IN THE SUPREME COURT OF FLORIDA



THEODORE ROBERT BUNDY,

Appellant,

vs. CASE NO. 59,128

STATE OF FLORIDA,

Appellee.

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# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE FACTS

Appellee, the State of Florida, accepts the Statement of Facts and the Statement of the Case as propounded by Appellant's Initial Brief. However, due to the importance of the statements made on voir dire by the twelve jurors who actually heard the case below, the State would offer a short summary of the statements given by each juror below.

### Phyllis B. Murphy

Mrs. Murphy's voir dire starts on page 1017 of the record. Initially, the trial court asked her whether she could put aside any opinion she might have about the guilt or innocence of the accused. She replied that she could (R-1018). When asked whether she had heard about this case or Bundy in general, she said that she knows the name, but that she did not remember what happened in the past (R-1032). She said that she did not even know the outcome of the murders in the Northern part of the state, but she thought if Bundy had received the death penalty, she would have heard about it (R-1039). When asked whether she remembered the facts in the case or who was involved, she replied "No." (R-1040). She answered negatively to counsel's question whether she knew anything which would prevent her from viewing the case objectively and impartially (R-1043).

## Floyd R. Armel

Mr. Armel promised Judge Jopling that he would put aside any opinions and consider only the evidence he heard in the courtroom (R-1081). When asked whether he knew of Bundy, Mr. Armel said he had heard the name, but had paid no attention to the stories since it did not interest him (R-1103). Further, he stated that he knew nothing about any previous incident and had not heard anything about the Leach case until he came to court as a prospective juror (R-1104,05). In fact, Mr. Armel explained that he had never even talked to anyone about Bundy (R-1106).

## Eleanor J. Thompson

Mrs. Thompson's voir dire starts on page 1481. While she stated that she heard negative things about Bundy, and that these had given a negative feeling toward him, she promised that she could put these opinions aside (R-1483,1513). The prospective juror had some knowledge of the Chi Omega case, but from her responses it is clear that she had no specific information about the crime (R-1512).

## George Yurcisin

The voir dire of Mr. Yurcisin starts on page 1686 of the record. Mr. Yurcisin promised the judge to lay aside all opinions he might have about the case or this defendant (R-1686). Mr. Yurcisin said he recognized Bundy's name but he did not know anything about the last case (R-1699). He mostly read

the headlines in the paper (R-1700). Additionally, he said that he had no idea of this case at all (R-1700). He did, however, know that Bundy had been found guilty of murder and sentenced to death in an earlier case (R-1710,1711). He never saw any portion of the trial in Miami and he also said that his knowledge of the earlier crime had no effect on him (R-1711).

**Clifton Lister**

Like all the preceding prospective jurors, Mr. Lister promised the trial court that he would put aside the opinions he held about the defendant or the case (R-1975). He was further asked whether he held an opinion about the instant case and he said he did not (R-1976). As far as his exposure to the media, Mr. Lister said that he had heard of Bundy, but that he had never listened to the radio or read news stories about him (R-1988). He had heard a rumor at work that Bundy was tried for something up North, but he couldn't remember the charges or the outcome (R-1997).

**David M. Thomas**

On page 2013 of the record, voir dire of Mr. Thomas starts with a promise to the judge that he will put aside his opinions and decide the case only on the evidence presented. Mr. Thomas stated that he had no opinion about this case (R-2015). Further, he stated that he didn't know about this case but that he had been informed about the Chi Omega case (R-2037). He knew that

Bundy had been tried in Miami for the murder of two coeds in Tallahassee. He further knew that bite mark testimony had been admitted and that a death sentence had been returned (R-2038). However, Mr. Thomas stated that this earlier case had no effect on him concerning Bundy's guilt or innocence (R-2042).

## Lorraine L. Rochefort

Mrs. Rochefort promised the judge she would leave her opinion outside the court and decide the case only on the evidence presented (R-2699). She also said that she had no knowledge of the facts of this case (R-2713). She had heard that Bundy had been on trial before they moved the trial to Orlando (R-2721). She knows he had been tried and found guilty, but she doesn't know what for (R-2722). The knowledge she had acquired would not affect her ability to decide this case (R-2725).

## Lorraine Meserole

To the judge's question whether she could put aside any opinions of the case, Ms. Meserole said that she had a clear mind (R-2738). The first time she heard about Bundy was when she came into court for jury duty (R-2760). She has never talked about this case (R-2763).

## Dorothy Eddy

Mrs. Eddy's voir dire starts on page 3102 with the same promise all the others had given concerning the putting aside of

opinions (R-3103). She stated that she does not know anything about this trial (R-3127). Further, she had not read or seen anything that had given her an opinion about this case (R-3128).

