IN THE SUPREME COURT OF FLORIDA

CLARENCE HILL,

Appellant,

v.

CASE NO. 63,902

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIROUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

CLARENCE HILL,	:	
Appellant,	:	
v.	:	CASE NO. 63,902
STATE OF FLORIDA,	:	
Appellee.	:	

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, CLARENCE HILL, was the defendant in the trial court and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal will be referred to by use of the symbol "R". An Appendix relating to the jury selection proceeding is attached to the brief; it contains record references to challenges for cause (successful and unsuccessful) and peremptory challenges exercised by the state and the defense, and the composition of the jury which was ultimately selected. All emphasis is supplied unless the contrary is indicated.

II STATEMENT OF THE CASE

Clarence Hill was charged by indictment returned November 2, 1982 with the first degree murder of Pensacola police officer Stephen Taylor, the attempted first degree murder of police officer Larry Bailly, three counts of armed robbery (alleging the taking of money from the custody of three individuals at Freedom Savings and Loan Association), and possession of a firearm during the commission of a felony (R.1440-41). The Grand Jury which indicted appellant at the same time issued a separate presentment honoring Officer Taylor, entitled "A Tribute to a Hero" (R.1649-52).

On April 14, 1983, the defense filed a motion for change of venue

(R.1563-64, see R.1565-1657). After a hearing on April 21, 1983, the trial judge ruled that he would attempt to select a jury in Escambia County (R.1723). Defense counsel renewed his motion for change of venue on several occasions during the jury selection proceeding (R.27-28, 186, 347, 650). The trial court denied the motion (R.650).

At the conclusion of the trial, the jury returned a verdict finding appellant guilty of first degree murder (premeditated and felony murder) and guilty as charged on all other counts (R.1660-61). Following the penalty phase of the trial, the jury recommended that a death sentence be imposed (R.1665). On May 27, 1983, the trial court sentenced appellant to death on the murder conviction, finding five aggravating circumstances, and finding that "[t]he age and background of [appellant] do little to mitigate the circumstances of the killing of Officer Taylor" (R.1668-69, 1673, 1690). The court imposed consecutive life sentences for the attempted murder and armed robbery convictions, and did not impose a separate sentence on the sixth count (R.1671, 1674-78, 1689). Notice of Appeal was filed on June 27, 1983 (R.1694).

III STATEMENT OF THE FACTS

The evidence presented at trial* established that on the afternoon of October 19, 1982, Clarence Hill and Cliff Jackson, both of Mobile, Alabama, entered the Freedom Savings and Loan Association in downtown Pensacola and robbed it at gunpoint. Money was taken from the custody of tellers Tina Neese and Melanie Morris, and another teller, Patricia Devlin, was forced to open the vault. During the course of the robbery, either by the robbers'

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* Due to the length of this brief, and since appellant is not challenging on appeal the sufficiency of the evidence to withstand a motion for judgment of acquittal, the following is not intended to be a complete summary of the evidence presented at trial. Further facts of the case, as they relate to the particular issues raised, will be set forth in the appropriate section of argument.

act of pulling the "bait money" out of the tellers' drawers or by the assistant manager Pat Prince's setting off the alarm, hidden cameras in the lobby were activated and the police were notified (R.719, 723-24, 740-41, 797). Bank manager Alex Sparr was in his office on the second floor; when he saw squad cars arriving in front of the building, he phoned downstairs to find out what was going on (R.805-06, 849-50). Sparr's call alerted the robbers that something had gone wrong (R.717, 806). Jackson went out the front door and appellant went out the back (R.717, 806, 1099). Jackson was immediately apprehended by Officer Larry Bailly, who had been positioned outside the door (R.864-65). Bailly ordered Jackson to the ground, and then knelt down to handcuff him; Officer Stephen Taylor had come over to assist Bailly (R.866-68). Meanwhile, appellant, who was on his way back to his car, turned around and saw that the police had caught Jackson (R.llOO-01). Appellant went back around the corner and came up behind the officers (R.836, 351, 901-02, 1101-02).

[While the state's numerous witnesses gave a great deal of conflicting testimony as to the details of the robbery and shooting and as to the sequence of events, the state and the defense were pretty much in agreement as to the above-stated facts. It is at the point where the shooting began that the state and defense theories diverge].

Appellant testified that when he approached the officers, he did not intend to kill anyone (R.1106). Rather, it was his intention to force the officer to drop his gun and release Jackson (R.llO1-02, 1106). He came up behind the officer [Bailly] who was kneeling over Jackson and told him to halt (R.1103). The officer froze for a second, then wheeled around and fired; at the same time appellant pulled the trigger but his gun misfired (R.1103-04, 1119-23). Appellant was shot in the stomach (R.1103-05). He and Officer Bailly both continued firing (R.1103-05). When appellant heard Bailly's gun click, he began to run (R.1105). Appellant was shot five times

(R.1104). He did not realize that the other officer, Taylor, had been shot and killed until he learned about it in the hospital that night (R.1106).

Officer Bailly testified that he was kneeling over Cliff Jackson, getting ready to handcuff him, and Officer Taylor was standing behind him (R.867-68). As he reached for his handcuffs, Bailly heard a bang and felt a sting on the left side of his neck (R.868). That one bang was the only shot he heard (R.869). He looked to his right and saw a black male standing seven or eight feet behind him and pointing a gun at him (R.868-69). Bailly turned around and commenced firing (R.869). He fired six rounds until his gun clicked (R.869). After his gun clicked, the subject on the ground [Jackson] began struggling with him (R.870). Appellant turned and ran toward the north-east (where he was apprehended near the Dainty Del Restaurant by Officer Paul Muller (R.925-28)) (R.870). Officer Bailly chased Cliff Jackson into an alleyway beside the bank (where Jackson was apprehended by Officer Pat Adamson (R.1022)) (R.870). Bailley did not realize that Officer Taylor had been shot until he came back out of the alley and saw him lying in the street (R.872-73).

Of the state's eyewitnesses, bank employees Tina Neese, Melanie Morris, and Patty Devlin did not see the shooting (R.718, 746, 762). Bank employee Glenn Pugh, who saw the shooting when he went to help Pat Prince lock the front door, said appellant came within a foot or two of the afficer who was kneeling over the other suspect and shot him; the officer flinched and tried to get up (R.784-87). Pugh was positive that the officer he saw kneeling over the suspect was the same officer he later saw stagger into the street and collapse by the curb (R.787, 789-90). Pat Prince Mowery, who at the time was assistant manager of the bank and was known as Pat Prince, said appellant walked up behind the policeman who was standing and shot him three or four times in the back (R.809-11, 814-15).

William Mark Cooey, a bank customer who was also helping to lock the

front door, saw one of the robbers [Cooey was unable to identify appellant (R.840)] shoot the one officer and then turn and shoot the other officer (R.836-37). Cooey (unlike several of the other witnesses, including Officer Bailly, who had Jackson wearing an orange cap (R 866)) was positive that the person he saw doing the shooting outside was the one with the orange cap on (R.841, 844). Cooey also testified that the robber who approached him in the bank and pointed a gun at him was not the man who did the shooting (R.829, 845), while the testimony of other witnesses showed that appellant* was the robber who was rounding people up at gunpoint. Cooey had told the police that the man who approached him in the bank wore an orange cap, and that the only person he saw with a gun was the man with the orange cap (R.844); yet, as he acknowledged on cross-examination, the photographs taken by the hidden camera show that the man approaching him is not the person with the orange cap on (R.841). Alex Sparr, the bank manager, who observed the shooting from a second story window, saw only one officer, who was in a semi-crouched postion over the suspect (R.850-51). Sparr saw appellant walking briskly from the corner directly down the sidewalk with a pistol in his hand (R.851). He walked up behind the officer and fired four shots in rapid succession (R.852).

Donald Gratton, a bystander who was at the bus stop by the Plasma Center, saw appellant come from a different direction than what the other witnesses saw. Appellant, according to Gratton, had been talking to some people on the corner, came up the sidewalk on the opposite side of the street from the bank, crossed the street at a casual gait, and when he got to the bank, pulled a gun and just started shooting (R.887). He fired four or five times, shooting both officers (R.887-88). Gratton described it

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* The testimony presented by the state does not clearly establish whether Jackson was even armed. The trial court, in his findings in support of the death sentence, specifically found that Jackson was unarmed (R.1668).

"... Actually, I don't believe in murder or anthing but it was pretty slick the way he had done it. Almost like you would see on TV. He would come up the sidewalk, and as he crossed the street, and as he got toward the middle of the street he sort of slowed down like he was casually passing by and as he got up to the entrance of the door, he sort of reached down like this and slipped it out and started firing" (R.893-94). Gratton testified that appellant was right up to the officers before he ever pulled the gun out, and the officers didn't even have time to shoot back - "I didn't believe they even had time to get their guns out of their holsters" (R.894).

Hayward Norred, a bystander, saw appellant come around the corner and come up behind the officers at close range (R.901-03). Appellant aimed his gun and fired four, five, or maybe six shots (R.903). After hearing those shots, Norred heard four or five louder shots which he surmised were from a different kind of gun (R.903-04).

Donna Haner, a city employee who (escorted by Officer Bailly) had just taken the city's deposits to another bank, said Bailly got the alarm regarding a robbery at Freedom Savings (R.910). Ms. Haner was a fairly close friend of both Bailly and Steve Taylor (R.913). Watching from the patrol car, she saw Taylor get down to frisk and handcuff the suspect, and Bailly backed off (R.912-13). Ms. Haner did not notice appellant's presence until after she heard gunshots (R.913); appellant was five or ten feet from the officers and firing his gun, and Larry Bailly was shooting back at him (R.913). After the shooting, appellant ran toward the Dainty Del, Bailly and a newly arrived officer, Miller, were struggling with the other suspect, and Officer Taylor fell over in the street (R.914).

The testimony of the associate medical examiner, Dr. Thomas Birdwell, established that Officer Taylor had been shot twice; one bullet entered in the lower back and traveled right to left at an upward angle, while the other bullet entered the chest and traveled left to right at a downward angle (R.965-67, 975-76, 980). Officer Bailly received a bullet wound to

the left side of his neck; he was treated and released the same day (R.873–75).

Firearms examiner Donald Champagne concluded that the .22 caliber bullet which caused Officer Taylor's death was fired from appellant's revolver (R.1078–79). He found that four of the expended cartridge cases were fired in this revolver, and the other two had been misfired (R.1077).

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN EXCUSING FOR CAUSE PROSPECTIVE JURORS BONNER AND BONDURANT, SINCE NEITHER JUROR MADE IT UNMISTAKABLY CLEAR THAT SHE WOULD AUTOMATICALLY VOTE AGAINST THE IMPOSITION OF CAPITAL PUNISHMENT REGARDLESS OF THE CIRCUMSTANCES, AND SINCE THE TRIAL COURT EMPLOYED AN INCORRECT STANDARD OF LAW IN DETERMINING WHETHER THE JURORS SHOULD BE EXCUSED, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, AND FLORIDA STATUTES §§913.03 and 913.13.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court recognized that there are constitutional limitations upon the state's power to exclude jurors who express opposition to the death penalty. Witherspoon holds that a sentence of death cannot be carried out if it was imposed or recommended by a jury from which one or more venirepersons were excluded "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, supra, 391 U.S. at 522; Davis v. Georgia, 429 U.S. 122 (1976). The Court in Witherspoon further determined that the only prospective jurors who may constitutionally be excluded for cause from a capital trial jury are those who made it "unmistakably 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." Witherspoon v. Illinois, supra, 391 U.S. at 522, n. 21 (emphasis in original); see also Adams v. Texas, 448 U.S. 38, 44 (1980); Chandler v. State, 442 So.2d 171, 173 (Fla.1983); Downs v. State, 386 So.2d 788, 791 (Fla.1980); Burns v. Estelle, 592 F.2d 1297, 1299 (5th Cir. 1979), adhered to ~~en banc~~, 626 F.2d 396 (5th Cir. 1980).

In the present case, two prospective jurors, Mrs. Bonner and Ms. Bon-

durant, were excused for cause in clear violation of the principles set forth in Witherspoon. Not only did these two jurors "never [come] close to expressing the unyielding conviction and rigidity of opinion regarding the death penalty which would allow their excusal for cause under the Witherspoon standard" [Chandler v. State, 442 So.2d 171, 173-74 (Fla.1983)], the trial court did not find that either of them made it unmistakably clear that she would automatically vote against a death sentence without regard to the evidence. Instead, the trial court applied an incorrect standard of law, and found (as to Mrs. Bonner) that "I have unequivocally noted she is unsure if she could recommend death in any case" (R.337), and (as to Ms. Bondurant) that "she is unsure whether her verdict will be affected in either phase, principally in the recommendation portion of the trial, because of capital punishment" (R.340). However, the state is not entitled to a jury composed only of persons who are free from doubt about whether they could vote for a death sentence. See e.g. Granviel v. Estelle, 655 F.2d 673, 677-78 (5th Cir. 1981) (juror Harrison was improperly excused, where he stated that he didn't think he could vote for the death penalty); People v. Szabo, 447 N.E.2d 193, 206-07 (Ill. 1983) (juror Ivezich was improperly excused, where she stated that she would rather not vote to put somebody to death, and had some doubts about whether she could do it under any circumstances); see also White v. State, 674 P.2d 31 (Okla. Cr. 1983).

> Expressions of doubt do not amount to excusal for cause. For a venireperson to express qualms about imposing the death penalty is not unexpected. Witherspoon requires that the venireman make it unmistakably clear that he or she could not impose the death penalty regardless of the eivdence presented.
>
> People v. Szabo, supra, at 207.

Nor is the state entitled to a jury composed only of persons whoe verdict as to both guilt and penalty would not be "affected" by their attitudes toward capital punishment. Adams v. Texas, supra, 448 U.S. at 49-50; see Burns v. Estelle, 592 F.2d 1297, 1301 (5th Cir. 1979), adhered to en banc,

626 F.2d 396 (5th Cir. 1980) (juror Doss was improperly excused, where she stated three times in succession that she "did not believe in" the death penalty, and acknowledged that the mandatory penalty of death or life imprisonment would "affect" her deliberations).

Both in terms of their responses on voir dire, and in terms of the mistaken standard of law applied by the trial court, Mrs. Bonner and Ms. Bondurant were removed from the jury on grounds broader than those permitted by Witherspoon. Since "[n]o jury from which even one person has been excused on broader Witherspoon-type grounds than these may impose a death penalty or sit in a case where it may be imposed, regardless of whether an available peremptory challenge might have reached him" [Chandler v. State, supra, at 174-75; Burns v. Estelle, supra, 592 F.2d 15 1300; see Davis v. Georgia, 429 U.S. 122 (1976)], appellant's death sentence must be reversed and the case remanded for resentencing, including an advisory verdict to be rendered by a jury chosen in compliance with Witherspoon. Chandler v. State, supra, at 175. Appellant further submits that, for the reasons discussed in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983) and Keeten v. Garrison, 578 F.Supp. 1164 (W.D. N.C. 1984), appellant is entitled to a new trial as well.

Bonner

In his voir dire examination of the second group of thirty prospective jurors, the prosecutor asked whether any of them had "any personal, religious, or philosophical objections to the imposition of the death penalty" (R.254). One of the jurors who indicated that she did was Mrs. Bonner. Her voir dire examination reveals the following:

> MR. JOHNSON [prosecutor]: Yes, ma'am, your name please?
>
> MRS. BONNER: Lana Bonner.
>
> THE COURT: I am sorry. What was the name again?
>
> MRS. BONNER: Bonner.

MR. JOHNSON: Mrs. Bonner?

MRS. BONNER: Is there electrocution? Are you sentencing him to jail to go off in prison and stay?

MR. JOHNSON: Okay. The trial is divided into two parts. The first part, you know, there is a verdict of guilty or not guilty. The second part, the jury must recommend a life sentence or a death sentence, of course, if there was a death sentence, then he would await possible electrocution at some later date. A life sentence, he would sit in prison not being eligible for parole for at least twenty-five years, but the jury just makes a recommendation. The judge makes the final determination and imposes the sentence.

What are you feelings, Mrs. Bonner, about capital punishment?

MRS. BONNER: Well, I was thinking about what way to kill. I would accept that, but I would go for sending him off and let him do time or lifetime or whatnot.

MR. JOHNSON: You could go for life sentence?

MRS. BONNER: Yes, sir.

MR. JOHNSON: Could you go with the death sentence?

MRS. BONNER: What is a death sentence?

MR. JOHNSON: Could you ever recommend that this defendant be killed for what he has done?

MR. TERRELL [defense counsel]: Objection, Your Honor, assuming facts. It's an improper question.

THE COURT: I am going to sustain the objection to the form of the question. Please restate it.

MRS. BONNER: He killed somebody. I mean, he is guilty, right? And he should be killed, right; is that what you are saying?

MR. JOHNSON: Could you ever recommend that to the judge?

MRS. BONNER: I will recommend him being sent off for time, but I don't know. I am a Christian.

MR. JOHNSON: Okay.

MRS. BONNER: And I do everything that I possibly can to observe the law, and so, killing, I don't know.

MR. JOHNSON: So, do you think you could ever recommend a sentence of death?

MRS. BONNER: I don't know because I believe in right, I say

like this, I believe in right, but I have never been on a jury before.

MR. JOHNSON: We are not asking you what you are going to do in this case because you don't even know what the evidence is in this case.

MRS. BONNER: No.

MR. JOHNSON: But, do you have an opinion about the death penalty in capital punishment that you could never recommend it?

MRS. BONNER: No, I can't say that.

MR. JOHNSON: Okay. That's what I am trying to find out. Thank you, Mrs. Bonner.

(R. 257-59).

The prosecutor subsequently challenged Mrs. Bonner for cause, inaccurately stating that "[s]he said she couldn't recommend under any circumstances because of her religious feelings" (R.336-37). Defense counsel said "I'm not sure that's what she said, Your Honor. I think there is a communication problem right there. She said she had some religious problems with it, but again she was acting like a person facing the decision for the first time" (R.337). The prosecutor agreed that there could be some communication problem (R.337). The trial court then ruled:

I have unequivocally noted she is unsure if she could recommend death in any case. Based upon her conviction and that is a straight out of the textbook influence on the penalty phase which justifies a challenge for cause, so that challenge is granted.

(R.337).

Defense counsel requested an opportunity to further question Mrs. Bonner (which was denied), and objected to the trial court's ruling on the challenge for cause before Mrs. Bonner was excused (R.337-38, 340). Consequently, the improper excusal of Mrs. Bonner is fully preserved for appellate review. See Paramore v. State, 229 So.2d 855, 858 (Fla.1969); Brown v. State, 381 So.2d 690, 693-94 (Fla.1980); Maggard v. State, 399 So.2d 973, 975 (Fla.1981).

In Downs v. State, 386 So.2d 788, 790 (Fla.1980) this Court said:

> The Supreme Court, in Witherspoon, held that a sentence of death cannot be carried out if the jury that imposed or recommended the death penalty was chosen by excluding veniremen for cause who voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction but who did not state that they would automatically vote against the imposition of such punishment.

Mrs. Bonner was just such a juror. [In contrast, there was no reversible error in Downs because in that case all of the excluded jurors stated that they could not, under any circumstances, vote to impose the death penalty after a verdict of guilty was returned. Downs v. State, supra, at 7911. Mrs. Bonner, as defense counsel observed, apparently was facing the decision for the first time, and had never been on a jury before (R.259). She was a Christian, she believed in right, and, significantly, believed in doing everything she possibly could to observe the law (R.258-59). Her voir dire examination indicated, at most, that because of her religious feelings she could "go for" a life sentence, but had qualms about the death penalty. (R-257-58). To the prosecutor's questioning as to whether she could ever recommend a death sentence, she consistently responded that she did not know (R.258-59). Most importantly, when the prosecutor sought to pin her down with the bottom-line Witherspoon question "But, do you have an opinion about the death penalty in capital punishment that you could never recommend it?", she replied "No, I can't say that" (R. 259).

