into the trial, when Mr. Minerva made his first appearance before the jury, Appellant introduced Mr. Minerva to the jury. (R-8952). Mr. Minerva did not withdraw as counsel until after the trial was over. (R-1661; 10126; 10135). Indeed, Appellant insisted upon his public defenders representing him at the motion for new trial. (R-10142). Mr. Minerva's qualifications and experience need no introduction to this Court. Further, note the clever wording of Appellant's charge: No court-appointed counsel had capital experience; Appellant also had volunteer private counsel, Robert Haggard, who, according to the court was ". . . an old-timer to this circuit" who also was ". . . a good choice." (R-3930). Additionally, Appellant had the advantage of the presence of Margaret Good, a capital appeals specialist who also needs no introduction to this Court.

Appellant's final complaint is that counsels' assistance was below the standard required in capital cases in the area of trial procedure. (See his citations at p. 121 of his brief.) As Appellant has not elaborated on specifically why this trial procedure was deficient, it is difficult to respond. Appellant's citation to 8149 is representative (perhaps) where Mr. Haggard asked the question "So you didn't know how to do that" and Mr. Simpson (the prosecutor) responds "Is he asking her a question or is he making a statement for the record, Your Honor?" The Court responded "He's flirting." And Mr. Haggard continues to ask another question which was unobjected-to. How this constitutes ineffective assistance of counsel or deficiency in trial procedure is beyond the State. At any rate, courts are not in the business of rating legal performances. United States v. Hand, 497 F.2d 929 (5th Cir. 1974), affirmed en banc, 516 F.2d 472 (5th Cir. 1975). Moreover, someone who is seeking relief predicated upon ineffective assistance of counsel must do more than make conclusive assertions to substantiate his challenge. Woodard v. Beto, 447 F.2d 103 (5th Cir. 1971), cert. den. 404 U.S. 957, 92 S.Ct. 325, 30 L.Ed.2d 275.

Appellant, relying upon Knight v. State, supra, then proceeds to note "qualitatively, capital cases are different," and that the "inexperience of counsel was tantamount to no effective sentencing phase at all,[13] that he was denied the preparation of a defense, and that evidence of material importance was kept from the jury. (Appellant's brief at 121-122).

It is the State's position that Appellant has failed in (1) showing that the acts or omissions that he has detailed were measurably below that of competent counsel and (2) proving "prejudice" to the extent that the detailed acts or omissions affected the outcome of the court proceedings.

It is interesting to note that these acts or omissions detailed in Appellant's brief were not detailed in his motion for new trial. (R-1658). Indeed, Appellant's only allegations regarding any ineffective assistance of trial counsel in his motion for new trial were that (1) the trial court erred in

[13] Appellant makes no complaint on appeal that his sentence is improper.

specifically ruling that his court-appointed counsel were competent and (2) that he did not receive a fair and impartial trial because his court-appointed counsel were ineffective to secure his right to counsel guaranteed by the Sixth Amendment to the United States Constitution.

Two final points in rebuttal to Appellant's allegation should be noted. First, the trial court incorporated the entire transcript as evidence on the evidentiary issues regarding Appellant's charge of ineffective assistance of counsel. (R-10034-10035). The voluminous record, the quality of the motions filed by defense counsel found in this record, and the quality of their presentation as reflected by this record refutes Paragraphs 33 and 34 of Appellant's motion for new trial. Second, Appellant's allegations of ineffective assistance of counsel do not take into account the fact that <u>he</u> was the chief trial counsel, that he deposed, examined, and cross-examined witnesses to his satisfaction. If Appellant has a claim of ineffective assistance of counsel, it is against himself, not against his appointed trial counsel.

Additionally, Appellant also had the benefit of <u>private</u> volunteer counsel.

In order for this Court to conclude that Appellant's defense team was ineffective in representing him, their errors must have been so flagrant as to be obvious that they resulted from neglect or ignorance rather than from an informed professional deliberation. Knight v. State, supra and Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977). To do that, this Court would have to indulge in the prohibited practice of hindsight or second guessing. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Effectiveness of counsel should be determined from the totality of the circumstances of the entire record. United States v. Gray, supra.

Given the record before the Court, Appellant was not entitled to a hearing on the issue of ineffective assistance of counsel.

CONCLUSION

Based on the foregoing arguments and authorities, Appellant's judgment and sentence on all counts should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

By: David P. Gauldin
DAVID P. GAULDIN
ASSISTANT ATTORNEY GENERAL

SUITE 1502, THE CAPITOL
TALLAHASSEE, FL 32301
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Robert Augustus Harper, Jr., Esquire, 308 East Park Avenue, Post Office Box 10132, Tallahassee, Florida 32302 by U.S. Mail this 18th day of May, 1982.

David P. Gauldin

DAVID P. GAULDIN