**Dorothy Henderson**

Mrs. Henderson promised to put aside any opinon she had about the case (R-3192). She further stated that she knew nothing about this case (R-3203). About any previous case, Mrs. Henderson said she knew there had been one but that is all (R-3218).

**Marjorie B. Parsons**

Mrs. Parsons promised to put aside her opinions (R-3228). However, Mrs. Parsons stated that she does not have a T.V. and does not receive a newspaper, so she knows very little about the case (R-3228). She further said she had never heard of Bundy before being called into court for jury duty (R-3248).

**Patrick Wolski (foreman)**

Mr. Wolski told the judge he could put aside what he has heard in the media (R-3456). He stated that he knows about the Tallahassee murders and that Bundy was convicted in Miami (R-3473). Mr. Wolski did not see the trial on T.V. but he did see some accounts on the 6:00 news (R-3474). Mr. Wolski stated that he believes that he has no opinion as to guilt or innocence until the evidence is produced (R-3479). Mr. Wolski stated that he had not read anything about the Leach murder (R-3480).

## ISSUE I

**THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE TESTIMONY OF C. L. ANDERSON ON THE GROUND THAT MR. ANDERSON'S TESTIMONY WAS TAINTED BY PRE-TRIAL HYPNOSIS.**

## ARGUMENT

Appellant claims that the use of C.L. Anderson's testimony was inappropriate because Anderson had been placed under hypnosis prior to his taking the witness stand. This argument takes two forms: (1) that, as a result of the hypnosis, the testimony was inadmissible per se, and (2) that the testimony was unreliable. Appellant traces the development, in certain states, of a per se rule exclusion of such testimony. However, that rule is not the law in Florida and should not be adopted by this Court. In fact, this case demonstrates exactly why such a rule of inadmissibility is inappropriate.

Initially, it is important to recognize that hypnosis was not the source of the testimony of C. L. Anderson. The witness had been able to describe the encounter with the white van prior to the hypnosis sessions. Several cases allow the refreshed testimony of hypnotized witnesses who have, through trauma, lost the ability to remember the event. State v. Jorgensen, 8 On.App. 1, 429 P.2d 312 (1971); State v. Brom, 494 P.2d 434 (On.App. 1972); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974).

Unlike the witness who was the victim of a violent act and whose memory was almost non-existent before the hypnosis, we clearly have testimony "before" and "after" hypnosis, which can be compared to determine the effect of the intervening process. The defense claims that extensive media coverage created the suggestion which caused C. L. Anderson to confabulate his testimony. How can this theory withstand the fact that Bundy's picture figured prominently in the media, and even after the hypnosis, Anderson could not positively identify Bundy in the courtroom (R-4072). If memory was hypnotically supplemented by external influences, as the initial brief of appellant exhaustively argues, then why was not this essential identification a positive one? Further, the defense makes a point to show that the description of Kimberly Leach was known to the witness. If so, and if this supplemented his memory, how is it that the witness "missed" the number on the girl's jersey by saying that it was 63 or 68, (R-4064), when it was actually 83 (R-3877). Surely, if the defense theory is correct, such a detail would have been supplied by Anderson's exposure to the media.

These facts cannot be reconciled with the theory proposed by the defense, because C. L. Anderson's testimony <u>was not</u> a product of hypnotically induced memory. This is made very clear by the testimony of Anderson himself to the effect that his memory was not different before and after the session (R-4084).

Since the testimony "before" and "after" is the same concerning the in-court identification of Kimberly Leach and the identification of Bundy as similar to the man driving a white van, we do not have the question of admissibility of an out-of-court identification, but we have an in-court identification subject to the full range of cross examination. See State v. Jorgensen, supra, Rodriguez v. State, 327 So.2d 903 (Fla. 3d DCA 1976), cert. den. 336 So.2d 1184, State v. McQueen, 244 So.2d 414 (N.C. 1978). Essentially, the situation can be favorably compared to the investigatory hypnosis spoken of in People v. Shirley, 31 Cal.2d 18, 641 P.2d 775 (1982). If we exclude those details made clear by hypnosis, we are left with relevant, untainted testimony.