The trial court, having had the opportunity to observe the juror's demeanor and the tone of her responses, made a finding of fact that Mrs. Bonner was unsure if she could recommend death in any case; this finding of fact is supported by the record, and appellant certainly does not contest it. See Patton v. Yount, __U.S.__ (1984)(35 Cr.L. 3152); see also Texas v. Mead, __U.S.__ (1984)(34 Cr.L. 4196, 4197-99)(Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, dissenting from denial of certiorari). It is the trial court's conclusion of law, i.e. that the juror's uncertainty is a "straight out of the textbook influence" on the penalty phase which

justifies a challenge for cause, that is wrong. The fact that a juror's qualms or reservations about the death penalty, or religious objections to the death penalty, might "influence" or "affect" his or her deliberations in either phase of the trial is not a sufficient basis for excusal under the Witherspoon standard. See e.g. Adams v. Texas, supra; Burns v. Estelle, supra. Similarly, a juror's uncertainty about whether he or she could vote for imposition of a death sentence is not a sufficient ground for excusal under the Witherspoon criteria. See e.g. Granviel v. Estelle, supra; People v. Szabo, supra; White v. State, supra. Here, Mrs. Bonner specifically declined to state, in response to the prosecutor's leading question, that her opinion about the death penalty was such that she could never recommend it. Plainly, she did not express "the unyielding conviction and rigidity of opinion" regarding the death penalty which would permit her excusal under the Witherspoon standard. See Chandler v. State, supra, at 173-74. Plainly, she did not make it "unmistakably clear . . . that [she] would automatically vote against the imposition of capital punishment without regard to any evidence which might be developed at the trial of the case before [her]." See Witherspoon v. Illinois, supra, 391 U.S. at 522 n. 21; Adams v. Texas, supra, 448 U.S. at 44; Chandler v. State, supra, at 173; Downs v. State, supra, at 791; Burns v. Estelle, supra, 592 F.2d at 1299 and 626 F.2d at 398. As the U.S. Supreme Court commented in Witherspoon (391 U.S. at 515, n. 9), "Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." Not only would Mrs. Bonner's answers fail to support a finding that she made it unmistakably clear that she would automatically vote against a death sentence without regard to the evidence, the trial court did not make such a finding. Instead, he "unequivocally noted" that Mrs. Bonner "is unsure if she could recommend death in any case." However, there is a world of difference between a juror's

uncertainty or doubt as opposed to the "irrevocable commit[ment], before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might arise in the course of the proceedings" [see Witherspoon v. Illinois, supra, 391 U.S. at 522 n. 21; Burns v. Estelle, supra, 592 F.2d at 1299; Granviel v. Estelle, supra, at 677]. Only where a juror has clearly and unambiguously expressed the latter position may he be excluded from the jury without violating the constitutional limitations set forth in Witherspoon. Mrs. Bonner never said that she would automatically vote against a death sentence under any circumstances, the trial court did not find that she would automatically vote against a death sentence under any circumstances, and her excusal for cause was "straight out of the textbook" error under the Witherspoon standard, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 16 of the Florida Constitution, and Florida Statutes §§913.03 and 913.13.

The erroneous excusal of Mrs. Bonner requires, at minimum, reversal of appellant's death sentence for a new trial on the issue of penalty before a properly selected jury. Chandler v. State, 442 So.2d 171, 175 (Fla.1983). As previously mentioned, no jury from which even one person has been excused on grounds broader than those permitted by Witherspoon may impose a death sentence or sit in a case where the death penalty may be imposed, regardless of whether an available peremptory challenge might have reached him. See e.g. Davis v. Georgia, 429 U.S. 122 (1976); Chandler v. State, supra, at 174-75; Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979), adhered to en banc 626 F.2d 396 (5th Cir. 1980); Hance v. Zant, 696 F.2d 940, 956 (11th Cir. 1983); People v. Szabo, 447 N.E.2d 193, 207 (Ill. 1983); White v. State, 674 P.2d 31, 36 (Okla. Cr. 1983); Blankenship v. State, 280 S.E.2d 623 (Ga. 1981); Grijalva v. State, 614 S.W.2d 420, 424-25 (Tex. Cr. App. 1980). In Grijalva v. State, supra, at 424-25, the Texas Court of Criminal Appeals observed:

> . . . to allow retrospective exercise of peremptory challenges on appeal gives the State even greater advantages. When used onappeal the State effectively postpones exercise of its strikes until error has been found, and then with the benefit of the ruling of this Court as its guide the State can maximize the accuracy of the strikes not used at trial. In actuality this Court not only counsels the State, but actually exercises the strike for the State. In effect a peremptory strike against a prospective juror is transformed into a peremptory strike against a ground of error.
>
> Upon consideration of the various unfair advantages given the State by the ruling in Chambers v. State, supra, which allowed the State in effect to exercise its peremptory strikes in the light of 20-20 hindsight, illuminated by a privileged view of all prospective jurors, of the defense exercise of peremptory strikes, and of the subsequent appellate decision, we overrule that decision and hold that the fact that the State had unused peremptory challenges does not cure the error in this case.

Appellant further contends, based on the decisions in Grigsby v. Mabry, 569 F.Supp 1273 (E.D. Ark. 1983) and Keeten v. Garrison, 578 F.Supp. 1164 (W.D. N.C. 1984), and based on the empirical studies discussed at length in those opin ons, that he is entitled to a new trial as well.

Bondurant

Since the improper excusal of Mrs. Bonner requires reversal, it is not necessary for this Court to resolve whether Ms. Bondurant was improperly excused as well. See Burns v. Estelle, supra, 592 F.2d at 1301; People v. Szabo, supra, at 207. Ms. Bondurant initially answered the prosecutor's question as to whether she was opposed to capital punishment, "I probably would be" (R. 254). She stated that she had never been on a jury, and had never been in a courtroom before (R.255). The prosecutor continued:

> Right. It's not something that any of us usually sit around and think about. Although I am sure some of you have talked to people about it, but could you under any circumstances recommend a sentence of death for a criminally accused?
>
> MS. BONDURANT: I really don't know.
>
> MR. JOHNSON [prosecutor]: See, you have to assure, hopefully --
>
> MS. BONDURANT: I have to be sure?
>
> MR. JOHNSON: The Court and the defendant --

MR. TERRELL [defense counsel]: Objection, Your Honor. That's not proper standard.

THE COURT: Sustained.

MR. JOHNSON: What we are trying to find out, if you can give the State of Florida and the defendant a fair trial, and assure His Honor that you will follow the law in this case?

MS. BONDURANT: I will follow the law.

MR. JOHNSON: Okay. So, do you feel that you could in some circumstances recommend a sentence of death?

MS. BONDURANT: Yes, I believe so.

(R. 255).

Subsequently, Ms. Bondurant indicated that she had reservations about her ability to recommend a death sentence because of her religious beliefs:

MS. BONDURANT: From what Judge Barfield said about the death penalty, are we perjuring ourselves if we say that we do not believe in capital punishment?

MR. JOHNSON: What do you mean, do you perjure yourself?

MS. BONDURANT: Because we took an oath to tell the truth.

MR. JOHNSON: Oh, commit perjury?

MS. BONDURANT: Yeah.

MR. JOHNSON: Well, I don't think we are too concerned with that right now, but we do expect you all to take that oath seriously. And we do expect you to follow the law, and if you have a question or reservation or know you can't, then that's what we want to know.

MS. BONDURANT: Well, I have thought a lot about it, too, and I can't really completely say that I would, you know, say about capital punishment, about death.

MR. JOHNSON: What are the nature of your objections?

MS. BONDURANT: It's because of God's law.

MR. JOHNSON: So, you think you might have some difficulties?

MS. BONDURANT: I might have some reservations.

MR. JOHNSON: Are you saying you are unsure at this time?

MS. BONDURANT: Well, I don't think I could say--1 could ever say that I would be for capital punishment.

MR. JOHNSON: You don't think you would ever be for it?

MS. BONDURANT: That's right.

(R.262-64, see R.1738).

The state challenged Ms. Bondurant for cause, identifying her as "the lady that couldn't make up her mind if she could follow the Court's instructions on capital punishment" (R.339-40). Over defense objection, the trial court granted the challenge for cause:

> In my understanding of her responses she is unsure whether her verdict will be affected in either phase, principally in the recommendation portion of the trial, because of capital punishment.
>
> (R. 340).

For the reasons discussed in connection with the excusal of Mrs. Bonner, the excusal of Ms. Bondurant was also reversible error. Witherspoon v. Illinois, supra; Davis v. Georgia, supra; Adams v. Texas, supra; Chandler v. State, supra; Burns v. Estelle, supra; Granviel v. Estelle, supra; People v. Szabo, supra; see also Grigsby v. Mabry, supra; Keeten v. Garrison, supra.

ISSUE II

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR A CHANGE OF VENUE, THEREBY ABRIDGING HIS RIGHT TO A TRIAL BY AN IMPARTIAL JURY, AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, AND BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A motion for a change of venue is addressed to the sound discretion of the trial court; the defendant has the burden of showing that the setting of the trial s inherently prejudicial. Manning v. State, 378 So.2d 274, 276 (Fla.1979) Where the requisite showing has been made, denial of a motion for change of venue is an abuse of discretion. "A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural

result." Manning v. State, supra, at 276. As this Court observed in Manning, "[t]he trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, see Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause. Murphy v. Florida [421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975)]." However, where the community in which the trial is to take place has been pervasively exposed to inherently prejudicial publicity, the "successful" empaneling of a jury is not conclusive evidence of absence of prejudice. See Coleman v. Zant, 708 F.2d 541, 546-47 (11th Cir. 1983). For example, in Manning v. State, supra, a jury was selected in Columbia County, and the defense accepted the jury without renewing its motion for change of venue and without exhausting its peremptory challenges.[1] See Manning v. State, supra, at 279 (Alderman, J. dissenting). Nevertheless, this Court reversed Manning's conviction and death sentence, holding that "[t]he motion for change of venue . . . was amply supported by evidence which established that the community was so pervasively exposed to the circumstances of this incident that the defendant could not secure a fair and impartial trial in Columbia County." Manning v. State, supra, at 276. The voir dire examination in Manning established "that every member of the jury panel had prior knowledge of the alleged crimes through news media accounts and community discussion" Manning v. State, supra, at 275. In Manning, "the fact that the

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1 In the instant case, in sharp contrast, appellant repeatedly renewed his motion for change of venue (R.27-28, 186, 347, 650); unsuccessfully challenged numerous jurors for cause on grounds relating to pre-trial publicity (see *R.169-84,329-46,539-44);* exhausted his peremptory challenges (R.650); unsuccessfully requested additional peremptory challenges (R.650-51); and finally challenged all remaining members of the panel for cause based on their exposure to prejudicial publicity (R.651).

victims were well-liked Caucasian deputies of the local sheriff's department and the accused was a young black male from outside the community clearly magnified the problems involved in securing a fair trial in Columbia County." Manning v. State, supra, at 276. In the present case, as in Manning, both the murder victim and the victim of the attempted murder (who testified at trial)were well-liked Caucasian officers of the Pensacola Police Department, and the accused was a young black male from outside the county. As in Manning, the voir dire inquiry established that every one (sixty out of sixty) of the prospective jurors had been exposed to the pre-trial publicity in this case (see R.6-24,93-124, 190-91, 278-301).

Article I, §16 of the Florida Constitution guarantees the accused in a criminal case a trial by an impartial jury.[2] See e.g. Singer v. State, 109 So.2d 7, 15-16 (Fla. 1959); Manning v. State, supra, at 277; Thomas v. State, 403 So.2d 371, 375 (Fla. 1981); Livingston v. State, ___ So. 2d ___ (Fla. 1984) (case no. 61,967, opinion filed September 13, 1984). In Singer v. State, supra, at 15, this Court observed:

> As long as the Constitution of this State guarantees an accused trial by "an impartial jury" the people of this State through their government in all its branches at all levels and all the institutions fostered or permitted under it are solemnly bound to do that which is necessary to preserve such a trial to every accused, whether he be guilty or innocent.
>
> This responsibility can not be escaped nor can failure to furnish such a trial be excused on the ground that under existing conditions publicity given crimes, particularly sensational crimes, is so generally disseminated that it is impossible to empanel a jury of persons who are free from knowledge of the crime and of preconceived opinions of the guilt or innocence of the accused. Rather, the answer is to remove the condition which creates the extrajudicial knowledge and preconceived opinions.

The Court in Singer went on to recognize that prior restraint of publication, as employed in England and other European countries, is not a favored practice in the United States, as it would involve a clash between

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2 This right is also guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Appellant wishes to make it clear that, while preserving the federal claim, he is primarily relying on the Florida constitutional provision in this appeal.

the constitutional guarantee of a free press and the constitutional right to a fair trial by an impartial jury. The Court continued:

> But while the intelligent exercise of the rights and duties of citizenship requires that the organs of the news inform the people of events which transpire about them, the guarantee of trial by "an impartial jury" requires that those called for jury duty will come to the trial of the cause free of knowledge of the events related to the cause and that their actions as jurors be based solely on evidence and argument in open court and the law applicable. Therefore, the publication of the details of the commission of crimes, especially as they connect or tend to connect a named person with guilt therefor or to establish the innocence of a named person, not only is not required in the public interest, but the preservation of the constitutional guarantee of trial by an impartial jury requires that such publication not be made.
>
> Singer v. State, supra, at 16.

Where, notwithstanding the admonitions made in Singer, such publication has been made, and where the community has been pervasively exposed to it, a change of venue may be necessary to preserve the accused's constitutional rights. As recognized in Singer (at 14) and in Manning v. State, supra, at 227:

> Every reasonable precaution should be taken to preserve to a defendant trial by [an impartial] jury and to this end if there is reasonable basis shown for a change of venue a motion therefor properly made should be granted.
>
> A change of venue may sometimes inconvenience the State, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a costly retrial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant change of venue.

Among the circumstances which, individually or in combination, may require a change of venue include (1) where the community has been pervasively exposed to media coverage of the criminal incident, (2) where the crime itself is a sensational one, (3) where the community is small enough so that it is impossible to find potential jurors who do not have extrajudicial knowledge of the case derived from the media, (4) where the nature of the

publicity was inherently prejudicial (i.e. where it did not consist merely of dispassionate factual accounts of the crime, but instead included the disclosure of matters which would be inadmissible at trial, as well as inflammatory editorials and commentary), and (5) where the voir dire examination did not reveal specifically what each prospective juror had read or heard about the case. See Manning v. State, supra; see also State v. Oliver, 250 So.2d 888 (Fla. 1971).[3] Contrast Copeland v. State, ___ So.2d ___ (Fla. 1984)(case no. 57,788, opinion filed September 13, 1984)(slip opinion, p.7)(publicity was largely factual rather than emotional in nature). It is with these considerations in mind that the pre-trial publicity in the instant case should be viewed.

In support of his motion for change of venue, appellant submitted copies of numerous newspaper articles, photographic features, and editorials concerning the crime and its repercussions, as well as transcripts of television and radio news broadcasts (R.1565-96,1597-1634,1654,1656-57). On October 20, 1982, the morning after the crime, the front page of the Pensacola Journal carried the banner headline "POLICEMAN KILLED IN BANK SHOOTOUT" (R.1576). Clarence Hill ("last known address" in Mobile, Alabama) and Cliff Anthony Jackson, also of Mobile, were "tentatively identified" as the perpetrators (R.1576). Photographs of the murdered police officer Steve Taylor and the wounded officer Larry Bailly were prominently featured on the front page (R.1576). Taylor, according to the article, had planned to leave the force in a few months to go back to school to become a certified public accountant (R.1576). "Dozens of people witnessed the exchange of gunfire, which sent pedestrians scurrying for safety and prompted teachers at [a nearby] school to rush their students indoors from a playground. 'We went in and

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3 Cases from other jurisdictions which discuss the circumstances in which community exposure to inherently prejudicial publicity may require a change of venue include Henley v. State, 576 S.W.2d 66, 71-72 (Tex. 1978); State v. Stiltner, 491 P.2d 1943 (Wash. 1971); State v. Clark, 442 So.2d 1129 (La. 1982); Martinez v. Superior Court of Placer County, 629 P.2d 502 (Cal. 1981); Commonwealth v. Frazier, 369 A.2d 1224 (Pa. 1977).

got all the kids off the playground and we closed and locked the doors', said a day school aide, who asked that her name not be used . . ." (R.1576). The article concluded:

> One Pensacola police officer wept when she heard of Taylor's death in the bloody shootout.
>
> "I guess it hurts us all more because we're a small department and we're all family," said officer Jeri Schadee, her eyes welling with tears. "You know they say that police officers don't cry. Well, this one is crying."
>
> The force's top officer also was visibly shaken by Taylor's death Tuesday.
>
> "I'd like to make the statement that it's a tragic thing when a young, talented police officer has to die because of some hoodlums," said Chief Lou Goss shortly after the robbery.
>
> A spokesman at Baptist Hospital said Taylor died of gunshot wounds to the head and abdomen.
>
> Taylor grew up in Escambia County and attended public schools here. He is survived by a wife, whose name was withheld by police.
>
> (R. 1574).

Next to the headlines was a box which directed the reader to other stories concerning the bank robbery and shootout, "Inside Story ·The scene of the shootout in pictures, Page 4A. 'A routine ride with officer turns into an exercise in terror, Page 2A. 'Eyewitnesses recount the tragedy as they saw it, Page 2A. ·Shift change left plenty of personnel on hand at Baptist Hospital, Page 2A." (R.1576). The article entitled "Witness: 'It was a gun play over there'", contained descriptions of various aspects of the incident by eyewitnesses Ivey Michael, Gus Georgiades, Alan Rosenbloom, David Jackson (a visiting Baptist minister), Benjie Davis, and a woman who was inside the bank who asked that her name be withheld, none of whom (with the possible exception of the unidentified woman) testified at trial. (R.1575). Ivey Michael was quoted as saying,"The black dude started the

shooting first. . . . He came around the corner pulling out his gun and started shooting" (R. 1575). The unidentified woman in the bank stated that the robber who was pointing a handgun did all of the talking. "There was no doubt the man was a threat. . . . He told the teller if you don't do what I tell you to do, he would shoot her" (R.1575). "He left no doubt in your mind he would have shot you. . . . I thought, my God, he was liable to kill us"(R. 1575).

The article entitled "Routine turns to terror" depicted the experience of Donna Haner, a cashier for the city of Pensacola, who had been given a ride to the bank by Officer Bailly to deposit the city's receipts (R.1583) [Ms. Haner was subsequently a witness at trial (R.909-17)]. She was sitting in the parked police car, and watched in horror as the bank robbers and the police exchanged gunfire and Steve Taylor fell, fatally wounded (R. 1583). ". . . [As] paramedics frantically pumped on the chest of Taylor, Haner sat in a nearby van alternately sobbing and praying for his welfare while a friend encircled her with her arms" (R.1583).

On page *4A* was a full-page photographic feature entitled "A Policeman Dies" (R.1577). The photographs include one of "paramedics work[ing] in vain over wounded Officer Taylor, a long time Escambia County resident"; one of Officer Taylor "bleeding from the head and abdomen", being carried on a stretcher to a waiting Life Flight helicopter; one of the helicopter hovering over downtown Pensacola, captioned, "Not even the rush to Baptist Hospital aboard Life Flight helicopter . . . would save the life of [Officer] Taylor"; and a close-up of a handgun, captioned, "A weapon, right, allegedly used by robbery-murder suspect Clarence Hill, *24,* lies in an alley behind Dainty Del Restaurant, where the suspect collapsed from his own wounds" (R. 1577).