In the very complete memorandum presented by the state attorney to the trial court on the admissibility of Anderson's testimony (R-13,198-13,212) it is clear that rather than excluding the testimony of a hypnotized witness, the proper procedure is to present that testimony to the jury, along with the caveat of the intervening hypnosis. This is to allow the jury to decide what weight the evidence has. In the case sub judice the jury heard both the tape of the actual hypnosis session, (R-6276) along with expert testimony provided by the defense on the suggestability of individuals placed under hypnosis. The decision concerning the weight to be given such testimony was made by an informed jury. Recently, the Fifth District Court of Appeal has held that the jury must decide what

credibility a hypnotized witness is entitled to. Snead v. State, 415 So.2d 887 (Fla. 5th DCA 1982). While there is little discussion of the issue in Snead, it is clear that the Fifth District Court of Appeal has not adopted the rule of exclusion proposed by Appellant.

In addition to Snead, the First District Court of Appeal has upheld the admissibility of hypnotically refreshed testimony in Clark v. State, 379 So.2d 372 (Fla. 1st DCA 1979). In Clark, the victim was placed under hypnosis and told to reconstruct the robbery episode. After coming out of the hypnotic trance, the victim was shown photos of his assailants, who he then identified.

At trial the victim testified to the manner in which he identified his assailants. A hypnosis expert was called to allow the jury the opportunity to further evaluate the credibility of the witness. The First District Court of Appeal upheld the victim's identification, stating that his credibility was for the jury to determine.

Generally, but with some notable exceptions, courts across the country have allowed the testimony of witnesses whose memories have been hypnotically refreshed. See, e.g., Annot.: Admissibility of Hypnotic Evidence at Criminal Trial, 92 ALR.3d 442, Section 8, 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); Chapman v. State, 638 P.2d 1280 (Wy. 1982). Appellant's claim that the evidence should be excluded as inadmissible has been rejected in the Ninth Circuit. 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, supra.

Appellant attacks the in-court identification of Bundy by C. L. Anderson, stating that the hypnosis made the likelihood of irreparable misidentification likely. Appellant is of course using the case of Neil v. Biggers, 409 U.S. 188 (1974), to support his theory. However, the State would point out that the Biggers analysis does not become relevant until we can determine that the "confrontation" was suggestive. Of course, this argument is built on the assumption that the hypnosis caused confabulation, which in turn caused a suggestive situation. The State has thoroughly rebutted that assumption, and thus a Neil v. Biggers analysis is unnecessary.

The statement was earlier made that this case demonstrates why a per se rule of inadmissibility is inappropriate. C. L. Anderson's testimony was undoubtedly relevant. To have thrown it out of court because of the intervening factor of hypnosis, would have been to disqualify the testimony of an eye witness without knowing whether that testimony was in fact tainted. The appropriate standard is to allow the jury to decide what weight to be given such testimony. This Court should affirm the lower court's ruling allowing the witness, C. L. Anderson, to testify.

## ISSUE II

**WHETHER THE TRIAL COURT ERRED IN EXCUSING FOR CAUSE THOSE JURORS WHO WERE UNALTERABLY COMMITTED TO VOTE AGAINST THE DEATH PENALTY SHOULD THEY SIT ON THE JURY.**

## ARGUMENT

Appellant's second issue is innovative in urging the new application, or in truth a non-application, of Witherspoon v. Illinois, 391 U.S. 510 (1968). The substance of Appellant's point is that the differences between the Illinois statute, and the Florida statute, causes Florida's interest in excluding jurors who would automatically vote against the death penalty, to be lessened into non-existence. This being so, Appellant urges, the defendant's interest in a jury composed of a cross section of the community, controls.

Though novel, this issue was never ruled on below since the specific objection was never lodged (R-14,658). This Court held in Steinhorst v. State, 412 So.2d 332 (Fla. 1982), that the objection below must be on the same ground as urged on appeal. Thus, Appellant's argument should be disregarded by this Court.

Even if this Court decides to address the unpreserved issue, it still must decide in favor of the State. This is because of an essential flaw in Appellant's theory: that Witherspoon spoke only to those cases in which the statute provides for jury sentencing. The court in Witherspoon stated the issue: "The

petitioner contends that a state cannot confer upon a jury selected in this manner the power to determine guilt." Witherspoon, at p.516. Clearly, the challenge in Witherspoon was not whether the jury could ultimately sentence after a guilty verdict, but was instead whether such a jury could return a verdict on guilt or innocence. Focusing only on the ability to return a verdict, the Illinois statute and the Florida statute cannot be relevantly distinguished. Had the Supreme Court wished to speak only to states with statutes like Illinois, it would clearly have done so.

Appellant's claim is built on the allegation that juries empanelled under the Witherspoon rule are not representative of a cross section of the community. It is clearly not the case, and this Court has repeatedly so held. Riley v. State, 366 So.2d 19 (Fla. 1979); Maggard v. State, 399 So.2d 973 (Fla. 1981); Gafford v. State, 387 So.2d 333 (Fla. 1980); Steinhorst v. State, supra; Jackson v. State, 366 So.2d 752 (Fla. 1978).

In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), this issue was presented with the claim that Spinkellink's Sixth and Fourteenth Amendment right to an impartial jury had been violated. In Spinkellink, defendant acknowledged that the Supreme Court in Witherspoon had specifically declined to embrace the theory that jurors opposed to capital punishment are unrepresentative of the community in the guilt-innocence phase. However, Spinkellink sought an evidentiary hearing wherein he

would seek to prove his point. The Fifth Circuit assumed the allegation was true for the limited purpose of disposing of the case, and found the argument non-meritorious. The court stated:

> "The veniremen indicated only that they would be willing to perform their civic obligation as jurors and obey the law. Such persons cannot accurately be branded as prosecution prone." At p. 594

The Spinkellink court went on to explain that if a juror who could not vote for the death penalty found himself on a jury determining guilt or innocence, the possibility of the imposition of the death penalty might cause that juror to refuse to vote for a guilty verdict. The chance of a hung jury increases along with the chance that a guilty defendant might avoid punishment altogether by being repeatedly tried by such jurors.

Appellant's contention is clearly meritless under Florida and federal law. This Court must affirm the judgment below.

## ISSUE III

**WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR CHANGE OF VENUE OR ABATEMENT OF PROSECUTION.**

## ARGUMENT

Characterizing the pretrial publicity below as "enormous," Appellant asked this Court to find that his jury was so predisposed to a finding of guilt, that he was denied a fair trial. Interestingly enough, Appellant does not point to any juror's excusal for cause based on this all-pervasive publicity. More relevant indeed, he does not point out how many of the jurors below had heard anything about the Kimberly Leach killing. The State has carefully examined the voir dire of those persons who served on the jury below, and can state that none of the jurors impanelled below had heard specific information about the Leach murder. All had heard nothing more than what is contained in the indictment which was read to them as prospective jurors.

In Dobbert v. Florida, 432 U.S. 282 (1977), the United States 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." At p. 303 (Emphasis added)

Instead of focusing on whether these twelve people were able to render a fair decision below, Appellant urges this Court to find that he is entitled to a jury who had no substantial knowledge of Bundy. (See Initial Brief p. 62) Were that truly the standard, then persons known to the public, Spiro Agnew and John Dean as examples, would have virtual immunity from prosecution. Instead, the constitutional standard requires not that the jurors be totally ignorant of the facts or issues, but that they retain their impartiality. Murphy v. Florida, 421 U.S. 794 (1975).

The Supreme Court in Dobbert, citing to Murphy v. Florida, further stated:

> "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. At p. 303, Dobbert v. Florida

See also Dobbert v. State, 328 So.2d 433,440 (Fla. 1976); Chandler v. Florida, 449 U.S. 560 (1981); Straight v. State, 397 So.2d 903 (Fla. 1981); Knight v. State, 338 So.2d 201 (Fla. 1976).

Murphy v. Florida, supra, provides an interesting comparison to the case below. "Murph the Surf" as the press referred to him, had been newsworthy since he flamboyantly stole the Star of India Sapphire from a New York museum. Six years later, jury selection began in a prosecution against Murphy for breaking and entering while armed. In the meantime, he was convicted of murder in Broward County and pled guilty to a federal indictment involving stolen securities. These previous convictions received wide media coverage. The United States Supreme Court upheld the conviction even though, unlike the case sub judice, there was no change of venue. All six jurors who made up the panel in Murphy, including the two alternates, apparently had knowledge of Murphy's previous crimes. This fact stands in stark contrast to the instant case. Of the twelve jurors below, three had no knowledge of the Chi Omega murders. (Meserole, R-2760; Eddy, R-3103; Parsons, R-3248). Of those three, two had never even heard of Theodore Bundy (R-2760, 3248). Five of the remaining nine had some knowledge of the Chi Omega murders, but these had little more than sketchy ideas of what had occurred (Murphy, Armel, Lister, Rochefort, and Henderson). The four remaining jurors knew of the Chi Omega murders and Bundy's conviction for those crimes (Thompson, Thomas, Yurcisin, and Wolski). However, all the jurors, including the four with knowledge of the previous crime, stated without hesitation that they would put aside any opinions they might hold and decide the case only on the evidence presented (R-1018,1081,1513,1686,1975,2013,2699,2738,3103,3192, 3228,3456).