An article in the October 20 edition of the Pensacola News entitled

"Violence Comes Close to School" conveyed that the shootout endangered the lives of children playing at the Episcopal Day School a block away (R.1585, 1587). This feature, a first-person account by staff writer Betsy Killam, reads in part:

> A mother whose children were among those playing innocently at Episcopal Day School happened to be driving past a bank just a block away from the school when bullets flew across the city's wide downtown thoroughfare.
>
> Her instincts led her running to the school, where calmly, insistently, she urged, "Get the children in get the children inside. There's been a policeman shot and there's gunfire all over there."
>
> Her calm voice couldn't camouflage the shock and fear in her eyes. No one wasted any time. No one asked questions. Her message was clear - there was danger.
>
> As a reporter, I was among those within the school compound when the word came in. An officer was shot - and there could be a pursuit with more gunshots yet to fly.
>
> It struck me immediately that a school might seem a good place to run from police - "Get them in and lock the doors." I suppose my thoughts of my child's safety were almost instinctively handled. I knew where he was - safely, inside. All that remained was to lock the doors, and that was done. He was safe.
>
> Teachers calmly handled their charges, some of whom had been on the playground and had heard the volley of shots followed by screaming sirens and the whoop-whoop of emergency medical vehicles and fire department vehicles.
>
> (R.1585, 1587).

After describing the life-saving efforts at the scene and the apprehension of the suspects, Ms. Killam continued:

> Violence - crazy, wanton, reckless bloodshed had come too close to their school yard. "Bad guys' had been close to home. And, even though the walls of their building prevented their seeing the scene of the horror, they seemed to feel the tension.
>
> It was no longer coming to them in the safety of their living room over the two-dimensional television screen. This was no cartoon.
>
> And while police detectives struggle to piece together the jigsaw details of the thwarted robbery - the children will no doubt also search for the eternally missing piece - the clue

to the question we all ask: "Why?"

(R. 1585)

The front page of the weekly Pensacola Voice carried the headline "Bank Suspect's Mother Expressed Shock", subtitled "'I Feel Terrible About It' 'I Don't Know Why He Did It'", accompanied by a large photograph of appellant's mother (R.1579). The article also quoted one Ronald Mitchell, a friend of the suspects, as saying that Hill and Jackson "were unemployed but always had money", that "everytime we went out they always paid the tab", and "It was strange to see them with money even though they weren't working but I just said to myself 'I guess they're getting it from somewhere'" (R.1579)

The funeral of Officer Taylor also received intense media coverage. The front page headline of the October 21, 1982 edition of the Pensacola News announced "1,000 People Attend Funeral for Officer" (R.1586). Above the headline, on page 1, are large photographs captioned "Family and friends fill Myrtle Grove Baptist Church for Taylor services" and "Law enforcement cruisers form endless procession to cemetery (R.1586). The article begins:

> A sea of people - including law officers from across the Gulf Coast and the Florida Panhandle - crowded into the Myrtle Grove Baptist Church for services held for slain Pensacola policeman Stephen Alan Taylor.
>
> They joined Taylor's wife, daughter, parents and other family members.
>
> The 26-year-old police officer died Tuesday in a shoot-out following a downtown bank robbery. Today, Escambia County's entire law enforcement community was represented among the crowd.
>
> Those there ranged from Police Chief Lewis Goss and Escambia County Sheriff Vince Seely tp patrolmen and deputies. There were the brass - captains, lieutenants and sergeants - as well as dispatchers, cadets and retired police officers.
>
> Plainclothes investigators, clerks and secretaries and even teenaged Police Explorer Scouts were among the crowd.
>
> So were a judge, defense lawyers, prosecuting attorneys, and court security officers. A nurse in uniform, Emergency Medical Service workers and firemen also were present.

> Uniformed officers from a score of law enforcement agencies from Tallahassee to Clearwater, from Milton to Atmore, Ala., were there. Most of the law officers - uniformed and plain-clothes - wore black bands across their badges. There were literally hundreds of them present. They had lost a colleague.
>
> Others, friends and family members of Taylor, filled the church. They had lost a loved one.
>
> The crowd was estimated at about 1,000. All were there to pay their last respects to a law officer slain while simply doing his job.
>
> Following the service an honor guard escorted Taylor's coffin - followed by his black-veiled widow, Suzanne, and his daughter - to the hearse which carried the officer's remains to Bayview Park Cemetery.
>
> The procession, including scores of police vehicles from the surrounding region, followed. The police cars, with lights flashing, were followed by ambulances and fire trucks and a stream of private cars.
>
> Overhead flew the same Life Flight helicopter that two days ago whisked the fatally injured Taylor to Baptist Hospital in a futile effort to prevent the need for today's scene.
>
> Along the way traffic halted as other drivers paused in respect for the dead lawman.
>
> (R. 1586).

(See also R.1578, 1580-82, which contains an article and numerous photographs from the Pensacola Voice).

A television newscast on Channel 5 described the funeral services as follows:

> The police motorcades into the funeral service were several miles long this morning. And it seemed as though the line of people into the Myrtle Grove Baptist Church would never end. Lawmen from as far away as Miami came to pay their respects to their fellow policeman who died in the line of duty. Another officer, *43* year old Larry Bailey was also injured in that robbery shoot-out. He, along with several hundred others, attended today's services. The silence around the church was overwhelming. Those who did talk spoke kind words of Taylor. He was 26 years old, a three year veteran of the force. He had intended to leave police work in December to pursue a college degree in accounting. At the cemetery, police officers in black arm bands stood guard as family members were escorted to the grave site. Following a brief

eulogy, Taylor was honored with a 21 gun salute. And Taps.

(R. 1599-1600).

An October 22, 1982, broadcast announced the formation of the Stephen Alan Taylor Fund to help the family of the slain police officer, and invited the public to mail or deliver their donations to any branch of the Florida National Bank in Pensacola (R.1601). Meanwhile, it was announced that Clarence Hill and Cliff Anthony Jackson of Mobile would be charged with homicide and robbery upon their release from Baptist Hospital (R.1601).

On October 26 and 27, the newspapers published reports that Hill and Jackson were transferred "under a cloak of secrecy" from Baptist Hospital to the Sheriff's Department infirmary because security officials feared a possible escape attempt (R.1592-93). Hospital security director Allen Foster was quoted as saying "We were very, very wary"(R.1592-93). Foster said that a brother of Clarence Hill was "known to be in Pensacola" and authorities feared the brother might try to free him (R.1592). Foster further stated that "authorities had received intelligence reports indicating there were plans to free the suspects" (R.1592).

Another front page headline and article appeared when appellant and Jackson were brought before the court for first appearance (R.1594-95). TV Channel 5 reported:

> The two Mobile men accused of robbing a Pensacola bank and of killing a city police officer made their first appearance before a judge this morning. . . . Judge William Frye asked the questions. The two suspects barely acknowledged them. 24 year old Clarence Hill was brought in first. He is the man suspected of firing the bullets that killed 23 [26] year old police officer, Steve Taylor. <u>According to police reports, Hill is currently out on bond for two armed robberies in the Mobile area. He has been labeled "highly uncooperative" by the State Attorney's office</u>. By contrast, 18 year old Anthony Jackson was relatively humble before the court. His criminal history lists a few misdemeanors. Jackson said his family will probably hire a private attorney for his defense. The Public Defender's office was appointed to Hill's case.
>
> (R.1602).

While the "hard news" coverage and feature articles concerning this case contained more than enough prejudicial material to irreparably damage appellant's chances of receiving a fair trial before an Escambia County jury, the editorial treatment of the case was even more destructive. A number of editorials and columns were published in the Pensacola daily newspapers which were flagrantly, and in some cases deliberately, inflammatory - designed to mobilize community opinion and action in support of the war on crime; designed to evoke sympathy for the murdered officer and his family, and for police officers in general; and, not incidently, designed to procure a death sentence for Clarence Hill.

An editorial entitled "His death not in vain", published shortly after the crime occurred, invoked the murder of Officer Taylor to urge community support for law enforcement's "war on crime", and spoke with utter contempt and ridicule for the constitutional rights of defendants in criminal cases:

> THE BRUTAL, heinous murder of Police Officer Steve Taylor during a bank robbery in downtown Pensacola Tuesday is yet another frightening example of how violent crime plagues this community and all of America.
>
> Taylor's death is a great loss to this city and the Pensacola Police Department.
>
> Yet the 26-year-old police officer's heroic actions in line of duty and his death were not in vain. They dramatically demonstrate how urgent the need is for greater public support of law enforcement's war on crime.
>
> For the enemy in this war is the wanton criminals among us who heed no laws, value no life, respect no individual. They rob, steal, deal drugs and kill with abandon. When caught they cower behind loopholes in the laws and if convicted cry foul when society seeks to punish.
>
> It is no mere coincidence that crime has escalated to unimaginable levels in the past two decades, which are marked by outrageous court rulings mocking the Constitution.
>
> These court rulings, in the name of protecting the rights and safety of all, have had the opposite effect. Criminals are set free routinely on the slightest of technicalities while those convicted of capital crimes easily avoid the death

> penalty by appealing frivolous points of law in the federal courts.[4]
>
> It's time for the public to fight back with a vengence. One way to fight back is to vote "yes" for Amendment 2 and Amendment 3 on the Nov. 2 ballot.
>
> But the struggle against crime cannot end there. The Legislature and Congress must continuously search for ways to equip law enforcement agencies with the necessary means to decisively win the war on crime.
>
> (R. 1584),

Columnist Craig Waters, who happened to have been a boyhood schoolmate of Steve Taylor, wrote a column entitled "Taylor 'Cared an Awful Lot'", in which he praised the officer's heroism and speculated that, in sacrificing his own life, Officer Taylor may have saved the lives of many others, including children. The column begins:

> The elements were all there: two desperate gunmen on a crowded street one block from a school full of children, within view of scores of motorists and pedestrians in downtown Pensacola.
>
> It could have been disaster. The men who tried to rob Freedom Savings & Loan Association around 2:10 p.m. Tuesday could have killed at random, taken a whole school hostage or terrorized the people in some downtown office or restaurant.
>
> We were lucky. It didn't happen that way.
>
> A young policeman, Steve Taylor, had stepped in. There was a scuffle and he'd been shot, but the worst had been avoided. Everyone in downtown Pensacola stopped for a moment to ponder the calamity that brushed within inches of their own lives.
>
> (R. 1589).

Waters then recalls his acquaintance with the fatally wounded officer:

> By the time I got to the scene to report for the newspaper, paramedics were loading the young officer into a helicopter ambulance for the flight to Baptist Hospital. Somebody leaned to me and said, "That's Taylor."

4

In the event that this Court reverses appellant's conviction for a new trial on the ground that prejudicial publicity in the Escambia County news media deprived him of his right to a fair trial before an impartial jury, presumably this would be considered "the slightest of technicalities" or a "frivolous point of law" by the same editors whose lack of restraint and lack of respect for due process of law created the problem in the first place. See Singer v. State, supra, at 15-16.

It didn't register right away. There are so many Taylors in Pensacola, and I'd forgotten about the young blue-eyed officer I'd seen perhaps five weeks ago when a stalled car had blocked an entrance ramp to Interstate 110. He was there warning motorists to stay in the far lane so they wouldn't hit the car, which was on a blind curve.

I had driven up to ask what was the matter. "Howya doing, Craig," the officer said as soon as I rolled down the window.

It took me a second to remember Steve. Then I smiled and we jokedalittle bit about the time we attended class together 13 years ago at Brownsville Middle School here in Pensacola. That year, we sat next to each other in homeroom.

We talked only a minute on that interstate ramp. It was the kind of thing old classmates, indulging a moment of sentiment, will do. I guess it's no different than pressing a flower between the pages of a book: you hope to capture some of the magic of a moment that's bound to fade, despite every effort to preserve it.

A car drove up behind me. The memories of seventh grade classes faded into air. I said goodby and drove on.

The next time I saw Steve he was bleeding on the sidewalk in front of the Freedom bank, and I was there to write a story about it for the newspaper.

When another reporter told me that the wounded officer was Steve and that Steve was dead, a hollow pit formed in my stomach. I bit my lip, and I wrote my story; but I couldn't help feeling a special kind of sorrow, even if reporters are supposed to be unemotional and uninvolved.

A part of my own past - a young man who was my age - was dead. The shy, slightly bucktoothed kid who sat next to me in homeroom 13 years ago was gone.

He met the enemy and gave his best," the pastor at Myrtle Grove Baptist Church would later say over Steve's coffin.

The only thing I'd add is that he must have cared an awful lot.

(R. 1589).

The column then returns to the subject of the even greater tragedy which Officer Taylor's heroism may have averted:

Perhaps the children at Christ Episcopal Day School will never know, as I knew, the young officer who bled his life away on a Pensacola sidewalk. And they'll never know if he saved their lives, because Steve put himself in the way of a gun that day and he took the bullets that might have killed somebody else.

> The people who sat a block away in the Dainty Del Restaurant on Tuesday afternoon may never see the wife and child Steve left behind, and they'll never know if his sacrifice saved their own relatives the same sorrows his family now feels.
>
> That's how it goes. Nobody ever knows what would have happened if events had turned out differently. The people whose lives may have been saved won't have the chance to savor the very special gift Steve gave them when he died.
>
> Steve's death, like the sacrifices of any lawman, was an act of the greatest love.
>
> (R. 1589).

Waters' story concludes on an emotional note:

> After it happened - when we knew that Steve was dead - Officer Jeri Schadee looked at me with tears brimming in her eyes. "You know," she said, "they say that police officers don't cry. Well this one is crying."
>
> There's another myth that says reporters don't cry. Well this one is.
>
> (R. 1589).

Another tribute to Officer Taylor, entitled "He liked to think people were good", described the murdered officer as a quiet, dependable man, happily married and the father of a seven year old daughter (R.1591). He was planning to go back to school and become an accountant - "a job that offered better pay and less danger than a policeman has" (R.1591). At the funeral, the pastor of the Myrtle Grove Baptist Church, Dr. Alton Butler,

> . . . led the people in prayer before he talked about Taylor and the role of the police in enforcing the laws of society. "God urges us to have respect not only for these laws, but for those who enforce them."
>
> People consider Taylor a hero, but Taylor probably would have said he was just doing his job, the preacher said. "He met the enemy and gave his best," Butler said. "He did everything we asked of him, and more."
>
> Butler urged the people to be inspired by Taylor's death, to leave the church and work for a righteous, moral society where it is "highly unlikely and almost impossible" for another policeman to be killed.
>
> (R. 1591).

On October 25, 1982, an editorial headlined "Cruel irony abounds in timing of events" was published (R.1590). The "cruel irony" referred to was that the

killing of Officer Taylor occurred the day before Governor Graham signed a death warrant for Leslie Jones, who was convicted of the murder of a Pensacola liquor store clerk. Meanwhile, the editorial complained, federal courts had granted stays of execution for two other Florida prisoners. Juxtaposing all of these unrelated events, the editorial not only urges that death sentences be swiftly carried out, but specifically urges that the killers of Officer Taylor be sentenced to death and executed. [The publisher either forgot or did not care that unlike the other individuals referred to - Jones, Thomas, Meeks, and Spenkelink - the "killers of young Officer Taylor" had not yet been tried, much less convicted or sentenced]. The editorial reads:

> LAST week was one of cruel irony for Escambia Countians who believe punishment for heinous murder should be swift and sure death in the electric chair.
>
> On Tuesday, Pensacola Police Officer Steve Taylor, 26, was slain by bank robbers, who were in turn wounded and captured.
>
> On Wednesday, Florida Gov. Bob Graham signed a death warrant for Leslie R. Jones, 32, who killed Pensacola liquor store clerk Peter Petros while Petros, unarmed, was pleading for his life and that of the woman store manager who survived her own gunshot wounds.
>
> On Tuesday and Thursday, federal judges blocked handed down orders halting the pending executions, last Friday, of two other killers.
>
> One of them, Daniel Thomas, was a member of the "Ski Mask Gang" so notorious and so feared that 10,000 Central Florida residents signed a petition asking that he be put to death.
>
> Thus, it is obvious that death warrant or not, Jones will not be put to death at any time in the near future.
>
> Yet the Petros slaying occurred on Dec. 2, 1974 - which means that Jones has already lived nearly eight years after his victim.
>
> Swift and sure punishment?
>
> It would be laughable if it were not so tragic.
>
> The fact is the death warrants Graham signed last week were the 42nd and 43rd since he took office not quite three years ago.

> In a couple of instances, including the case of Douglas Ray Meeks last week, he has issued warrants twice on the same man.
>
> Only one person, John Spenkelink, has died in Florida's electric chair in the past 15 years, because of interminable court rulings and appeals and double appeals.
>
> One would like to think that the killers of young Officer Taylor would be promptly tried, promptly sentenced to the electric chair, and promptly dispatched to the nether regions.
>
> And one can be pretty sure that the first two of these propositions will be carried out with all the dispatch one would wish.
>
> But when, if ever, the death penalty will be carried is anyone's guess.
>
> Assuredly, it will not be any time soon, any more than Jones will go to the electric chair any time soon.
>
> It is a travesty of what justice is supposed to be about.
>
> (R. 1590).

Talk about a travesty of what justice is supposed to be about! In Singer v. State, supra, and Manning v. State, supra, this Court condemned what it called "trial by newspaper". The above editorial can only be called a "lynching by newspaper". Without benefit of a trial, without benefit of counsel, without consideration of any mitigating circumstances, the local press has determined, based on its sense of outrage against the crime, along with its sense of outrage against some other crimes and its frustration with the courts and the Constitution, that the killers of Officer Taylor (whom it has already identified as Clarence Hill and Cliff Anthony Jackson) should be "promptly tried, promptly sentenced to the electric chair, and promptly dispatched to the nether regions" (hopefully in that order). Without benefit of evidence, the press has determined the proper verdicts as to both guilt and penalty, and so informed the local readership (consisting, of course, of potential jurors who will be called upon to reach the real verdicts). The editorial expresses confidence that the trial system will do its part "with all the dispatch one would wish", but complains in advance

that appellant and his co-defendant, like the aforementioned Leslie Jones, will not be executed soon enough.

On November 2, 1982, the grand jury indicted appellant for the first degree murder of Officer Taylor, the attempted first degree murder of Officer Bailly, three counts of armed robbery, and possession of a firearm in the commission of a felony (R.1440-41). The indictment was accompanied by an "interim report", entitled "A Tribute to a Hero". This presentment by the grand jurors clearly and poignantly reflects "the general atmosphere and state of mind of the inhabitants in the community" of Pensacola and Escambia County. See Manning v. State, supra, at 276. It reads:

> On October 19, 1982, the downtown business area of Pensacola was shaken by a chain of reckless crimes that began with the afternoon robbery of a bank. Two armed men, attempting to flee endangered the lives of countless citizens by running helter-skelter into the city streets firing their weapons at police officers trying to stop them. In the exchange of fire, Pensacola Policeman Stephen Alan Taylor, aged 26, lost his life.
>
> We, the Grand Jurors, after reviewing these events and receiving the testimony of witnesses, have collected facts and reached conclusions that we now publish to the people of this community and of the state. We depart from the Grand Jury's usual silence in criminal matters because of the special circumstances in this instance, and because we feel there are important issues here that can be brought to our fellow citizens only by presentment.
>
> The events of October 19 were a great tragedy to us and our community. However, any careful study of the circumstances surrounding them leads to the conclusion that, except for the bravery of our lawmen, we in Escambia County came only a hair's breadth from even greater calamity.
>
> The robbery occurred at approximately 2:07 P.M. in a bank in the heart of the downtown business district. Only a short distance away, there were a school full of children, many offices and stores, restaurants, a federal courthouse, and other public buildings. All of them were full of citizens conducting their early afternoon business. Palafox Street was crowded with pedestrians and motorists. Had events gotten out of hand, the gunmen easily could have taken hostages or killed any number of people unlucky enough to be nearby.
>
> We in Escambia County avoided this greater tragedy. But we still paid a tremendous price, a price that leaves us all bereaved. At approximately 2:10 P.M. while serving the betterment of his community, Officer Stephen Taylor received gunshot

wounds that took his life. The efforts of emergency workers are to be commended, but Taylor's injuries were too great to be healed. He [died] in the uniform he was serving only minutes after he made his stand on a downtown sidewalk.

In giving his life, he purchased a margin of time that let other lawmen end the dangerous flight of these armed men. His sacrifice helped ensure the safety of hundreds of people who otherwise might have become victims, as he did.

Stephen Taylor's death leaves us bereft, but also ennobled. Liked his family, we mourn the loss of one of our own sons. We feel grief and anger that this community is deprived of a man of Stephen Taylor's character. But we are ennobled and humbled by his actions on October 19. He showed the firm will and moral conviction that befits a man. We do not know his last thoughts, but we do know the actions he took when confronted with a desperate situation on Palafox Street. They paint an honorable portrait of his family, of lawmen and of this community.

Facing death, Stephen Taylor drew a line and did not cross it nor did he yield to the temptation of cowardice, nor leave the innocent unprotected. We, the Grand Jurors, call upon the citizens and officials of this community to take careful note of his sacrifice, to honor his memory and to make Officer Taylor an example for our sons and daughters. He was the best we had in a crucial moment, and he confronted the worst without shirking duty or principle. We can ask nothing more of our children than that they believe, as Stephen Taylor believed, in principles more important than our own single lives. Our American nation was built and has endured on such conviction.

We, the Grand Jurors, also serve notice on those who would disturb the peace and order of this community and of its people. This day we return criminal indictments against the men accused of Stephen Taylor's murder, and in doing *so*, we hand them over to the Honorable Judges of this Court and to a jury of peers who will hold them accountable for their actions. We note that our lawmen were swift in apprehending these men, and that they now are before the bar of justice. Anyone contemplating reckless crimes on our streets can expect no less. We, the people of this county, represented and empaneled in the Grand Jury, will show no mercy in indicting those people whose actions endanger the lives and safety of our neighbors.

We raise our voices, however, in praising the family and the example of Stephen Taylor. ***Like*** any ***lawman,*** he made daily sacrifices for this community. The job he held often is the object of criticism and irritation, yet it is the most indispensable job any community has. Without it, we all would live at the mercy of the worst elements in society and crime itself would become, not a matter of disgust, but a way of life. We owe the security of our homes to men like Stephen Taylor. He was not paid a lot of money for this job he did, yet he did not throw his hands up in despair and live on the public dole.

> Instead, he worked for the public good; and, when the critical moment came, he laid down everything he had, his best years and his own future so that we and our children would be safe another day longer.
>
> There are cynics who would make light of what he and his fellow lawmen have done for us, but their thoughts are meaningless before the praise this community now gives to Stephen Taylor. A cynic is merely someone drowning in his own shallow thoughts; Stephen Taylor is a hero to this community and to his nation.
>
> SO SAY WE ALL.
>
> The Grand Jury requests that the Pensacola News-Journal print this presentment in its entirety.
>
> (R. 1649-62).

While the Pensacola newspapers did not reprint the presentment in its entirety, it hardly matters, since vitually all of the sentiments expressed therein had already been widely disseminated in the press, in the news and feature articles, columns, and editorials previously discussed. The grand jury presentment is primarily significant in that it reflects the overwhelming community reaction to this crime. The Pensacola Journal reported that the grand jury had issued a separate presentment praising Officer Taylor as "a hero to this community and this nation", and quoted several portions of the report (R.1573). The article in the Journal states, in part:

> In its report, the grand jury warned would-be felons not to commit violent crimes in the county.
>
> "This day we return criminal indictments against the men accused of Stephen Taylor's murder." said jurors, "and in doing so, we hand them over to the Honorable Judges of this Court and to a jury of peers who will hold them accountable for their actions. . . . Anyone contemplating reckless crimes on our streets can expect no less.
>
> The jury lauded Taylor and said his actions "paint an honorable portrait of his family, of lawmen and of this community."
>
> "In giving his life," said the jurors, "he purchased a margin of time that let other lawmen end the dangerous flight of these armed men. His sacrifice helped ensure the safety of hundreds of people who otherwise might have become victims, as he did."
>
> (R. 1573)

During the period of time between the November indictment and the April trial, the publicity continued, though not at the same fever pitch. The focus turned to appellant's pending trial on two unrelated armed robbery charges in Mobile (upon which he was free on bond at the time of the Pensacola bank robbery and the killing of Officer Taylor)(see R.1567-68, 1624-32). News broadcasts throughout December reported that appellant was wanted by Alabama authorities (R.1624-29); that an extradition warrant had been signed in Mobile and a hearing set before Judge Barfield (R.1624-29); and that Pensacola prosecutor Ron Johnson favored the extradition, provided that Alabama promise to return appellant to Florida for the murder trial then scheduled for the week of January 31 (R.1625-26, 1628-29). While revealing the armed robbery charges pending against appellant, the broadcasts also revealed Assistant State Attorney Johnson's motivation in agreeing to the extradition request:

> Assistant State Attorney Ron Johnson says the judge in Alabama has promised to return Hill in time for that trial . . . and Johnson says that's good. Because of that assurance, Johnson says it might be advantageous to go ahead and let Hill face trial first in Alabama. His reasoning is that unrelated armed robbery convictions might persuade the court to impose a stiffer sentence, if Hill is convicted locally of bank robbery.
>
> (R. 1625)
>
> Assistant State Attorney Ron Johnson says Florida authorities favor the extradition, following assurances from an Alabama judge that Hill will be returned to Florida for his scheduled trial the week of January 31st. The reasoning is that should Hill be convicted in Alabama and later in Pensacola, his Alabama conviction would be admissible as evidence in the penalty phase of his Pensacola trial.
>
> (R. 1626)
>
> And Assistant State Attorney Ron Johnson says he is not opposed to such a request. The thinking is that if Hill should be convicted in Alabama and subsequently in Pensacola, his Alabama conviction could be introduced as evidence during the penalty phase of the later trial.
>
> (R. 1628)

The Pensacola News, on December 29, 1982, reported that Judge Barfield had granted Alabama's extradition request, with the understanding that appellant would be returned to stand trial for the local murder (R.1568):

> Assistant Public Defender Terry Terrell objected to the move, claiming that his client's absence would hinder preparations for the murder trial here.
>
> Terrell also said it was "patently apparent" that the prosecution has an interest in the outcome of the Mobile case because a guilty verdict in that case could be useful to the state if Hill is convicted of the local shooting.
>
> If Hill is convicted here, the robbery conviction could be considered by a judge and jury during sentencing.
>
> (R. 1568).

A newscast announced:

> Judge Ed Barfield ok'd an extradition of Hill to his native Alabama . . . where a day long robbery trial is to be held. It isn't good news to be going home. Should the man accused of— participating in the robbery that led to Pensacola Police Officer Steve Taylors death be convicted on the Alabama charge . . . it is then conceivable he would then face a Pensacola conviction . . . and the robbery conviction could then be mentioned to the jury when penalty time comes.
>
> (R.1629).

However, before "penalty time" came, and before an Escambia County jury was selected to try appellant for the murder of Officer Taylor, the community (which had already been repeatedly informed of the pendency of the Alabama armed robbery charges) was advised of appellant's conviction therefor (R.1567, 1632). On January 5, 1983, the Pensacola media reported that appellant had just been found guilty by a jury of robbing a Mobile doughnut shop and had been sentenced to 25 years imprisonment, and that his return to Pensacola to stand trial for the murder of Officer Taylor was imminent (R.1567,1632).

Appellant's trial was postponed until April. In mid-March, the Pensacola Journal reported that appellant's co-defendant, Cliff Anthony Jackson, entered a plea of guilty to Officer Taylor's murder and four other charges, and was sentenced to life imprisonment without eligibility for parole for 25 years

(R.1565-66). Jackson's attorney, P. Michael Patterson, stated that had his client not entered the plea, a jury could have given him the death penalty (R.1565). The attorney was quoted as saying "The sentence Mr. Jackson received was the most we could have hoped for if we had been highly successful in a trial. The risk of the death penalty weighed against the benefit a trial could have achieved was just nil. The likelihood of conviction was approaching 100 percent" (R.1565). The attorney further stated "Because of the seriousness of the offense - the death of a police officer in the line of duty - even though Jackson did not pull the trigger, under Florida law he seriously faced the possibility of the death penalty" (R.1565-66). The article mentions appellant by name as the other defendant charged in the incident (R.1566).

On April 19 and 21, 1983, immediately prior to the trial, brief newspaper articles appeared concerning appellant's motion for change of venue itself (R.1654, 1656). One of these articles repeated:

> Last month, Cliff Anthony Jackson, 18, pleaded guilty to murder, attempted murder and three counts of armed robbery stemming from the abortive bank holdup. He received five concurrent life sentences. Jackson, who is also from Mobile will not be eligible for parole for 25 years.
>
> (R. 1654).

At the April 21, 1983 hearing on the motion for change of venue (R.1717-29), the trial court stated that he would try to select a jury from the Escambia County electorate (R.1723).

At the beginning of the voir dire proceeding, the trial court told the prospective jurors that "[t]here has been considerable media coverage of this particular case over the last several months", and this needed to be discussed (R.5). As a consequence of the denial of appellant's motion for individual and sequestered voir dire (R.1451-52, 1530-34) [see Issue III, infra], it was not possible to question the jurors as to what in particular each one of them had read or heard, without running a substantial risk of

contaminating the entire venire.[5] The jurors were initially questioned in two separate groups of thirty jurors each. At the outset of each session, the jurors were warned not to discuss any specific information which they may have obtained (R.6-7, 191). However, what the voir dire did reveal was that, as in Manning v. State, supra, every one of the sixty prospective jurors had prior knowledge of the crime through news media accounts and community discussion (see R.6-24, 93-124, 190-91, 278-301). A substantial proportion of the venirepersons made statements at one time or another which strongly tended to confirm that the prejudicial publicity had in fact impaired appellant's ability to receive a fair trial in Escambia County. Ms. Mayton's husband was a deputy, and she acknowledged that what she had read and heard in the newspapers and on TV might preclude her from rendering a fair and impartial verdict (R.6-7). Ms. Manion formed an opinion based on what she had heard and read, had some doubts about whether she could set it aside, and could not vote not guilty even if the state failed to prove its case (R.7-8, 141). Ms. McCargo had a son who is a police officer and a friend of Officer Taylor; she herself had met Officer Taylor, but she would try to be fair (R.11-12, 46, 53, 118-19). Mrs. McCrudden had formed an opinion from what she heard in the media and could not "definitely" set it aside (R.10-11, 122). Mrs. McCowan had formed an opinion and could not vote not guilty (R.12, 122-23, 141). Mr. Blacknall went to the scene shortly after the crime occurred, and definitely thought that his exposure on that day and the media coverage that followed would affect him (R.16-17). Ms. Dortsch had met Officer Taylor, who was a classmate of her younger son; she had formed an opinion and could not vote not guilty (R.19, 48-49, 94, 141). Ms. Zina Johnson had heard about the case through television and newspapers,

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[5] At the change of venue hearing, the trial court specifically stated that, in questioning the panel members regarding their exposure to publicity, he would not ask details (R.1726).

had formed an opinion which she could not set aside, could not vote not guilty, and was predisposed to recommend the death penalty for the murder of a police officer (R.21, 124, 133, 141, 148-49, 423-24, 507-08). Mr. Piret had formed an opinion from the reporting of the case, would operate on the basis of the opinion he had formed, and believed it was impossible to put out of one's mind what has been learned from outside sources; he had also formed an opinion as to penalty, and admitted to a "strong bias" in favor of the death penalty for the first degree murder of a police officer (R.23-24, 101-02, 148-49, 166). Mr. Wooten had formed an opinion, which he would set aside to the best of his ability (R.98-99). Mr. Carper was equivocal as to whether he had formed an opinion, and was trying his best to set it aside (R.100-01). Mr. Dyson had formed an opinion when it happened, but "since then, it's kind of gone away" (R.110). Mr. Cotten had formed an opinion, which he believed he could set aside, but his feelings about crime in the community would enter into his decision (R.112,133). Mr. Bergstrom made the comment that, when he heard of the shooting of Officer Taylor, he thought "[at] the time, it was like, another one bites the dust. We have problems in society and they are just getting worse and it continues, you know, and it doesn't seem like there is an end to it" (R.104-05). Mr. Maynard, when he heard about the incident, thought "I was more concerned about the life of the police officers in that situation. There are more and more of this happening" (R.108), and was strongly predisposed to recommend a death sentence for the murder of a police officer (R.109, 165-69). Mr. Averill was acquainted with Officer Taylor's family (R.223-224, 292). Mrs. Jones, who had a husband and two sons in the banking business, was afraid she would be prejudiced and could not put her prejudice aside (R.270-71). Mrs. Jordan had formed a fixed opinion which she could not set aside unless she heard evidence to change it; could not presume appellant innocent because of what

she had read in the newspaper, seen on TV, and heard in conversations with other people; and was predisposed to recommend the death penalty (R.279-80, 304, 321-22, 326-27). Mrs. Hassebrock had formed an opinion but felt like she could set it aside (R.282). Mr. Jackson had formed an opinion from the media, still had the same opinion, and did not know if he could be fair, though he later said he thought he could base his verdict on the evidence (R.290-91, 325). Mrs. Peters was downtown, about two blocks away, when the incident occurred, and she went to the scene, although she didn't think she would let her opinion "enter into it" (R.294-96). Mr. Ickes had formed an opinion based on what he had read or heard, would try to be fair as much as he could, and would not let his opinion enter into his decision; he also stated that he could not presume appellant innocent, but later said that he could (R.297-98, 304, 327-28). Mr. Delsignore got his information from television and the News-Journal and had formed an opinion, which he believed he could set aside (R.298-99). Mrs. Laughlin first indicated that she could not presume appellant innocent, but later said she could (R.304,325-26); Ms. Sprinkle's family were friends of Officer Taylor's family; she did not believe that this would influence her verdict (R.222-23, 659, 679-80). Mr. Larry Johnson was in the vicinity, about two blocks away, when the bank robbery and murder occurred; he "read everything" and listened to the news, and discussed the case with his wife and with a woman at work whose husband is a police officer; he formed an opinion which he did not necessarily associate with appellant but "just a blank feeling" that "anyone that shoots anyone else in the type of incident as much as I know about it now" should receive the death penalty; and that he had not necessarily discarded his prior opinion and was still inclined toward the death penalty in this case in the event of a conviction (R.288-90, 320, 519-26). Mr. Harris was asked by the prosecutor, in the presence of all of the remaining venirepersons [see Issue VI, infra], whether he had "ever thought about whether the police are engaged in a war with the criminals" (to which Mr. Harris replied "Sure he is, sure, it's

a war"), and whether he "consider[ed] the criminal the enemy to the policeman".[6]

When one allows for the prospective jurors excluded for cause on the state's motion on Witherspoon grounds, and the juror excused by the court for personal reasons, the venirepersons. discussed above constitute over half of the available jurors. Considering their responses (which were as revealing as they could be given the inhibiting effect of the group voir dire), it is abundantly clear that the prejudicial and inflammatory media coverage in this case did impair appellant's ability to receive a fair trial in Escambia County. It is equally important to emphasize that all of the venirepersons not discussed above also had prior knowledge of the case derived from the news media or community discussion. It has long been recognized that where a juror has been exposed to prejudicial publicity, his assurances that he can be impartial and give the accused a fair trial are not necessarily dispositive. See Sheppard v. Maxwell, 384 U.S. 333, 351 (1966); Murphy v. Florida, 421 U.S. 794, 800 (Fla. 1975); Singer v. State, supra, at 24; Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981); State v. Goodson, 412 So.2d 1077, 1080 (La. 1982). Where there has been potentially prejudicial media coverage in a criminal case, and where a significant

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6 Of the above mentioned jurors, 3 (Blacknall, Jones, and Jordan) were excused for cause on the court's own motion; 7 (Dortsch, Zina Johnson, Mayton, McCargo, McCrudden, Peters, and Piret) were excused for cause on motion of the defense; 3 (Averill, Manion, and McCowan) were excused for cause on motion of the state; 2 (Bergstrom and Cotten) were removed by state peremptory challenges; 3 (Dyson, Larry Johnson, and Laughlin) were removed by defense peremptory challenges after unsuccessful attempts to challenge them for cause; 5 (Carper, Hassebrock, Jackson, Maynard, and Wooten) were unsuccessfully challenged for cause by the defense, but did not serve on the jury. Ms. Sprinkle served as an alternate juror, after a defense challenge for cause was denied and after the defense had exhausted its peremptories. Mr. Delsignore, Mr. Harris, and Mr. Ickes served on the jury, after defense challenges for cause and motion for mistrial were denied, and after the defense had exhausted its peremptory challenges, unsuccessfully requested additional peremptory challenges, and repeatedly renewed its motion for change of venue. See Appendix, p.2-5.

possibility exists that a juror may be ineligible to serve because of exposure to such publicity, it is the obligation of the trial court, not the juror himself, to make the ultimate determination of whether his impartiality has been impaired. United States v. Hawkins, 658 F.2d 279, 283, 285 (5th Cir. 1981); United States v. Davis, 583 F.2d 190, 197 (5th Cir. 1978). In order to meet this responsibility, the trial court must at least determine (through his own questioning or that of counsel) "what in particular each juror had heard or read and how it affected his attitude toward the trial". United States v. Hawkins, supra, at 283, 285; United States v. Davis, supra, at 196-97; State v. Goodson, supra, at 1081. By not permitting the jurors to be questioned outside one another's persence, and by not inquiring into the "details" of what each juror had learned about the case, the trial court effectively allowed the individual jurors to be the final arbiters of their own capacity to serve [see Issue III, infra].

The flood of sensational publicity which accompanied the mid-afternoon bank robbery and shootout in downtown Pensacola; the public tributes to Officer Taylor's heroism and sacrifice and the emotional coverage of his funeral; the local press' appeals for community support for law enforcement in the war against crime, coupled with less than subtle denigration of the constitutional protections afforded accused criminals; the publication of an editorial calling for the death penalty for the killers of Officer Taylor; and the continuing coverage, up through the time of trial, of appellant's extradition to Mobile on an unrelated armed robbery charge, his trial and conviction thereupon (which, as prosecutor Ron Johnson was repeatedly quoted, would be admissible in the penalty phase of the Pensacola murder trial), and co-defendant Cliff Jackson's plea of guilty to the murder of Officer Taylor, entered in order to escape the death penalty - each of these aspects of the media coverage of this case was inherently prejudicial to appellant's chances of receiving a fair and impartial jury trial in Escambia

County. Moreover, as in Manning v. State, supra, the fact that Officers Taylor and Bailly were well-liked Caucasian police officers, while appellant was a young black male from outside the community, magnified the problems involved in securing a fair trial in Escambia County.

One of the dangers inherent in extensive pre-trial media coverage is that it may inform potential jurors of inculpatory information wholly inadmissible at trial. See Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979); State v. Stiltner, 491 P.2d 1043 (Wash. 1971). Irrelevant evidence of other crimes allegedly committed by the defendant is presumed harmful error "because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (1981). It is also improper to disclose at trial that a co-defendant has been convicted or has pled guilty. Moore v. State, 186 So.2d 56, (Fla. 3d DCA 1966); Thomas v. State, 202 So.2d 883 (Fla. 3d DCA 1967); Libertucci v. State, 395 So.2d 1223, 1225-26 n-5 (Fla. 3d DCA 1981); Lebrun v. State, 408 So.2d 832 (Fla. 4th DCA 1982). The prejudicial effect of the disclosure of inadmissible facts regarding appellant's extradition to Mobile and subsequent conviction of armed robbery (as these events unfolded); appellant's having been out on bond at the time of the bank robbery and the murder of Officer Taylor; and Cliff Jackson's guilty plea (entered a month before appellant's trial) may have been even greater being served up through the media than if they had been introduced as part of the prosecution's evidence "and subject to protective procedures." Cf. Wilding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983).