Instead of demonstrating that he was tried by jurors with preconceived notions of his guilt, Appellant engages in a scholarly comparison of the First Amendment protection of the press and the protection's guaranteed to him by the Sixth and Fifth Amendments of the Constitution.

In Nebraska Press Association v. Stewart, 427 U.S. 539 (1976), the United States Supreme Court listed the following alternatives to protect a defendant's right to a fair trial:

> "(1) Change of venue;
> (2) Search and questioning of prospective jurors;
> (3) the use of instructions to each juror to decide the issue only on the evidence presented in court;
> (4) Sequestration of the jury."

Here, change of venue was granted from Suwannee County to Orange County, Florida; all of the jurors stated that they could decide the issues based solely on the evidence presented in court; the jurors were individually voir dired; and the jury was sequestered after it was impanelled.

Every protection listed by Nebraska Press was followed below. The crime was first charged in Columbia County and Appellant elected to proceed in Suwannee County pursuant to Section 910.03, Florida Statutes. Trial was then moved to yet a third county after an attempt to impanel a jury in Suwannee County was unsuccessful. It would be interesting to hear Appellant's suggestion concerning where the trial could have been

moved yet a third time if his second motion for change of venue had been granted. Abatement of prosecution would have been useless since it is clear that to delay the prosecution would simply delay the coverage it would receive. As it was, the trial took place nearly two years after the commission of the crime.

All this Court need do to conclude that Appellant's point is without merit is to examine the voir dire of the jurors who actually decided the case sub judice. This Court should affirm the denial of Appellant's Motion for Change of Venue.

## ISSUE IV

**WHETHER THE TRIAL COURT ERRED IN NOT CONDUCTING, ON ITS OWN MOTION, A "FRYE TEST" CONCERNING THE FIBER AND SHOE TRACK EVIDENCE.**

## ARGUMENT

Appellant next complains that the trial court erred in failing to hold a Frye inquiry on its own motion.

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), held that when expert testimony is adduced from a scientific experimental test, the test from which the expert's conclusion is based must be recognized as probative of the results testified to. Specifically, Appellant claims that the trial court should have inquired as to whether comparisons of fiber and shoe tracks have probative value.

Fundamental error appears, Appellant contends, because of this alleged failure. It is little wonder that Appellant argues that the error is fundamental because there was no objection on this ground below. In Steinhorst v. State, supra, this Court held:

> "Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. (Citations omitted) Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below. (Citations omitted)" At p. 338.

While Appellant made an objection to the expert testimony on other grounds, that objection cannot now be transformed into an objection based upon the Frye case.

Thus, the issue becomes whether "fundamental error" appears below. Fundamental error, of course, is that error which "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So.2d 481, at 484 (Fla. 1960). See also Stewart v. State, ___ So.2d ___ (Fla. 1982) (7 F.L.W. 375).

To be able to argue that an error is fundamental, Appellant must first be able to argue that the admission was simple error. Appellant must show that the evidence was not probative because the scientific test cannot lead to any reliable results. This threshold question which would have to be answered in defendant's favor to demonstrate simple error, is missing.

In Jent v. State, 408 So.2d 1024 (Fla. 1981), the defense made an objection to the expert testimony on hair sample analysis. While the Court recognizes that hair sample analysis is not precise enough to positively identify a sample as having come from a particular individual, the Court also recognized the probative value of such testimony. The reliability of the tests is relevant to the analysis of the proper weight to be given the evidence. See also Peek v. State, 395 So.2d 492 (Fla. 1980).

Hair sample and shoe track evidence is of the same type as hair sample evidence. Therefore, the analogy of Jent and Peek is strong. Having failed to carry his burden of even showing simple error, Appellant is barred from a presentation to this Court of an issue unpreserved below.

## ISSUE V

**WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR VIEW.**

## ARGUMENT

Appellant correctly states that the Motion for View is left to the discretion of the trial court and that discretion is presumed to have been exercised correctly in the absence of a demonstration to the contrary. Rankin v. State, 143 So.2d 193 (Fla. 1962); Dixon v. State, 143 Fla. 277, 196 So. 604 (1940); Tompkins v. State, 386 So.2d 597 (Fla. 5th DCA 1979). In the Initial Brief, Appellant strongly urges the trial judge erred in failing to allow the jury to "see for themselves" that C. L. Anderson could not have seen what he saw. This contention does nothing to undercut the trial court's exercise of discretion.