In addition to the repeated disclosure of inadmissible information, the media reports included numerous "eyewitness" accounts of various aspects of the crime, from vantage points inside the bank or on the street. Some of these "newspaper witnesses", such as Donna Haner, later testified at trial, but most of them did not. In Singer v. State, supra, at 16-17, and

Manning v. State, supra, at 277, this Court recognized that the publication of details of the commission of a crime which tend to connect a named person with guilt thereof, or publication of statements of witnesses or the accused himself, may seriously jeopardize the accused's right to a fair trial:

> . . . Publication of such statements, evidence or confession forms the basis for trial by newspaper. Further, such statements, evidence or confession either may not be submitted at the trial, or if offered may not be admitted, yet if those who sit on the jury have read the press version of them it is most difficult, if not impossible, for the human mind not to fill in from its extrajudicial knowledge that which is not offered at the trial or to determine the veracity of a witness by comparing the newspaper version of the facts with the testimony given at the trial. It is a tribute to the press that most believe as true what is written or spoken by the press media, yet it must be admitted that press reports are not always accurate and are seldom complete. Further, the accused has no means to answer them, nor is there any appeal from conviction on trial by newspaper.

Along similar lines, in Corona v. Superior Court for County of Sutter, 101 Cal.Rptr. 411, 415 (Cal.App. 1972), the appellate court observed:

> Indispensable to any morally acceptable system of criminal justice is a verdict based upon evidence and argument received in open court, not from outside sources. When community attention is focused upon the suspect of a spectacular crime, the news media's dissemination of incriminatory circumstances sharply threatens the integrity of the coming trial. The prosecution may never offer the "evidence" served up by the media. It may be inaccurate. Its inculpatory impact may diminish as new facts develop. It may be inadmissible at the trial as a matter of law. It may be hearsay. Its potentiality for prejudice may outweigh its tendency to prove guilt. It may have come to light as the product of an unconstitutional search and seizure. If it is ultimately admitted at the trial, the possibility of prejudice still exists, for it had entered the minds of potential jurors without the accompaniment of cross-examination or rebuttal.
>
> The goal of a fair trial in the locality of the crime is practicably unattainable when the jury panel has been bathed in streams of circumstantial incrimination flowing from the news media.

Of all the pre-trial publicity in this case, however, it was the editorial and feature coverage which had the most devastating impact upon appellant's right to a fair trial. Officer Taylor was acclaimed as a hero, whose ultimate

sacrifice may have saved dozens of people, including school children, from death at the hands of desperate bank robbers; yet at the same time he was portrayed as a likable young man with a family and a future in accounting who would not have thought of himself as a hero. The grand jury which indicted appellant and Jackson was moved enough to issue a separate presentment entitled "A Tribute to a Hero", praising Officer Taylor for his courage and sacrifice in defense of the community. Taylor's funeral, which was attended by a thousand people including numerous representatives of the law enforcement community, received extensive coverage in news articles, columns, and photographs. The fact that the admiration, affection, and sympathy shown by the media and the community for Officer Taylor, his family, and for law enforcement in general was genuine and deserved does not obviate the need to afford appellant, like everyone else accused of a crime, a fair trial by an impartial jury. The Pensacola press did not seem to see it that way; instead, they seized the occasion to publish several enraged and inflammatory editorials in which the death of Officer Taylor was linked with appeals to the community stressing the "urgent . . . need" for "greater public support of law enforcement's war on crime" (R.1584); to the fear of "violent crime [which] plagues this community and all of America" ("For the enemy in this war is the wanton criminals among us who heed no laws, value no life, respect no individual. They rob, steal, deal drugs and kill with abandon" (R.1584)); to popular mistrust of the judicial system and contempt for the constitutional rights of accused criminals ("When caught they cower between loopholes in the laws and if convicted cry foul when society seeks to punish"; "It is no mere coincidence that crime has escalated to unimaginable levels in the past two decades, which are marked by outrageous court rulings mocking the Constitution"; "Criminals are set free routinely on the slightest of technicalities while those convicted of capital crimes easily avoid the death penalty by appealing frivolous

points of law in the federal courts"; "It's time for the public to fight back with a vengeance'' (R.1584); and to several completely unrelated murder cases in which the defendants had already been convicted and sentenced to death, as a vehicle for expressing dissatisfaction with "interminable court rulings and appeals and double appeals" resulting in less frequent use of the electric chair than the editor thought appropriate (R.1590). Linking Governor Graham's signing of a death warrant for Leslie Jones, who was convicted of the robbery and murder of a Pensacola liquor store owner, with the killing of Officer Taylor, "slain by bank robbers who were in turn wounded and captured", this editorial begins "Last week was one of cruel irony for Escambia Countians who believe punishment for heinous murder should be swift and sure death in the electric chair" (R.1590), and concludes "One would like to think that the killers of young Officer Taylor would be promptly tried, promptly sentenced to the electric chair, and promptly dispatched to the nether regions. And one can be pretty sure that the first two of these propositions will be carried out with all the dispatch one would wish" (R.1590).

In publishing an editorial of this nature, the newspaper essentially "endorsed" a verdict as to guilt or innocence ("guilty as charged") and as to penalty ("death"), predicted that the jury and trial court would indeed convict the defendants and sentence them to death, and disseminated these opinions to its Escambia County readership, composed of potential jurors in the case. Combined with the gentler feature stories and columns praising Officer Taylor and mourning his death; combined with the emotional media coverage of the funeral; combined with the publication of numerous extra-judicial ''eyewitness'' accounts of the crime; combined with the disclosure of inadmissible information concerning appellant's conviction of armed robbery in Alabama, his being on bond at the time of the murder, and Cliff Jackson's guilty plea, this case presents a classic example of "trial by

newspaper'' or "trial by media", condemned by Singer v. State, supra; Manning v. State, supra; and the Florida Constitution, Article I, Section 16. Considering the pervasive exposure of the community to this inherently prejudicial publicity, considering the attitude of the community as reflected by the grand jury presentment "A Tribute to a Hero", and by the responses of many prospective jurors on voir dire, and especially considering the fact that sixty out of sixty members of the venire stated that they had prior knowledge of the case through news media accounts and community discussion, the trial court abused its discretion in refusing to grant a change of venue. Manning v. State, supra. Because the pervasive and prejudicial pre-trial media coverage may have improperly influenced the jury's verdict and recommendation of death [see Manning v. State, supra, at 2781, appellant's conviction and death sentence must be reversed and the case remanded for a new trial in a location other than Escambia County. See Manning v. State, supra, at 278.

It can be anticipated that the state, in responding to appellant's arguments regarding the necessity for a change of venue, as well as the related arguments presented in Issues 111, IV, and V, will rely heavily on the recent decision of the U.S. Supreme Court in Patton v. Yount, ___ U.S. ___ (1984)(35 Cr.L. 3152).Such reliance will be misplaced. In Patton v. Yount, the U.S. Supreme Court reversed a decision of the Third Circuit Court of Appeals granting federal habeas corpus relief to the petitioner. [As emphasized at p.20, footnote 2 of this brief, appellant is basing his arguments primarily on the Florida Constitution, Article I, Section 16, and on this Court's recognition in Manning v. State, supra, and Singer v. State, supra, of circumstances in which a change of venue may be required in order to preserve the accused's right under the state constitution to a fair trial by an impartial jury. This fact alone makes the state's anticipated reliance on Patton v. Yount inappropriate]. Moreover, the opinion of

the Court in Patton v. Yount is based almost entirely on the majority's perception that the four year time lapse between the inflammatory publicity and the second trial was sufficient to erase the prejudicial effects of the publicity. The Court distinguished Irvin v. Dowd, 366 U.S. 717 (1961):

> In Irvin, the Court observed that it was during the six or seven months immediately preceding trial that "a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against [the defendant]." 366 U.S., at 725. In this case, the extensive adverse publicity and the community's sense of outrage were at their height prior to Yount's first trial in 1966. The jury selection for Yount's second trial, at issue here, did not occur until four years later, at a time when prejudicial publicity was greatly diminished and community sentiment had softened. In these circumstances, we hold that the trial court did not commit manifest error in finding that the jury as a whole was impartial.
>
> The record reveals that in the year and a half from the reversal of the first conviction to the start of the second voir dire each of the two Clearfield County daily newspapers published an average of less than one article per month. . . . More
>
> the trial dates and scheduling such as are common in rural newspapers. . . . The transcript of the voir dire contains numerous references to the sparse publicity and minimal public interest prior to the second trial. . . . It is true that during the voir dire the newspapers published articles on an almost daily basis, but these too were purely factual articles generally discussing not the crime or prior prosecution, but the prolonged process of jury selection. . . . In short, the record of publicity in the months preceding, and at the time of, the second trial does not reveal the "barrage of inflammatory publicity immediately prior to trial," Murphy v. Florida, 421 U.S. 794, 798(1975), amounting to a "huge . . . wave of public passion," Irvin, supra, at 728, that the Court found in Irvin.
>
> Patton v. Yount, supra (35 Cr.L. 3154)
>
> . . .
>
> . . . It would be fruitless to attempt to identify any particular lapse of time that in itself would distinguish the situation that existed in Irvin. But it is clear that the passage of time between a first and a second trial can be a highly relevant fact. In the circumstances of this case, we hold that it clearly rebuts any presumption of partiality or prejudice that existed at the time of the initial trial. There was fair, even abundant, support for the trial court's findings that between the two trials of this case there had been "practically no publicity given to this matter through the news media," and that there had not been "any great effect created by any publicity."
>
> Patton v. Yount, supra (35 Cr.L. 3155)

Contrast also Murphy v. Florida, 421 U.S. 794, 802 (1975)(articles concerning petitioner had ceased being published seven months before the jury was selected for trial; moreover, articles were largely factual in nature).[7]

In the instant case, the crimes were committed on October 19, 1982, and jury selection commenced on April 25, 1983, six months later. The greater part of the inflammatory publicity occurred, typically enough, around the time of the bank robbery and shooting, at the time of Officer Taylor's funeral, and at the time appellant and Jackson were indicted by the Grand Jury. The latter event, accompanied by the separate presentment, "A Tribute to a Hero", occurred in early November. Throughout December there were frequent media references to the efforts being made to extradite appellant to Mobile to stand trial for an unrelated armed robbery. A conviction on that charge, as Assistant State Attorney Ron Johnson was repeatedly quoted, would be admissible in the penalty phase of the upcoming Pensacola murder trial. In early January, it was duly reported that appellant had now been convicted of the armed robbery of a Mobile doughnut shop and had been sentenced to 25 years imprisonment. In mid-March, the lead article of the local section of the newspaper announced that co-defendant Jackson had entered a plea of guilty, in order to avoid the death penalty which his attorney feared might be imposed if the case went to trial, even though Jackson was not the triggerman. Jackson's attorney was quoted as saying that the likelihood of conviction was approaching 100 percent. In April, less than a week before the jury was selected, an article concerning appellant's motion for change of venue repeated the information that Jackson had pled guilty. All of the publicity in this case occurred within the six month period immediately preceeding the trial. Thus, neither Patton v. Yount (in which the inflammatory publicity occurred four years before the second trial) nor Murphy v. Florida (in which the earlier publicity was largely factual, and in which the seven month period immediately preceeding the

[7] See also Copeland v. State, ___ So. 2d ___ (Fla. 1984)(case no. 57,788, opinion filed September 13, 1984)(slip opinion, p.7)(articles were largely factual, rather than emotional, in nature).

trial was almost entirely free of any publicity) involve circumstances which are comparable to the instant case. Because the evidence reflected that the community was so pervasively exposed to the circumstances of the crimes, so pervasively exposed to inadmissible information regarding the Mobile armed robbery trial and conviction and Cliff Jackson's guilty plea, and so pervasively exposed to the inflammatory rhetoric of the press, that prejudice, bias, and preconceived opinions were the natural, inevitable, result, the trial court was bound to grant appellant's motion for change of venue. Manning v. State, supra. Because he refused to do so, appellant's conviction and death sentence must be reversed. Manning v. State, supra.

ISSUE III

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE.

To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. Gannett Co. v. DePasquale, 443 U.S. 368, 378, (1979); see United States v. Hawkins, 658 F.2d 279, 285 (5th Cir. 1981). It is appellant's position that the publicity in this case was so intense, inflammatory, and prejudicial, and the exposure of the prospective jurors so widespread, that under these circumstances no remedy short of a change of venue would suffice. But even assuming arguendo that the trial court could have alleviated some of the damage by alternative means, the fact remains that, when presented with the opportunity, he consistently declined to do so. Specifically, the trial court denied appellant's motion for individual and sequestered voir dire of prospective jurors, denied defense challenges for cause made on the ground that the particular juror's impartiality was impaired by his or her exposure to media coverage [see Issue IV, infra], and refused to allow additional peremptory challenges [see Issue V, infra]. Under the circumstances

of this case, and in light of the fact that the trial court refused to order a change of venue, appellant submits that the court's failure to utilize all or any of these protective measures amounted to a clear abuse of discretion.

On November 23, 1982, appellant filed a motion for individual and sequestered voir dire, in which he noted that "[e]motionally charged and prejudicial publicity" had appeared in the local press, and that "[c]ollective voir dire of jurors empaneled as to their familiarity with the crime, the victim, or the probability of accused's guilt or innocence, will educate all jurors to prejudicial and incompetent material, thereby rendering it impossible to select a fair and impartial jury"(R.1451-52). At a pre-trial hearing on January 20, 1983, the trial court denied the motion, stating ". . . I am not going to conduct individual Voir Dire Examination, that is with all the other jurors sequestered, but we will do it in groups of about thirty." (R.1532). At the April 21, 1983 change of venue hearing, the judge stated that he would ask prospective jurors if they had formed opinions, but "I will not ask details" (R.1726). During the jury selection proceeding itself, at the outset of the examination of each group of thirty jurors, the trial court specifically advised them not to discuss the specific information they may have obtained (R.6-7, 191).

It is well recognized that where a juror has been exposed to prejudicial publicity, his assurances that he can be impartial and give the defendant a fair trial are not necessarily dispositive. Sheppard v. Maxwell, supra, 384 U.S. at 351; Singer v. State, supra at 24; Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981); State v. Goodson, 412 So.2d 1077, 1080 (La. 1982). Where the nature of the publicity as a whole raises a significant possibility of prejudice, and a juror acknowledges some exposure to that publicity, it is the responsibility of the trial court, not the juror himself, to make the ultimate determination of whether his impartiality has been

impaired. United States v. Hawkins, 658 F.2d 279, 283, 285 (5th Cir. 1981); United States v. Davis, 583 F.2d 190, 197 (5th Cir. 1978). Because the attorneys and the court in this case were unable to determine what each juror had heard or read, the trial court was unable to fulfill this constitutional responsibility. See United States v. Hawkins, supra; United States v. Davis, supra; see also State v. Goodson, supra; Section 8-3.5, American Bar Association Standards Relating to Fair Trial and Free Press.

Although a trial court has broad discretion in its conduct of voir dire, this discretion is limited by the requirements of due process. United States v. Hawkins, supra, at 283 (5th Cir. 1981); United States v. Gerald, 624 F.2d 1291, 1296 (5th Cir. 1980). See also United States v. Rucker, 557 F.2d 1046, 1049 (4th Cir. 1977); United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976); Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981) (exercise of trial court's discretion in conduct of voir dire is limited by "essential demands of fairness"). In order to satisfy the requirements of due process, the method of voir dire adopted by the trial court must be capable of giving reasonable assurance that prejudice would be discovered if present. United States v. Hawkins, supra, at 283, 285; United States v. Gerald, supra, at 1296; United States v. Nell, supra, at 1229; United States v. Chagra, 669 F.2d 241, 253 (5th Cir. 1982). In view of the volume of inflammatory publicity and the pre-trial disclosure of inadmissible facts in the present case, the trial court's ruling, and the consequent examination of the prospective jurors in each other's presence, virtually guaranteed that any prejudice created by the publicity would not be discovered, unless the juror himself recognized and admitted that he could not be impartial. Since it is the court, and not the individual juror, who must ultimately decide whether the juror's impartiality has been impaired by his extrajudicial knowledge or his exposure to inflammatory publicity, the group voir dire employed in this case was constitutionally inadequate. United States v.

Hawkins, supra; United States v. Davis, supra.

ISSUE IV

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS ICKES AND LARRY JOHNSON.

Considering the fact that every member of the venire had been exposed to the inflammatory and prejudicial media coverage of this case, it is not surprising that many prospective jurors acknowledged having formed an opinion as to guilt, penalty, or both, and it is not surprising that well over half of the prospective jurors were challenged for cause. In some of the more obvious instances, where the juror's bias or prejudice was blatant, the trial court excused the challenged juror either upon defense motion or sua sponte. See Appendix, p.3. However, in what might be termed "borderline" cases, the trial court consistently denied defense challenges for cause to jurors who had formed opinions based on what they had learned from the media. See Appendix, p.4. For example, defense challenges for cause to at least nine prospective jurors[8] who at some point acknowledged having formed an opinion were denied, as were challenges for cause to two jurors[9] who were friends or acquaintances of Officer Taylor's family. Of these jurors, Delsignore and Ickes served on the jury and Sprinkle was an alternate. Mr. Jackson had formed an opinion from the media, still had the same opinion, and did not know if he could be fair, though he later said he thought he could base his verdict on the evidence (R.290-91, 325). Mr. Ickes had formed an opinion based on what he had read or heard, would try to be fair as much as he could, and would not let his opinion enter into his decision; he also stated that he could not presume appellant innocent, but later said that he could (R.297-98, 304, 327-28). Mrs. Laughlin initially stated that she could not presume appellant innocent, but later said she could (R.304,325-26. Mr. Larry Johnson was in the vicinity,

[8] Wooten, Carper, Dyson, Hassebrock, Jackson, Ickes, Delsignore, Laughlin, Larry Johnson

[9] Averill and Sprinkle

about two blocks away, when the bank robbery and murder occurred; he "read everything" and listened to the news, and discussed the case with his wife and with a woman at work whose husband is a police officer; he formed an opinion which he did not necessarily associate with appellant but "just a blank feeling" that "anyone that shoots anyone else in the type of incident as much as I know about it now" should receive the death penalty; and that he had not necessarily discarded his prior opinion and was still inclined toward the death penalty in this case in the event of a conviction (R.288-290, 320, 519-26). Contrast Straight v. State, 397 So.2d 903, 906 (Fla. 1981). ("The record shows that prospective jurors exhibiting even a hint of prejudice were excused. The court granted the appellant extra peremptory challenges and defense counsel did not use them all. The court did not abuse its discretion in denying the motion for change of venue"). In the present case, involving the killing of a popular white police officer by a young black outsider to the community, and an emotionally charged reaction by the press and by the public (as indicated by the grand jury presentment), the circumstances are far closer to Manning v. State, supra, which is specifically distinguished in Straight. Moreover, the protective measures utilized in Straight, such as granting additional peremptory challenges and excusing any juror exhibiting "even a hint of prejudice" were not employed in the instant case.

Even apart from the trial court's general failure to take any affirmative steps to minimize the impact of the prejudicial pre-trial publicity, his rulings on two of the defense's challenges for cause, in and of themselves, amounted to an abuse of discretion. See Singer v. State, 109 So.2d 7, 19-25 (Fla. 1959); Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981); Plair v. State, So. 2d (Fla. 1st DCA 1984) (case no. AW-236, opinion filed August 8, 1984) (9 FLW 1723).

Larry Johnson

Fla. Stat. §913.03(10) provides that a juror is subject to a challenge

for cause where

> The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he declares and the court determines that he can render an impartial verdict according to the evidence.