First, an analysis of what was disadvantageous about the view. The view was to be conducted many miles from the courtroom. This cannot be charged against Bundy, but the physical act of moving a sequestered jury, the trial judge, the defense and the prosecuting attorneys, and the defendant, is not to be taken lightly. Although Bundy waived his right to be present at such a view, it is clear that Bundy would have had to have been present (R-5859). See Section 918.05, Florida Statutes, and Fla.R.Crim.P. 3.180(a)(7). Bundy was a known security risk having escaped from custody on earlier occasions (R-5858). Also, working against such a view was the fact that

the scene was substantially different in 1980 than it was in 1978. Counsel pointed out that the road in front of the school had been widened and four-laned (R-5592). Appellant was arguing that the view was necessary for distance evaluations between the road and other points. Clearly, the fact that the road was different in 1980 worked a significant disadvantage to a view. Additionally, the defense was claiming that the traffic flow would not allow a van to be parked on a street while an abductor searched for a victim. The fact that the traffic patterns were changed by the addition of extra lanes, weakens the value of a view. The court also expressed concern that the view might cause disruption in the school day at the Junior High School. Clearly, holding a view on a weekend would not approximate the activity and traffic present on February 9, 1978 (R-5859).

The above considerations are against the Motion for View. An examination of Appellant's reasons in favor of a view shows that the trial court did not abuse its discretion in denying the motion. Appellant claims it would be physically impossible for C. L. Anderson to have seen Bundy and Kimberly Leach and the white van on February 9, 1978, because of the distance between the roadway and the likely route taken by Kimberly Leach (R-5590;14,787). Distances are capable of measurement, and are not demonstrated only by pacing off the purported route of travel. Similarly, defense witnesses could take the stand to provide the jury with approximate distances and time of travel between identified points. Mr. Africano stated:

> "I think they should be allowed to walk from Mr. Bishop's room or here to the gym, to walk from this point to the gym and from the gym back over there just so they've got a feel and knowledge of what was going on there and how possible it would have been for this to have occurred." (At R-5593)

Clearly counsel wished the jury to engage in an experiment to determine time and distance themselves. There would be no reliable conclusion because Kimberly Leach's route was unknown, traffic patterns were different, and the roadway in front of the school was not the same.

It is interesting that Dixon, supra, is cited by Appellant since Dixon is capable of close analogy with this case. Dixon's theory of the defense was that the state witnesses stood in positions from which they could not have seen the crime committed. The court denied Dixon's motion for view stating:

> "The record shows that these different witnesses were closely cross examined by counsel for defendant and their knowledge of the locus in quo and the parties was fully submitted to the jury. It was not shown that the premises where the crime was alleged to have been committed were in the same condition when the trial was had as they had been when the difficulty took place." At p. 606

While the motion in Dixon was directed to a view of a building, and the motion below was for a view of a junior high school campus, these cases are closely aligned. Counsel had substantial opportunity, which he exercised, to cross examine the

witness C. L. Anderson. Further, the roadway from which Anderson saw Bundy and the victim was different when the trial took place, but from aerial photographs, measurements could be taken so that defendant's theory of the case could have been presented to the jury.

It is unmistakably clear that the trial court was correct in refusing Appellant's Motion for View. This Court should affirm the ruling below.

## ISSUE VI

**WHETHER THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF TESTIMONY OF FLIGHT, AND THE SUBSEQUENT JURY INSTRUCTION.**

## ARGUMENT

In a two-part issue, Appellant contends that the introduction of evidence of flight, and the instruction to the jury thereon, was reversible error. The first sub-issue claims that the trial court misinterpreted two cases; Batey v. State, 355 So.2d 1271 (Fla. 1st DCA 1978), and Hargrett v. State, 255 So.2d 298 (Fla. 3d DCA 1971). While the State staunchly maintains that these cases are supportive of the court's ruling, it must also be said that if the court's ruling was right under any other case not mentioned, the ruling is still correct.

In both Hargrett and Batey, Appellant contends, the defendants urged the court to find that there was too little evidence of flight to have supported its introduction into evidence. On the other hand, Appellant here claims that the objection below was aimed at excluding irrelevant evidence. This is a clever attempt in trying to make six, something different than one half dozen.

The argument urging irrelevance goes something like this: There is no showing that Appellant was fleeing as a result of the crime charged. Appellant admits the flight, but contends

that there is not enough evidence to show what crime he was fleeing from. The very fact that he admits the flight allows the admission of the evidence. Appellant's argument goes to the quality of the evidence of flight. Appellant is saying that merely running away does not prove guilty knowledge of the crime charged -- he is right! It is merely circumstantial evidence of guilt. Mackiewicz v. State, 114 So.2d 684 (Fla. 1959), cert. den. 362 U.S. 965 (1959); Daniels v. State, 108 So.2d 755 (Fla. 1959); Hernandez v. State, 397 So.2d 435 (Fla. 3d DCA 1981); Williams v. State, 268 So.2d 566 (Fla. 3d DCA 1972). Thus, using Hargrett and Batey, which allow the evidence of flight as circumstantially proving guilty knowledge, was proper.