In Thomas v. State, 403 So.2d 371, 375 (Fla. 1981) this Court recognized that bias against the defendant in the sentencing aspect of a capital case amounts to a "fundamental violation . . . [of] the express requirements in the Sixth Amendment to the United States Constitution and in Article I, Section 16, of the Florida Constitution, that an accused be tried by 'an impartial jury'". It is error to deny a challenge for cause to a prospective juror who harbors such a bias. Thomas v. State, *supra*. While appellant does not contend that prospective juror Larry Johnson was an "automatic death penalty" juror like the juror in Thomas, neither was he merely a juror with a general tendency in favor of the death penalty like the jurors in Fitzpatrick v. State, 437 So.2d 1072, 1075-76 (Fla. 1983). Rather, Mr. Johnson clearly exhibited a strong bias in favor of imposing the death penalty on Clarence Hill, should he be convicted of the murder of Officer Taylor, based on the opinions Mr. Johnson had already formed as a result of the media coverage of this case. As such, Mr. Johnson is a classic example of a juror with a state of mind regarding the particular case which would prevent him from acting with the required impartiality in the penalty phase of the trial [Fla. Stat. 5913.03, supra], and appellant's challenge for cause should have been granted.

Mr. Johnson was in the vicinity of Belmont and Baylen, about two blocks away from the scene, when the bank robbery and killing of Officer Taylor occurred (R.288). He noticed the commotion, turned on the radio, and heard what happened, but he did not go down there (R.288). Mr. Johnson, who works

for the telephone company, got into a long conversation with one of the dispatchers, whose husband was a police officer and who was very upset (R.289). Mr. Johnson said he "read everything" and listened to the news, but he did not remember specific facts (R.289). Based on what he had read, Mr. Johnson formed an opinion as to the guilt or innocence of those charged with the crime, but he did not really feel that way any longer (R.289). He thought he could set that opinion aside and listen to the case solely on what was presented in court (R.290). Asked whether he would not let his prior opinion enter into his decision in any way, Mr. Johnson replied "That's a hard decision to make right now. I think I can say I can. I don't know for sure." (R.290). Mr. Johnson indicated that he would probably be inclined to vote for the death penalty in the event of a conviction of premeditated murder (R.319).

Defense counsel challenged Mr. Johnson for cause:

> MR. LOVELESS [defense counsel]: Your Honor, he said he had formed an opinion at the time. He said he read everything he could get his hands on. He was the one that works at the telephone company. He was two blocks from the thing when it happened. He said when asked had he formed an opinion, he said at that time, yes, sir. When asked if he could set it aside, he said I can't say I can, but I don't know for sure. We would challenge.
>
> MR. RON JOHNSON [prosecutor]: Your Honor, as I recall he said he could set aside any opinion, and if you would like to inquire further?
>
> THE COURT: I have my notes of his responses, indicated that while he had paid close attention to the media presentations that he would come into court with an open mind. I'm going to deny the challenge for cause on Larry Johnson.
>
> (R.329-30).

The prosecutor asked Mr. Johnson where he lived before moving to Escambia County; when the juror replied that he had lived in Miami, the prosecutor cracked "You left the jungle, huh?" (R.440). Mr. Johnson stated that his wife was a bank teller for seven years, both in Miami and in Pensacola (R.441). The prosecutor questioned Mr. Johnson about his attitude toward the death

penalty in general:

> MR RON JOHNSON [prosecutor]: What are your feelings about the death penalty?
>
> LARRY JOHNSON: Punishment should fit the crime, and it's a necessary deterrent.
>
> PROSECUTOR: Why do you think it's necessary?
>
> LARRY JOHNSON: I honestly feel that some people would be more apt to kill someone if they knew they were going to spend their life in prison, but if they knew they were going to die they wouldn't.
>
> PROSECUTOR: Do you feel these prisoners on death row would rather have a life sentence than a death sentence?
>
> LARRY JOHNSON: In my opinion, yes, sir.
>
> PROSECUTOR: Have you ever heard about any of these guys on death row pleading to get life sentences?
>
> LARRY JOHNSON: No.
>
> PROSECUTOR: Okay. Do you ever hear these guys on death row fighting against their death sentences and making an effort to live?
>
> LARRY JOHNSON: Yes, sir, I do.
>
> PROSECUTOR: Do you ever hear of any of them, the life sentences, trying to get into the electric chair?
>
> LARRY JOHNSON: No, sir.
>
> PROSECUTOR: Does that lead you to believe that they would rather have a life sentence than the death sentence?
>
> LARRY JOHNSON: Yes, sir.
>
> PROSECUTOR: Have you ever thought about what type of case would deserve a death sentence?
>
> LARRY JOHNSON: Yes, sir, premeditated murder, and felony murder. (R. 442-43)

The prosecutor asked Mr. Johnson if he knew of any reason why he could not be a fair and impartial juror in this case; Mr. Johnson replied that he did not (R.444).

Defense counsel asked:

> Mr. Johnson, how much of a discussion have you had about the circumstances with your wife?

LARRY JOHNSON: Previous to yesterday?

DEFENSE COUNSEL: Yes, sir.

LARRY JOHNSON: Considerable.

DEFENSE COUNSEL: Because of her particular occupation?

LARRY JOHNSON: Yes, sir, and that I had once wanted to be a police officer.

DEFENSE COUNSEL: Okay. That's new, too. That's something else that hasn't come out before. I appreciate you mentioning that.

LARRY JOHNSON: Yes, sir.

DEFENSE COUNSEL: Is that why you, as you said, read everything you could get your hands on?

LARRY JOHNSON: Possibly. Reason I wanted to read it all, I was within the vicinity. I was within two blocks away, and I wanted to know what went on. I was at Belmont and Bavlen Street.

(R. 519)

Mr. Johnson stated that he had formed an opinion at the time, but that he "had not associated it with Mr. Hill." (R.521). Rather, his opinion was just based "on the incidents of the man getting shot" (R.521). Mr. Johnson repeated that he did not hold an opinion about the persons arrested, because ". . . I feel I don't have all the facts. You get a very narrow point of view out of the media" (R.522). Asked by defense counsel how he was going to keep his feelings from affecting his deliberations, Mr. Johnson answered:

Well, basically, like I said, I have not associated that opinion with Mr. Hill. It was just a blank feeling that of someone that shoots someone else should be punished.

DEFENSE COUNSEL: Was that your feeling or was it that something else ought to happen to him? I don't want to put words in your mouth.

LARRY JOHNSON: Yes, sir.

DEFENSE COUNSEL: I would appreciate it if you would tell me.

LARRY JOHNSON: I feel anyone that shoots anyone else in the type of incident as much as I know about it now, the death penalty should be imposed upon them. That's basically what I felt at the time.

(R. 523)

Mr. Johnson stated that even if the state were to immediately present evidence that appellant was arrested at the scene, he would follow the instructions of the court as to the presumption of innocence and he would keep an open mind (R.523-24). He said he would wait and make his judgment from all the evidence (R.525). The examination then returned to the subject of the death penalty:

> DEFENSE COUNSEL: How do you feel about the death penalty? Do you still feel the same:
>
> LARRY JOHNSON: Yes, sir. Talking to Mr. Johnson, I feel the punishment should fit the crime.
>
> DEFENSE COUNSEL: Did you state earlier that under the facts that you knew, that you know them now, but you feel this is an appropriate case?
>
> PROSECUTOR: Judge, this is getting to be highly repetitious.
>
> THE COURT: I will let him answer the question. Go ahead.
>
> LARRY JOHNSON: Restate it, please.
>
> DEFENSE COUNSEL: Do you feel like from under the facts that you know now, do you feel like this might be an appropriate case?
>
> LARRY JOHNSON: I don't feel I have really been given any more facts than I have before coming into the courtroom.
>
> DEFENSE COUNSEL: You formed an opinion before though?
>
> LARRY JOHNSON: Yes, sir.
>
> DEFENSE COUNSEL: Have you now discarded that opinion?
>
> LARRY JOHNSON: Not necessarily.
>
> DEFENSE COUNSEL: Do you feel that in all cases of premeditated murder that the death penalty should be applied?
>
> LARRY JOHNSON: It's a hard question to answer.
>
> DEFENSE COUNSEL: Yes, sir, sure is.
>
> LARRY JOHNSON: I am not saying in all cases, dependant upon the evidence.
>
> DEFENSE COUNSEL: Are you still inclined towards the death penalty in this case if in fact there is a conviction?
>
> LARRY JOHNSON: Yes, sir.

DEFENSE COUNSEL: That's the presumption that you came into this court with?

LARRY JOHNSON: Yes, sir. (R.526)

Defense counsel renewed his challenge for cause to Larry Johnson (R.539, 542-43), on the ground, inter alia, that he had formed an opinion as to penalty (R.542) and was "proceeding into this case on the same basis he came in with preconceived notions" (R.543). The trial court denied the challenge (R.543), and the defense was forced to expend a peremptory challenge on Mr. Johnson (R.544). The defense subsequently exhausted its peremptory challenges (R.650), unsuccessfully requested additional peremptory challenges (R.650-51), unsuccessfully renewed its motion for change of venue (R.650), and unsuccessfully challenged for cause all remaining members of the panel based on their exposure to prejudicial media coverage of the case (R.651).

Appellant wishes to make it clear that he is not contending that the trial court abused his discretion in concluding that Mr. Johnson could be fair and impartial as to guilt or innocence. As to penalty, however, it is equally clear that Mr. Johnson could not be fair and impartial. Based on his extrajudicial knowledge and impressions - the media reports of the case (which he acknowledged having read extensively); his conversations with his wife (who had been a bank teller for seven years) and a co-worker (whose husband was a police officer and who was very upset over the incident); his proximity to the scene of the crime; his gut feeling that someone who shoots someone else "in the type of incident as much as I know about it now" should receive the death penalty - Mr. Johnson formed an opinion that death was the appropriate punishment in this case should appellant be convicted. Mr. Johnson admitted that he had not necessarily discarded his previously formed opinion, and was still inclined toward the death penalty in this case in the event of a conviction. That, as Mr. Johnson freely acknowledged, was "the presumption that [he] came into this court with" (R.526). Without

question, Mr. Johnson's extensive pre-trial exposure to the facts and circumstances of this particular crime caused him to be biased against appellant in the penalty aspect of the case. See Thomas v. State, supra.

In Singer v. State, supra, at 19, this Court discussed the defendant's challenge for cause to juror Stringfellow. Mr. Stringfellow

> . . . told the court that he had "to a certain degree" formed or expressed an opinion as to the guilt or innocence of the defendant, which opinion was based upon "newspaper articles and hearsay." He stated that if chosen as a juror he would render a fair and impartial verdict on the evidence in the case and the law as explained by the court.
>
> However, subsequently on questioning by the attorney for the defendant, Mr. Stringfellow answered as follows:
>
> Q. Do you think you can completely free your mind?
> A. Yes, sir, I think so.
>
> Q. And base your verdict solely upon the evidence or lack of evidence in this case? A. Yes sir. I would endeavor to very much. I think I could.
>
> Q. You think so, but * * * A. But, I do have this prejudice ahead which I have to admit to you, so I will have that to overcome.
>
> Q. Would that prejudice, if you are a juryman, have anything to do with it if the case arrived at the state where mercy or lack of mercy were considered by the jury? A. Yes, it might.
>
> Mr. Knight: Challenge for cause, your Honor.
> A. I might say the nature of the case would have a bearing upon that.
>
> The challenge for cause was denied and defendant used one of his peremptory challenges to excuse Mr. Stringfellow.
>
> Singer v. State, supra, at 19.

This Court concluded that Mr. Stringfellow should have been excused for cause "because of a reasonable doubt as to his impartiality and as to his ability to render a verdict based solely on evidence given at the trial free of the influence of his preconceived opinion and prejudice against the defendant", but declined to reverse on this ground because defense counsel failed to specify the grounds for the challenge for cause, and because Singer's conviction was being reversed on appeal for other reasons. Singer

v. State, supra, at 19.

In the present case, juror Larry Johnson's bias in favor of a death recommendation - an opinion which was formed as a result of his pre-trial exposure to the facts and circumstances of the case, and which he admittedly had not discarded - was far deeper and more fully articulated than juror Stringfellow's bias in Singer. Here, unlike Singer, the grounds of the challenge for cause were specified (R.542-43).

The initial determination of a juror's competence for cause lies within the discretion of the trial court. Singer v. State, supra; Leon v. State, supra; Plair v. State, supra. This discretion, however, is not unlimited, but is "subject to the essential demands of fairness." Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981); United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976). At stake is the party's Sixth Amendment right to an impartial jury. Leon v. State, supra, at 205; United States v. Nell, supra, at 1229. Where there is any reasonable doubt as to a juror's possessing the requisite state of mind as to render an impartial verdict (as to guilt or penalty or both), the defendant must be given the benefit of the doubt, and the juror should be excused for cause. See Singer v. State, supra; Blackwell v. State, 101 Fla. 997, 132 So. 468 (1931); Leon v. State, supra; Plair v. State, supra.

In Singer v. State, supra, at 24-25, this Court (in discussing a challenge for cause to prospective juror Shaw) said:

> We think the true test to be applied should be not whether the juror will yield his opinion, bias or prejudice to the evidence, but should be that whether he is free of such opinion, prejudice or bias or, whether he is infected by opinion, bias or prejudice, he will, nevertheless, be able to put such completely out of his mind and base his verdict only upon evidence given at the trial. [Citations omitted].
>
> We realize that, to say the least, it is difficult, if not impossible, for any individual to completely put out of mind knowledge, opinions or impressions previously registered. Such cannot be erased from the mind as chalk is erased from a blackboard. More the reason then that in the struggle toward attainment of the perfect aim of trial by an impartial jury composed of

> jurors "whose minds are wholly free from bias or prejudice, either for or against the accused," the pre-trial dissemination of the knowledge which destroys the impartiality of the public from which the jury must be drawn should be restricted as discussed earlier in this opinion. The result of failure to do so is clearly demonstrated in this case, yet the press in this case did no more than that commonly done.
>
> It is diffucult for anyperson to admit that he is incapable of being able to judge fairly and impartially. We think Mr. Shaw on voir dire examination did as much as he could to honestly express that he was of such a state of mind, consciously or subconsciously, that he was not sure he could render a verdict without being influenced by the opinion he had formed from what he had read and heard about the case and because of knowing decedent's family.
>
> Nor do we feel that his subsequent statements, in response to questions from the trial judge, that he was competent to serve as a juror were sufficient to overcome the effect of what he had previously said as to his state of mind.
>
> There is such a reasonable doubt as to the impartiality of Mr. Shaw and his being able to render a verdict on the evidence and law given at the trial free of the influence of his opinions and prejudices that we feel he should have been excused from the jury when challenged for cause by the defense. In view of the fact that the defendant used all of his peremptory challenges, denial of the challenge for cause directed to Mr. Shaw was reversible error.

In the instant case, Mr. Johnson expressly stated that he had formed an opinion that death was the appropriate penalty in this case in the event of a conviction, and that he had not necessarily discarded this opinion. From what he had read or heard about the case, and from his conversations with his wife and a co-worker, death was the presumption he admittedly brought to court with him. [Bear in mind also that Mr. Johnson acknowledged having read everything he could about the case, and that among the many inflammatory and prejudicial articles in the Pensacola press was an editorial which loudly and specifically called for the death penalty for the killers of Officer Taylor]. The fact that Mr. Johnson did not at that point associate his opinion with appellant is of little consequence, especially since the defense did not dispute that appellant was the individual who shot Officer Taylor. The only contested issues in the trial were whether the killing

was premeditated murder or felony murder, and whether the proper penalty was death or life imprisonment. Mr. Johnson's admitted bias as to the latter issue precluded him from sitting as an impartial juror in this case, and the trial court's refusal to grant a challenge for cause was an abuse of discretion which impaired appellant's right to an impartial jury guaranteed by the Florida and United States Constitutions. See Thomas v. State, supra.

It is reversible error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, since it has the effect of abridging the right to exercise peremptory challenges. Leon v. State, supra, at 205; Peek v. State, 413 So.2d 1225, 1226 (Fla. 3d DCA 1982); Highlands Ins. Co. v. Lucci, 423 So.2d 947, 948 (Fla. 3d DCA 1982); Williams v. State, 440 So.2d 404, 405-406 (Fla. 1st DCA 1983).[10] It has been recognized that any error which impairs the exercise of peremptory challenges is reversible error, and no showing of prejudice is required. See Swain v. Alabama, 380 U.S. 202, 219 (1965); United States v. Mobley, 656 F.2d

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A representative sample of appellate decisions from other jurisdictions which recognize that the erroneous denial of a challenge for cause requires reversal where the defendant exhausted his peremptories before the jury was sworn (without any claim that a sitting juror should have been disqualified) are Martin v. Commonwealth, 271 S.E.2d 123, 129 (Va. 1980); State v. Sugar, 408 So.2d 1329, 1331 (La. 1982); State v. Wilcox, 386 So.2d 257, 258-59 (W.Va. 1982); Commonwealth v. Jones, 383 A.2d 874, 876 (Pa. 1978); State v. Ternes, 259 N.W.2d 296, 197 (N.D. 1977). See also, Jones v. Cloud, 168 S.E.2d 598, 605-06 (Ga. 1969) ("Parties should not be required to use their strikes in an effort to remove disqualified jurors [citations omitted]. Let there be no thumb on the scale when the jury weighs the evidence"): Wasko v. Frankel, 569 P.2d 230, 232 (Ariz. 1977); State v. Munson, 631 P.2d 1099, 1100 (Ariz. App. 1981); Crawford v. Manning, 542 P.2d 1091, 1093 (Utah 1975)(party is entitled to exercise his peremptory challenges on impartial prospective jurors, and he should not be compelled to waste one in order to accomplish that which the trial judge should have done). Conversely, the general rule appears to be that a party waives any right to relief for the erroneous denial of a challenge for cause if he fails to exhaust his peremptory challenges. See e.g. Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984); State v. Hardee, 308 S.E.2d 521, 524 (S.C. 1983); State v. Pelletier, 434 A.2d 52, 55 (Maine 1981); Monserrate v. State, 352 N.E.2d 721, 723 (Ind. 1976); State v. Patriarca, 308 A.2d 300, 309-10 (R.I. 1973); State v. Eaton, 249 N.E.2d 897, 900 (Ohio 1969).

998,989-90(5th Cir. 1981); United States v. Brooklier, 685 F.2d 1208,123 (9th Cir. 1982); Carr v. Watts, 597 F.2d 830 (2d Cir. 1979); United States v. Turner, 558 F.2d 535 (9th Cir. 1977); Worthen v. State, 399 A.2d 272, 278 n.3 (Md.App. 1979). The involuntary exhaustion of peremptory challenges is in and of itself prejudicial, and more specific prejudice than that would be impossible to show, due to the subjective nature of the kinds of juror bias which peremptory challenges are uniquely suited to eliminate. See Francis v. State, 413 So.2d 1175, 1178-79 (Fla. 1982).

Since, as in Singer v. State, supra, and Leon v. State, supra, appellant exhausted his peremptory challenges, the trial court's erroneous refusal to excuse Mr. Larry Johnson for cause requires reversal of appellant's conviction and death sentence.

Ickes

The trial court also abused his discretion in denying appellant's challenge for cause to prospective juror Ickes. Ickes ultimately served on the jury which convicted appellant and recommended imposition of the death penalty.

Mr. Ickes got his information about this case from the radio and remembered "a little bit" of the specific facts which were reported (R.297). He formed an opinion about appellant's guilt or innocence based on what he heard, read, or knew (R.297). Asked if he would be able to set that opinion aside, he replied "Yeah, I would try to be fair, as much as I can" (R.297-98). He said that his opinion would not enter into his decision if he were chosen as a juror (R.298).

Defense counsel asked prospective juror Jordan, "knowing that you have an opinion about the case, do you think that you can look here at him today, right at this time, and presume him innocent even though you know you have an opinion about the case?" (R.304). Mrs. Jordan answered that she could not presume appellant innocent (R.304). Defense counsel asked if anyone else felt the same way (R.304). Prospective jurors Laughlin and Ickes volunteered that they felt that way too (R.304, see R.1739).