The probative value of the evidence is greatly underrated by Appellant. When Appellant fled from Officer Daws in Tallahassee, it was only after Officer Daws had noticed a loose license plate on the floorboard of Appellant's vehicle (R-4646). The plate turned out to be number 13D 11300, which was connected with a white van used in the Leach abduction and murder. As soon as Daws spotted the tag and started to question Bundy, the flight took place. This flight was only two days after the Leach abduction (R-4643). The flight in Pensacola was only six days after the crime (R-5192). It is easy to see the direction of flight from Lake City to Tallahassee to Pensacola. Clearly, this circumstantial evidence was stronger than portrayed by Appellant.

To argue that the flight could have resulted from guilty knowledge of a myriad of other crimes Bundy committed, is to carry the issue to the absurd conclusion that flight from a single crime is admissible, but the multiple offender is protected by his very lawlessness.

Under sub-issue B, Appellant contends that the giving of the jury instruction was error. It is difficult to conclude from the record that Appellant objected to the instruction given. This is so because during the charge conference, there is an objection to an instruction on flight, but defense counsel requests a change in that instruction, which the trial court agrees to implement (R-6759). Since there was no objection of record to the instruction which ultimately resulted, the State takes a position that review of this issue is barred by Lucas v. State, 376 So.2d 1149 (Fla. 1979).

However, even if this issue had been properly preserved, there is a substantial body of law that allows the giving of such an instruction. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. den. 425 U.S. 911 (1975); Villagelieu v. State, 347 So.2d 445 (Fla. 3d DCA 1977); Williams v. State, supra.

Since there was admittedly evidence of flight, the lower court did not err in allowing such testimony and giving the resulting instruction. This Court must affirm the lower court's ruling.

## ISSUE VII

**WHETHER THE TRIAL COURT ERRED IN SENTENCING DEFENDANT TO DEATH.**

**A. and B. Whether the trial court erred in finding that the crime was especially heinous, atrocious, and cruel.**

## ARGUMENT

In subsection A of Appellant's challenge of the court's imposition of the death penalty, he urges this Court to find that the aggravating circumstance of especially heinous, atrocious and cruel was not present below. Appellant's next sub-issue concerns the finding made as to the cause of death. Since this second issue is relevant only to the overall finding that the murder was especially heinous, atrocious and cruel, these two subsections will be treated as one issue.

This Court in State v. Dixon, 283 So.2d 1 (Fla. 1973), explained the language in Section 921.141(5)(h).

> ". . . (H)einous means extremely wicked or shockingly evil; . . . atrocious means outrageously wicked and vile; and . . . cruel means designed to inflict a high degree of pain with little indifference to, or even enjoyment of, the suffering of others." At p. 9

What is intended to be within these circumstances are,

> "Those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the consciousless or pitiless crime which is unnecessarily torturous to the victim." Dixon at p. 9

Appellant's victim was a 12 year old child who was abducted from her Junior High School. The evidence indicates that she was transported some distance and that for at least a period of that transportation, she struggled to escape (R-3955). The evidence further demonstrates that the victim was sexually assaulted prior to her death (R-5354, 5363, 5366, 5375, 5378). She certainly feared bodily injury and death during the course of the abduction. Bundy continued with the infliction of this "with little indifference to, or even enjoyment of the suffering of" Kimberly Leach.

These circumstances are more than sufficient to uphold the trial court's finding that the murder was heinous, atrocious, and cruel. Alford v. State, 307 So.2d 433 (Fla. 1975); Goode v. State, 365 So.2d 381 (Fla. 1978); and Hoy v. State, 353 So.2d 826 (Fla. 1977).

The evidence of homicidal injury to the neck was not the only ground upon which the trial court found the murder to be especially heinous, atrocious and cruel. However, that fact strongly shows the atrocious nature of the crime. Hallman v. State, 305 So.2d 180 (Fla. 1974). Appellant contends that this

finding is not supported by the evidence or the testimony of Dr. Peter Lipkovic. However, after extensive study of the remains, Dr. Lipkovic concluded that the death occurred from an injury to the neck region (R-4481).

The trial court did not err in finding the aggravating circumstance of especially heinous, atrocious and cruel.