Later, defense counsel asked the jurors ". . . [Is] there anybody here

who feels like you, because of the passage of time, if you go back in that jury room, because maybe there are eleven people saying something that's not the same as what you are saying, that you would have to agree with them just because of the number or the length of time involved?" (R.311). Mr. Ickes stated that he would feel that way and be tempted to go along, but he would probably do what was right (R.311).

The prosecutor sought to rehabilitate Mr. Ickes:

> And, Mr. Ickes, there was some indication about whether you could presume the defendant innocent. Could you follow the Court's instructions and presume the defendant innocent until he is proven guilty to the exclusion of and beyond every reasonable doubt?
>
> MR. ICKES: Yeah, when he was talking about -- I was thinking about what he said, what I was trying to say is he was saying that if everybody was saying one verdict and if I was saying another, you know, like I said, I might be tempted to go with them, but do what was right because of what was in the court here, see.
>
> (R.327-28)

In the face of Mr. Ickes' apparent confusion, instead of following up his inquiry into Ickes ability or willingness to presume appellant innocent, the prosecutor began questioning him about the duty to try to reach a unanimous verdict (R.328). It is evident, however, that at the time Mr. Ickes responded to defense counsel's question (to the jurors as a group) that he felt like Mrs. Jordan and could not presume appellant innocent, he could not have mistakenly thought he was responding to a different question about eleven jurors saying one verdict and would he go along with them or stand up for his own views, because that question was not asked until later. Consequently, the prosecutor's attempt to rehabilitate Mr. Ickes appears to have only confused him, and there remained at least a reasonable doubt as to Ickes' ability to presume appellant innocent.

The defense challenged Mr. Ickes for cause, and the challenge was denied (R.333-35).

In response to the prosecutor's questions concerning his attitude toward the death penalty, Mr. Ickes answered that he believed in it under some circumstances, and that he would follow the court's instructions on aggravating

and mitigating circumstances (R.398-400).

Defense counsel asked Mr. Ickes about the opinion he had formed:

> You said yesterday, also, that you had formed an opinion in this case, is that right?
>
> MR. ICKES: Yeah, a little bit.
>
> DEFENSE COUNSEL: A little bit.
>
> MR. ICKES: You know, it's kind of like I feel myself going one way sometimes.
>
> DEFENSE COUNSEL: Your feeling continued today?
>
> MR. ICKES: No. I keep thinking to myself, like if I was on a jury, I would have to put those thoughts out of my mind and go by what the evidence presented and all that.
>
> DEFENSE COUNSEL: Is that going to be hard for you to do that?
>
> MR. ICKES: I don't think it would be that hard.
>
> DEFENSE COUNSEL: Those thoughts keep coming up?
>
> MR. ICKES: Not really. You know, I always try to be as fair as I can. So, I am kind of used to it, but this is a more serious matter than what I usually go through.
>
> DEFENSE COUNSEL: That's for sure. . . .
>
> (R.498)

Mr. Ickes stated that he had not formed an opinion as to penalty (R.499-500).

The defense again challenged Mr. Ickes for cause, on the ground, inter alia, that "he said all along he has formed an opinion about the case, and he has been wishy-washy about it all along" (R.540). The trial court denied the challenge(R.540).

Juror Ickes admitted having formed an opinion as to appellant's guilt or innocence on the basis of his extrajudicial knowledge and exposure to pre-trial publicity. He was indeed, as defense counsel characterized it, "wishy-washy" about whether he could completely set his opinion aside - he kept using qualifiers like "I would try to be fair, as much as I can", ". . . it's kind of like I feel myself going one way sometimes'', "I would have to put those thoughts out of my mind" - but he never clearly stated that he could do it. See Singer v. State, supra. Very likely he was not

sure in his own mind whether he could do it. As was recognized in Singer:

> It is difficult for any person to admit that he is incapable of being able to judge fairly and impartially. We think Mr. Shaw on voir dire examination did as much as he could to honestly express that he was of such a state of mind, consciously or subconsciously, that he was not sure he could render a verdict without being influenced by the opinion he had formed from what he had read and heard about the case and because of knowing decedent's family.

Finally, Mr. Ickes stated that he would not be able to presume appellant innocent, and the prosecutor's attempt to rehabilitate him on this point was ambiguous at best. See Martin v. Commonwealth, 271 S.E.2d 123 (Va. 1980). This Court observed in Singer v. State, supra, at 24 and Powell v. State, 131 Fla. 254, 175 So. 213, 216 (1937):

> . . . The accused, guilty or innocent, is entitled to the presumption of innocence in the mind of every juror until every element of the offense charged against him has been proved by competent evidence adduced upon the trial beyond a reasonable doubt. This is not accomplished when a juror is taken upon a trial whose mind is in such condition that the accused must produce evidence of his innocence to avoid a conviction at the hands of that juror. . . .

There was, at the very least, a reasonable doubt as to whether Mr. Ickes possessed the requisite state of mind to render an impartial verdict, or whether the opinions previously formed and the impressions previously registered would preclude him from doing so. Under these circumstances, appellant should have been given the benefit of the doubt, Mr. Ickes should have been excused for cause, and the trial court's denial of the challenge was reversible error. See Singer v. State, supra; Plair v. State, supra.

On this issue as well, the state can be expected to rely improvidently on Patton v. Yount, ___ U.S. ___ (1984)(35 Cr.L. 3152). It should first be emphasized that the analysis employed in Patton v. Yount turns on whether the state court's findings of fact as to a juror's qualification to serve are entitled to a (rebuttable) presumption of correctness under 28 U.S.C. §2254(d) in a federal habeas corpus proceeding; the Court determined that

this presumption is indeed applicable. The instant case is on direct appeal from a state trial court to the state Supreme Court, and Patton v. Yount does not change the applicable substantive law. To the extent that Patton v. Yount recognizes that the trial court's ruling is entitled to "special deference" even on direct appeal, this does not mean the trial court's discretion cannot be abused, nor does it immunize his ruling from appellate review. In cases such as Singer v. State, supra; Leon v. State, supra, and Plair v. State, supra, (the latter decided six weeks after Patton v. Yount), Florida appellate courts have consistently recognized that the discretion accorded the trial court in determining a juror's competence for cause is not unlimited, and that an abuse of this discretion may require reversal. Moreover, Patton v. Yount turns largely on the U.S. Supreme Court's decision that, for purposes of federal habeas corpus review, the partiality of an individual juror is not a mixed question of law and fact but rather a question of "historical fact" [Patton v. Yount, supra, 35 Cr.L. at 31551. Under Florida law, in contrast, "[t]his Court has adopted the rule which makes the competency of a challenged juror one of mixed law and fact to be determined by the trial judge in his discretion." Singer v. State, supra, at 22.

In other words, appellant does not dispute that the trial court's ruling on challenge for cause is largely discretionary or that it is entitled (as is the case with other rulings in which credibility or "demeanor" of witnesses is a factor) to a presumption of correctness on appeal. See e.g. Crum v. State, 172 So.2d 24 (Fla. 1965)(trial court's ruling on sufficiency of evidence is entitled to a presumption of correctness); McNamara v. State, 356 So.2d 410 (Fla. 1978)(trial court's ruling on motion to suppress is entitled to a presumption of correctness); Stone v. State, 378 So.2d 765, 769-70 (Fla. 1979)(trial court's ruling on voluntariness of confession is entitled to a presumption of correctness) and hundreds of other decisions. Yet it is equally true that discretion can be abused and presumptions can be rebutted. See e.g. Jaramillo v. State, 417 So.2d

257 (Fla. 1982)(reversing on sufficiency of the evidence); Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983)(reversing on the basis of trial court's erroneous denial of motion to suppress); Brewer v. State, 386 So.2d 232 (Fla. 1980)(reversing on the basis of trial court's erroneous ruling that confession was voluntary and admissible), and hundreds of other decisions. Appellant has the burden of showing manifest error in the denial of a challenge for cause, but that burden can be overcome. Plair v. State, supra. In the present case, particularly in view of the volume and intensity of the prejudicial publicity to which all prospective jurors were exposed, appellant submits that the presumption of correctness which attaches to the trial court's rulings concerning jurors Larry Johnson and Ickes (and particularly the former) has clearly been rebutted.

ISSUE V

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES.

Fla.R.Cr.P. 3.350 provides that each party is permitted ten peremptory challenges for an offense punishable by death or life imprisonment, or six peremptory challenges for any other felony offense. Subsection (e) of the rule provides:

> If an indictment or information contains two or more counts or if two or more indictments or informations are consolidated for trial, the defendant shall be allowed the number of peremptory challenges which would be permissible in a single case, but in the interest of justice the judge may use his judicial discretion in extenuating circumstances to grant additional challenges to the accumulate maximum based on the number of charges or cases included when it appears that there is a possibility that defendant may be prejudiced. The State shall be allowed as many challenges as are allowed the defendant.

See Johnson v. State, 222 So.2d 191 (Fla. 1969).

The trial court's ruling on a request for additional peremptory challenges is a discretionary one, but as is the case with other such rulings, the trial court's discretion can be abused. See Thomas v. State, 403 So.2d

371 (Fla. 1981). Appellant submits that under the cumulative circumstances present in this case - the sensational nature of the crime, the inflammatory publicity and the exposure of every member of the venire to said publicity, the trial court's refusal to grant a change of venue, or individual and sequestered voir dire, or challenges for cause to numerous prospective jurors who acknowledged having formed an opinion (and some of whom exhibited more than a "hint" of prejudice, see Straight v. State, supra,) - and in light of the trial court's affirmative constitutional obligation to minimize the effects of prejudical pre-trial publicity [see Gannett Co. v. DePasquale, supra], it was an abuse of discretion for the trial court to refuse to grant additional peremptory challenges after appellant exhausted his original allotment of ten.

Appellant was charged in a six count indictment with first degree murder, attempted first degree murder, three counts of armed robbery, and possession of a firearm during the commission of a felony (R.1440-41). The first five of these offenses are punishable by death or life imprisonment; in fact, the trial court ultimately imposed a death sentence and four consecutive life sentences on these counts (R.1671-79). Rule 3.350 thus permitted the trial court to increase the allotment of peremptory challenges to any number up to and including 56, if there appeared that there was a possibility that appellant might be prejudiced by a strict limitation of ten.

In point of fact there was more than a possibility of prejudice, there was a certainty. The crime involved the murder of a young, popular white policeman by a black bank robber from outside the community. See Manning v. State, supra. The shootout occurred in downtown Pensacola in the middle of the afternoon, a block away from a schoolyard full of children. The immediate flood of publicity featured numerous eyewitness accounts of various aspects of the crime, emotional coverage of Officer Taylor's funeral, and outraged editorials demanding the death penalty, followed by the

repeated disclosures of inadmissible information right up to the time of trial. Every member of the venire had been exposed to the publicity and had knowledge, derived from the media, of the facts and circumstances of the crime. Many of them had formed opinions, which ranged from "wishy-washy" to set in concrete. The trial court refused to grant a change of venue. The trial court refused to allow the jurors to be questioned outside one another's presence in order to reveal specifically what they had learned or heard from the media. The trial court denied numerous challenges for cause by the defense to jurors who had formed opinions as to guilt or penalty based on the pre-trial publicity, or who were friends or acquaintances of Officer Taylor's family. Altogether, defense counsel challenged 31 jurors for cause and 22 of the challenges were denied. See Appendix, p.3-4. Defense counsel used all ten of his peremptory challenges, eight of them on jurors whom he had earlier unsuccessfully challenged for cause. See Appendix, p.4-5. Four jurors unsuccessfully challenged for cause by the defense - Ickes, Delsignore, Hilburn, and King - wound up serving on the jury. See Appendix, p.2,4. Two others unsuccessfully challenged for cause - Sprinkle and Bowman - were the alternates. See Appendix, p.2,4. After the trial court denied appellant's renewed motion for change of venue and his request for additional peremptories, defense counsel challenged all remaining members of the panel for cause "on the basis of all the publicity they have been exposed to in the course of this case and the media" (R.651).

Clearly, under the circumstances of this case, ten peremptory challenges were woefully inadequate to enable defense counsel to secure even a minimally acceptable jury from a community so pervasively exposed to inflammatory and prejudical pre-trial publicity. As appellant argued in Issue 11, the publicity in this case was comparable to that in Manning v. State, supra, in which this Court held that the denial of a change of venue was prejudicial

error requiring reversal. In Manning, as pointed out by Justice Alderman in dissent, the defense attorney did not renew his motion for change of venue, did not exhaust his peremptory challenges, and affirmatively expressed satisfaction with the jury which was chosen. Nevertheless, the majority in Manning found that the community had been so pervasively exposed to the circumstances of the case that prejudice, bias, and preconceived opinions were the natural result; consequently, a change of venue should have been granted, and the trial court's failure to do so was reversible error. In the instant case, defense counsel repeatedly renewed his motion for change of venue, exhausted his minimum statutory allotment of ten peremptory challenges, requested additional peremptory challenges, and (when the request was refused) expressed his fundamental dissatisfaction with the jury by challenging all remaining members of this media-tainted panel for cause.

In a number of opinions in which this Court held that the effects of pre-trial publicity in those cases were ~~not~~ *so* prejudicial as to require a change of venue, a major factor in reaching that conclusion was the defendant's failure to exhaust his peremptory challenges, or the trial court's granting of additional peremptory challenges. See e.g. Straight v. State, supra, at 906 (twenty percent of prospective jurors had no prior knowledge of the case; prospective jurors exhibiting even a hint of prejudice were excused; court granted defendant additional peremptory challenges and defense counsel did not use them all); Hoy v. State, 353 So.2d 826, 829 (Fla. 1977)("a great many" of the prospective jurors had not even heard about the case; defense utilized only 25 peremptory challenges when permitted 40 by the court); Dobbert v. State, 328 So.2d 433, 440 (Fla. 1976) (a number of prospective jurors had not heard about case in media; defense was allowed 32 peremptory challenges and only exercised 27); McCaskill

v. State, *344* So.2d 1276, 1278 (Fla. 1977)(defense filed motion for change of venue prior to trial but never asked for it to be heard or raised the issue during voir dire or at any time until appeal; defendants (tried jointly) accepted jury after using only eight of twenty peremptory challenges).

In the instant case, every single prospective juror had been exposed to pre-trial publicity concerning this case, and the nature of the publicity was inherently prejudicial to say the least. Yet, unlike the defendants in Straight, Hoy, and Dobbert, appellant was strictly limited to the statutory minimum of ten peremptory challenges, notwithstanding the extreme extenuating circumstances created by the saturation of the community with highly prejudicial pre-trial publicity. Moreover, the trials in Straight and Dobbert took place in Duval County and the trial in Hoy occurred in Pinellas County; these are urban areas considerably more populous and less closely knit than Escambia County. In each of these cases, a substantial number of jurors did not have extrajudicial knowledge of the case; defense counsel in those cases, armed with a considerable number of extra peremptory challenges (four times the statutory minimum in Hoy; more than triple in Dobbert), had at least some ammunition with which to minimize the impact of the publicity and protect his client's right to a fair trial by an impartial jury. Here, in contrast, and in spite of the plentiful extenuating circumstances, appellant was allowed exactly the same number of peremptory challenges as would be afforded to an individual charged with a single armed robbery, accompanied by no publicity at all, to be tried by a six person jury in Dade County, and carrying a maximum penalty of life.

Appellant wishes to make it clear that it remains his emphatic position that the nature and impact of the prejudicial publicity in this case could be cured by nothing short of a change of venue. However, even assuming arguendo that other protective measures (i.e. individual and sequestered voir dire, liberal granting of challenges for cause, extra peremptory

challenges), alone or in combination, might have sufficed, the fact remains that the trial court consistently declined to take these affirmative steps to minimize the effects of the publicity, as it is his constitutional responsibility to do. Gannett Co. v. DePasquale, supra. Under the extreme circumstances of this case, the trial court's refusal to grant additional peremptory challenges was an abuse of discretion. See Thomas v. State, supra.

ISSUE VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL OCCASIONED BY THE PROSECUTOR'S MISCONDUCT DURING VOIR DIRE.

At the pre-trial hearing on appellant's motion for individual and sequestered voir dire, defense counsel said:

> Part of the basis for this motion is that quasi circus atmosphere surrounding this case from the very beginning, and we feel that particularly with regard to the issue of feelings about guilt or innocence or necessity for punishment of feelings about that would be in a situation where virtually any comment would be infectuous of whatever panel is present.
>
> (R.1533).

The trial court replied:

> Well, if there is a circus atmosphere, it's not one that has gone on in the Courthouse, and not going to go on during the course of this trial, and because of the limited space there will be few clowns available to get into that Courtroom on prospective jurors. And so we will conduct the Voir Dire in increments of about thirty.
>
> (R. 1533).

During the jury selection proceeding, the jurors were examined in two separate groups of thirty [see Appendix, p.1]; after a number of venire persons were excused, all of the jurors still "in the running" were combined into one large group and examined further. It was during the latter portion of the proceeding, while juror Harris (who ultimately served on the jury) was being examined by the assistant state attorney in the presence of all the other prospective jurors that the following comments were made:

MR. JOHNSON [prosecutor]: I think during your voir dire you indicated that it's lawful to kill the enemy during the war. Have you ever thought about whether the police are engaged in a war with the criminals?

MR. HARRIS: Sure he is, sure, it's a war.

MR. JOHNSON: Do you consider the criminal the enemy to the policeman?

MR. HARRIS: Well, he can be.

(R. 561)

Defense counsel immediately requested a bench conference, where he objected to the prosecutor's comments about the criminals and law enforcement being at war with each other and drawing an analogy to this case, and moved for a mistrial (R.561-62). The trial court denied the motion and overruled the objection (R.562).

In light of the facts and circumstances of this case involving the killing of a police officer by bank robbers, in light of the inflammatory publicity in this case (much of it consisting of emotional tributes to Officer Taylor's heroism and sacrifice, outraged editorials fanning the community's fear of violent crime in the streets and mistrust of a judicial system perceived as being soft on criminals, and calls for community support of law enforcement), and in light of the exposure of every potential juror to this publicity, the prosecutor's comments were roughly equivalent to tossing a lighted match into a gas tank.

The prosecutor's deliberate and undoubtedly successful effort to link this particular case in the jurors' minds with "law enforcement's war on crime" exactly parallels an editorial which appeared immediately after the murder, entitled "His death not in vain." It reads:

> The brutal, heinous murder of Police Officer Steve Taylor during a bank robbery in downtown Pensacola Tuesday is yet another frightening example of how violent crime plagues this community and all of America.
>
> Taylor's death is a great loss to this city and the Pensacola Police Department.

> Yet the 26-year-old police officer's heroic actions in line of duty and his death were not in vain. They dramatically demonstrate how urgent the need is for greater public support of law enforcement's war on crime.
>
> For the enemy in this war is the wanton criminals among us who heed no laws, value no life, respect no individual. They rob, steal, deal drugs and kill with abandon. When caught they cower behind loopholes in the laws and if convicted cry foul when society seeks to punish.
>
> It is no mere coincidence that crime has escalated to unimaginable levels in the past two decades, which are marked by outrageous court rulings mocking the Constitution.
>
> These court rulings, in the name of protecting the rights and safety of all, have had the opposite effect. Criminals are set free routinely on the slightest of technicalities while those convicted of capital crimes easily avoid the death penalty by appealing frivolous points of law in the federal courts.
>
> It's time for the public to fight back with a vengence. One way to fight back is to vote "yes" for Amendment 2 and Amendment 3 on the Nov. 2 ballot.
>
> But the struggle against crime cannot end there. The Legislature and Congress must continuously search for ways to equip law enforcement agencies with the necessary means to decisively win the war on crime.
>
> (R. 1584).