### C. The trial court did not improperly double the same factual circumstance into two separate aggravating factors.

**ARGUMENT**

Appellant argues that the trial court improperly "doubled" two aggravating circumstances [conviction of murder while under the sentence of imprisonment and that he had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person] because both of these circumstances involve the same factual predicate.

In Provence v. State, 337 So.2d 783 (Fla. 1976), this Court found that the trial court improperly "doubled" two aggravating factors: commission of murder in the course of robbery and commission of murder for the purpose of pecuniary gain. This Court apparently felt that the imposition of both of these aggravating circumstances unfairly penalized the defendant because under the circumstances of Provence, one of the circumstances was an integral facet of the other.

Under State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), Whalen v. United States, 445 U.S. 684 (1980), and Albernaz v. United States, 450 U.S. 333 (1981), multiple punishments (or here, aggravating circumstances) may be imposed if the test in Blockburger v. United States, 284 U.S. 299 (1932), is met. In Blockburger, the same act violates two statutes if each statutory provision requires proof of a fact which the other does not. Id. at 304.

Here, Section 921.141(5)(a) and Section 921.141(5)(b) each require proof of a fact that the other does not. The former requires that the capital felony be committed by a person under sentence of imprisonment, which the latter does not. The latter requires that the defendant be previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, which the former does not. (The nature of the crime for which a person is imprisoned is irrelevant to the circumstance; what counts is the fact that the defendant is imprisoned at the time he committed his capital felony.) Under the Blockburger test, the facts involved under each circumstance are irrelevant; a reviewing court may only look to the aggravating circumstances as outlined in the statute.

Moreover, Appellant misapprehends the purpose of Section 921.141(5)(a). The object of this aggravating circumstance must either be to provide the ultimate punishment for those who would murder while imprisoned and for whom no other

punishment might provide deterence, or to provide punishment because the rehabilitative process is an obvious waste of time for such an individual, or both. At any rate, there lacks in these circumstances the "one-to-one" correspondence that exists between someone penalized for both robbery, a violent crime, and a crime pecuniary gain, which robbery is and must be. The distinction is, of course, that the crime of robbery is always a crime committed for pecuniary gain, and the two are inextricably related, while the commission of Appellant's capital murder while under the sentence of imprisonment is in no way dependent upon the nature of Appellant's previously committed violent crimes.

The trial court did not err in imposing both aggravating circumstances.

**D. The trial court did not err in admitting the testimony of Michael Fisher to show that Bundy was under a sentence of imprisonment.**

## ARGUMENT

Appellant urges this Court to find that the evidence of imprisonment is insufficient to allow the finding of the aggravating circumstance under Section 921.141(5)(a). At the sentencing proceeding below, the objection was made that the only way the State could prove that Bundy was under a sentence of imprisonment would be to produce the jailer and the fingerprint cards from Colorado. Appellant urges this by analogizing the case to a prosecution for escape. The testimony revealed, pursuant to a warrant, that Michael James Fisher of the District Attorney's Office in Vail Colorado, picked Bundy up at the state penitentiary in Utah. Testimony further reveals that the witness placed Bundy in confinement in Colorado pursuant to the warrant (SR-27). Later, the witness was responsible for a criminal investigation: i.e., the escape of Theodore Bundy from his Colorado imprisonment (SR-27).

The investigator testified that Bundy escaped from the Garfield County Jail in Glenwood Springs, Colorado. There was no objection to this testimony as hearsay, thus Appellant is not claiming that the witness had no personal knowledge of the escape. Appellant is claiming that the way the state should have proved the fact of escape was by documents showing commitment to

custody and by the jailer's testimony. The alternative proof offered by the state was not incompetent and was sufficient to show the aggravating circumstance. The trial court properly found that Theodore Bundy was under a sentence of imprisonment at the time the murder was committed.

**E. Whether the trial court erred in denying the defendant's motion to enter a life sentence and to prohibit the penalty phase of the trial.**

## ARGUMENT

Appellant claims that the trial court erred in denying his motion to enter a life sentence and prohibit the penalty phase of the trial. Appellant simply states that this was error without any citation of authority. Since Appellant deems this unworthy of discussion, the State would simply mention that Appellant has failed in his burden to demonstrate error and that as a result, the ruling below is entitled to the presumption of correctness.

## CONCLUSION

Based on the above and foregoing, the judgment of the lower court should be affirmed.

Resepctfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been forwarded to J. Victor Africano, Esquire, Post Office Box 1450, Live Oak, FL 32060, this 3rd day of February, 1983.

Of Counsel