The voir dire process is supposed to minimize the prejudicial effects of pre-trial publicity, not exacerbate them. Even in closing argument, it has been recognized that it is improper for a prosecutor to appeal to public fears regarding "crime in the community". See e.g. Salazar-Rodriquez v. State, 436 So.2d 269 (Fla. 3d DCA 1983); Hines v. State, 425 So.2d 589 (Fla. 3d DCA 1982); Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982); McMillian v. State, 409 So.2d 197 (Fla. 3d DCA 1982); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976); Russell v. State, 233 So.2d 154 (Fla. 4th DCA 1970); Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968); see also Hance v. Zant, 696 F.2d 940, 952 (11th Cir. 1983).

The prosecutor's misconduct in deliberately raising the spectre of the police being in a state of war with "the criminals" in the minds of a jury which had already been thoroughly exposed to that same theme by the media

is comparable to the misconduct of the prosecutor in Washington v. State, 343 So.2d 908 (Fla. 3d DCA 1977), although the prejudical effect upon appellant's right to an impartial jury is far more egregious and far less speculative than in Washington. The defendant in Washington allegedly sold heroin to an undercover policewoman. In his closing argument, the prosecutor made the following remark:

> The defendant admitted through the polygraph examiner that she [the undercover officer] was in his house. Why didn't she stay in the office and conduct this investigation? She's a police officer, everyday floating through Liberty City, everyday their life is on the line. We saw wakes, three police officers working -

When defense counsel objected to this comment, the prosecutor added "you know what is happening to the police officers in this community." The trial court admonished the jury to disregard any remarks concerning what may or may not have happened to police officers, but did not rebuke the prosecutor for making the remarks. The state argued on appeal that the prosecutor's comments were invited by defense counsel's repeated though "thinly veiled" attacks on the integrity of Miami police officers in his opening argument. The appellate court rejected this argument and held that a new trial was clearly required by law for the following reason:

> The trial in this cause was conducted about two weeks subsequent to the shooting deaths of three police officers in Miami Beach, who were in the process of arresting an alleged car thief. During the period between the deaths of these officers and the time of the remarks of the prosecuting attorney, the local newspapers had carried many stories of these killings and had conducted a long series recounting the deaths of some 15 police officers over the past years. At the hearing on the motion for new trial, appellant presented to the trial court some 20 exhibits of various newspaper stories on the deaths of police officers killed in the line of duty, all of which were of wide distribution in the County and, during the short period immediately preceding the trial, examples of headlines or leads on some of the articles are: "Policemen, they died protecting us. The saga of 15 fallen officers." "A memorial to Dade's fallen heroes." "Citizens and brother officers mourn three slain policemen."
>
> Washington v. State, supra, at 910.

The appellate court concluded that "[t]here could have been no other

purpose in making the questioned remarks, in the light of the flood of publicity here related, except to bring to the jury's attention facts far beyond the scope of the issues being tried", Washington v. State, supra, at 910.

In Washington, the flood of publicity concerning the murder of police officers was in a case unrelated to the one being tried. There was apparently no motion for change of venue in Washington, nor was there any need for one before the prosecutor made the challenged remarks. The newspaper stories were presented to the trial court in Washington at the hearing on the motion for new trial; there was no way of knowing at that point whether any, or how many, of the jury members had read the articles or were familiar with the murders of the police officers. [Bear in mind also the differences in population and community atmosphere between Dade County and Escambia County]. Nevertheless, the Third District Court of Appeal held that the prosecutor's gratuitous and prejudicial remarks may have deprived the defendant ofaconstitutionally guaranteed fair trial, and that the prejudice was not cured by the trial court's admonition to the jury.

In the instant case, the flood of publicity related to the very crimes for which appellant was now on trial, particularly the murder of Officer Taylor. Because of the inflammatory and prejudicial nature of the publicity, appellant moved for a change of venue, which was denied. From the voir dire, we know that every one of the prospective jurors had some knowledge, derived from the media or community discussion, of the facts and circumstances of the crimes. Many of them had formed opinions; some said they could put their opinions aside, some said they couldn't, and some said they were trying to. By diverting their attention to law enforcement's "war against the criminals", the prosecutor could hardly have done a better job of refreshing their memories.

In further contrast to Washington, the instant case is a capital case,

which means that prosecutorial misconduct affecting the fairness of the jury extends to the penalty phase as well. See Pait v. State, 112 So.2d 380 (Fla. 1959). In this case, unlike Washington, the state cannot even attempt to justify the prosecutor's remarks as "invited error." And unlike Washington, where the trial court at least admonished the jury to disregard the remarks (a measure which was held insufficient to cure the prejudice), the trial court here merely denied the motion for mistrial and overruled the objection (R.562).

Where an improper remark in the presence of the jury is so prejudicial to the rights of the accused that neither rebuke nor retraction could erase its influence, a mistrial is the necessary remedy. See Pait v. State, supra; Grant v. State, 194 So.2d 612 (Fla. 1967); Coleman v. State, 420 So.2d 354 (Fla. 5th DCA 1982); Meade v. State, 431 So.2d 1031 (Fla. 4th DCA 1983). If an instruction to disregard the improper remarks was insufficient to cure their prejudicial effect in Washington v. State, supra, then such an admonition clearly would have been ineffectual here, where the inflammatory pre-trial publicity rekindled by the prosecutor's remarks arose from the very crime for which appellant was now on trial, and where every juror had been exposed to it. But even assuming arguendo that the prjudicial effect of the prosecutor's remarks might have been dissipated if the trial court had sustained the objection, emphatically rebuked the assistant state attorney, and affirmatively instructed the jury that the comments must be totally disregarded [see e.g. Jackson v. State, supra, at 16; Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983)], the fact remains that he did not do any of these things.

ABA Standards for Criminal Justice 3-5.8 (1980) recognizes that it is unprofessional conduct for a prosecutor to "use arguments calculated to inflame the passions or prejudices of the jury", and that the prosecutor should "refrain from argument which would direct the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law." See Meade v. State,

supra, at 1032. By raising the spectre of the police being engaged in a war with "the criminals", the criminal being the "enemy" of the policeman, and by insinuating during voir dire that imposing the death penalty on appellant was the same thing as killing the enemy in a war, the prosecutor plainly and intentionally violated both standards, knowing full well that the prospective jurors were already thoroughly exposed to pre-trial publicity of the same nature.

In Meade v. State, supra, at 1033, quoting Blanco v. State, 150 Fla. 98, 7 So.2d 333 (1942) and Deas v. State, 119 Fla. 839, 161 So. 729 (1935), the court stated:

> When it is made to appear that a prosecuting officer has overstepped the bounds of that propriety and fairness which should characterize the conduct of a state's counsel in the prosecution of a criminal case, or where a prosecuting attorney's argument to the jury is undignified and intemperate, and contains aspersions, improper insinuations, and assertions of matters not in evidence, or consists of an appeal to prejudice or sympathy calculated to unduly influence a trial jury, the trial judge should not only sustain an objection at the time to such improper conduct when objection is offered, but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments.

See also Oglesby v. State, 156 Fla. 481 23 So.2d 558 (1945); Jackson v. State, supra, at 16; Edwards v. State, supra, at 359.

When an issue regarding prosecutorial misconduct is raised on appeal, the key question is "whether or not [the appellate court] can see from the record that the conduct of the prosecuting attorney did not prejudice the accused, and unless this conclusion be reached, the judgment should be reversed." Bayshore v. State, 437 So.2d 198, 199 (Fla. 3d DCA 1983); Lipman v. State, 428 So.2d 733, 736 (Fla. 1st DCA 1983); Coleman v. State, supra, at 356; see McCall v. State, 120 Fla. 707, 163 So. 38 (1935); Pait v. State, 112 So.2d 380, 385-86 (Fla. 1959); Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983). Similarly, unless it can be determined that the needless and inflammatory comments of the prosecutor did not

influence the jury's recommendation of death in the penalty phase, the death sentence must be reversed. Teffeteller v. State, supra; see Pait v. State, supra. In the present case, the prosecutor's comments during jury selection were the tip of the iceberg; the iceberg was the prejudicial pre-trial publicity which pervaded the community from which this jury was selected; and at the risk of straining the analogy, appellant's right to a fair trial by an impartial jury was the Titanic. Where incurably prejudicial remarks are made in the presence of the jury panel on voir dire examination, a mistrial is the appropriate remedy, in order to protect the accused's right to be tried by an impartial jury guaranteed by the Florida and United States Constitutions. See Wilding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983); Moncur v. State, 262 So.2d 688 (Fla. 2d DCA 1972); see also Jackson v. State, ___ So.2d ___ (Fla. 4th DCA 1984)(case no. 82-1843, opinion filed July 13, 1984)(9 HW 1544) Fussell v. State, 436 So.2d 434 (Fla. 3d DCA 1983); Ramos v. State, 413 So.2d 1302 (Fla. 3d DCA 1982). The prosecutor's remarks in the present case, which magnified the prejudicial effects of the inflammatory pre-trial publicity to which every member of the jury panel had been exposed, were not curable, and were not cured. Washington v. State, supra. The trial court, in overruling defense counsel's objection, evidently concluded that the prosecutor's remarks were not improper. See Simpson v. State, 418 So.2d 984, 986 (Fla. 1982); Jackson v. State, supra, at 16; Edwards v. State, supra, at 359. Consequently, the propriety (or lack thereof) of the comments in question would be fully preserved for appellate review even if defense counsel had not moved for a mistrial. Simpson v. State, supra, at 986; Ramos v. State, 413 So.2d 1302 (Fla. 3d DCA 1982); King v. State, 431 So.2d 272 (Fla. 5th DCA 1983). However, defense counsel did move for a mistrial, which was promptly denied. Since it cannot be determined from the record that the assistant state attorney's remarks and insinuations concerning the police being at

war with the criminals, the criminal being the enemy of the policeman, and the acceptability of killing the enemy in a war did not prejudice the jury (or add to the prejudice the jurors may have already acquired through the media) and affect its deliberations as to guilt or penalty or both, appellant's conviction and death sentence must be reversed. Washington v. State, supra, see Pait v. State, supra; Teffeteller v. State, supra.

Shortly after making the comments discussed above, the assistant state attorney asked prospective juror Capps, "Do you understand that I have a duty to uphold the laws of the state of Florida and that I have taken an oath just like you?" (R.564). He asked prospective juror Amelia Nelson, "Do you understand that I have taken an oath just like each of you have taken an oath, will you uphold that oath if you are selected as a juror in this case?" (R.566). At the bench, defense counsel objected and moved for a mistrial based on "the improper comments of the prosecutor relating to his taking the oath and compelling the jurors -- his oath has nothing to do with their responsibilities." (R.567). The trial court overruled the objection and denied the motion for mistrial (R.567). The prosecutor stated

> Judge, I tender. I would like to get a commitment from these other people that they will abide by their oath and feel like they are emotionally capable in facing this defendant and telling him that they think he ought to die. We are getting close to a jury, and I think I should be able to cover that point.
>
> (R.567).

Defense counsel objected, "Judge, that's improper voir dire. That's asking these jurors in effect to commit themselves to doing this specific thing and I don't think that's proper" (R.567-68). The trial court said, "I will grant it's [an] improper question, but each of you have had a crack at these jurors. We are not going back over and over again." (R.568).

From that point onward, the prosecutor continued to ask prospective

jurors the same improper question, i.e. "Do you feel like you are emotionally capable of walking back in this courtroom and looking at this defendant and saying I recommend you ought to die?" (R.576, see R.582,585, 593,598,604-05,609,611,615,617,658,663,667,673,676-77).

In contrast to the argument concerning the prosecutor's pernicious comments to the jury, in the form of questions to Mr. Harris, about the war between the police and the criminals, appellant is not predicating a claim of reversible error on the latter two incidents of misconduct, in and of themselves.[11] However, they are indicative of a pattern of misconduct which arguably began months prior to trial (in Mr. Johnson's repeated statements to the press that he favored extradition because a conviction of the Mobile robbery would be admissible in support of a death sentence at the penalty phase of the upcoming murder trial), and continued through the jury selection proceeding, in closing argument of the guilt phase, and throughout both the evidentiary and argument portions of the penalty phase [see Issues VII through X]. It is therefore necessary to discuss these improprieties briefly.

The prosecutor's comments to the effect of "I have taken an oath just like each of you have taken an oath" subtly suggested an alliance between himself and the jury. [This theme was repeated even more flagrantly in his guilt phase closing argument with his "thirteenth juror" remark - see Issue VII, infra]. In point of fact, as defense counsel stated in making his objection, the prosecutor's oath has nothing to do with the jury. Fla.Stat. 127.181 provides that a person appointed as an assistant state attorney must take and subscribe to "a written oath that he will faithfully perform the duties of an assistant state attorney"; these duties include

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11 Appellant would contend that the questioning of jurors as to their "emotional capability" of looking at this defendant and telling him he ought to die would be reversible error, in and of itself, if the issue were more clearly preserved.

appearing on behalf of the state in circuit and county courts; assisting the grand jury; summoning and examining witnesses for the state ". . . to testify before him as to any violation of the criminal law upon which they may be interrogated"; assisting the attorney general in preparing appeals to which the state is a party; and representing the state in habeas corpus proceedings. Fla.Stat. 5527.02 through 27.06. In other words, he takes an oath to do his job, and his job is as an advocate for one side in an adversary criminal proceeding. The jurors' oaths, in contrast, require them to swear to answer truthfully all questions asked of them on voir dire [Fla.R.Cr.P. 3.300(a)], and (if selected) *to* "well and truly try the issues between the State of Florida and the defendant and render a true verdict according to the law and the evidence" [Fla.R.Cr.P. 3.3601.

By misleadingly telling the jurors that "I have taken an oath just like each of you have taken an oath", the prosecutor insinuated that his words and actions should be accorded special deference or credibility by the jury. These comments were improper, and, at the very least, defense counsel's objection should have been sustained, the prosecutor should have been rebuked, and the jury should have been informed that the assistant state attorney's oath was irrelevant and entitled him to no special status or credibility. See e.g. Deas v. State, supra.

With regard to the prosecutor's repeated questioning of jurors *(at* a point in time when appellant had not yet been convicted of anything and was entitled to be presumed innocent) as to whether they had the emotional capability of looking appellant in th eye and telling him he ought to die, this line of questioning was tantamount to obtaining a tacit commitment from the jurors to convict and to recommend the death penalty, and (as the trial court apparently recognized, see R.568) was highly improper. See Dicks v. State, 83 Fla. 717, 719 (1922); Smith v. State, 253 So.2d 465, 470-71 (Fla. 1st DCA 1971); Harmon v. State, 394 So.2d 121, 123 (Fla. 1st DCA 1980);

Saulsberry v. State, 398 So.2d 1017 (Fla. 5th DCA 1981); see also Henninger v. State, 251 So.2d 862, 866 (Fla. 1971)(Ervin, J. dissenting).

ISSUE VII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND DENYING HIS MOTION FOR MISTRIAL OCCASIONED BY THE PROSECUTOR'S IMPROPER AND PREJUDICIAL REMARKS IN CLOSING ARGUMENT.

Near the beginning of his closing argument in the guilt or innocence phase of the trial, the prosecutor said:

> As His Honor indicated to you earlier, this is my last opportunity to speak with you. The defendant's lawyer gets to come up here again. So, when he comes back and makes his argument, I ask you to ask yourselves, I wonder what Ron Johnson would say in response to that. I wonder what he would say in rebuttal to that.
>
> Of course, after that argument, His Honor will instruct you on the law and then you retire to deliberate your verdict in this case and then you retire to the jury room.
>
> I would like for you to kind of consider me like the thirteenth juror.
>
> (R.1184-85).

Defense counsel immediately objected to this remark; the objection was overruled (R.1185). The prosecutor repeated:

> I would like for you to consider me like the thirteenth juror. Remember what I had to say to you during my closing argument.

The prosecutor then discussed the roles of the various participants in the trial:

> Before going into my argument, I want to remind you it's my responsibility in any criminal case to put on evidence on behalf of the people of the State of Florida, and the public of this community. It's my responsibility to seek justice, to seek the truth in this case.

After thanking the jurors for exercising their civic responsibility in serving on this jury, and for their attention and patience (R.1185-86), the prosecutor returned to the subject of everyone's job:

> I have done my job, and brought the defendant to the bar of justice. The police have done their job and completely investigated the case, and you are the next link in the so-called

criminal justice chain, and I ask you to do your job.

(R.1187)

The jury's job, the prosecutor explained, was to apply the law to the evidence, and if they did so they would have no alternative but to find appellant guilty as charged on all counts including premeditated murder (R.1187).

The prosecutor then began casting aspersions on appellant's exercise of his right to a jury trial:

> Remember during voir dire we talked a little bit about every person charged with a criminal offense, no matter what it is, is entitled to a jury trial merely by requesting that trial. Of course, this defendant had his trial and pretty much pled guilty to everything except premeditated murder. And the defendant's lawyer had told you that, and told all of us in opening statement.
>
> Now we could have progressed a lot quicker, and we wouldn't have had to - -
>
> MR. LOVELESS [defense counsel]: Your Honor, I object to that. That's very improper.
>
> THE COURT: Overruled.
>
> MR. JOHNSON [prosecutor]: - - but as I indicated, he gets that trial merely by entering that plea of not guilty.
>
> (R.1187-88)

The prosecutor then returned one last time to the subject of everyone's job:

> It is the lawyer's job to advocate his position, and protect his constitutional rights, or course. It's His Honor's job to instruct you on the law, to rule on objections during the course of the trial, and impose the proper penalty in this case.
>
> (R.1188)

At a bench conference immediately following the prosecutor's closing argument, defense counsel moved for a mistrial based on the "thirteenth juror" comment and the remark disparaging appellant's exercise of his right to a jury trial (R.1224-25). The trial court denied the motion (R.125).

The assistant state attorney's invitation to the jury to "kind of consider

me like the thirteenth juror" was of the same nature as his statement during voir dire that "I have taken an oath just like each of you have taken an oath"; a technique to align himself with the jury as the seeker of justice and truth, to the exclusion of defense counsel, whose "job" is merely to advocate the defendant's position and protect his constitutional rights (including his right to a jury trial, which "we could have progressed a lot quicker" without). In Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976), the court recognized that it was improper for the prosecutor, in commenting as to defense counsel's role, to state:

> Mr. Jacobson is the Defense Counsel in this case. His responsibility as the Defense Counsel is to defend someone charged with a crime. That's his duty. His responsibility in this case is to provide the best defense possible for his client, and he's doing just that: The best defense possible.
>
> Mr. Jacobson doesn't share any guilt that his client may have; he's merely doing his job in this case. . . .

The prosecutor's remarks in the instant case were more insidious than those in Reed because he not only disparaged defense counsel's role, but, by encouraging the jury to think of him as their thirteenth colleague, sought to create a special identification between himself and the jurors - an artificial aura of credibility - and this may well have infected their deliberations. In effect he was telling them "Unlike the defendant's lawyer, I am not merely an advocate. I am one of you, and my responsibility is to seek justice, to seek the truth in this case".

In Fischer v. State, 429 So.2d 1309 (Fla. 1st DCA 1983), following Berry v. State, 298 So.2d 491 (Fla. 4th DCA 1974) it was recognized that the presence of a seventh juror (the alternate, whom the court had forgotten to discharge) in the jury room during deliberations was fundamental error. The alternate was characterized as a "stranger to the proceedings", and an "outsider'', whose presence invaded the sanctity of the jury. Fischer v. State, supra, at 1312. See also Brigman v. State, 350 P.2d 321 (Okla. 1960)

(thirteenth juror became a "legal dead limb"). In the present case, of course, there was no flesh and blood stranger in the jury room; only the phantom thirteenth juror, Assistant State Attorney Johnson. Nevertheless, if the jury took the prosecutor at his word, and consciously or unconsciously accorded him some kind of "honorary juror" status during their deliberations, it could easilly have influenced their decision to convict appellant of premeditated murder as the prosecutor urged.

The prosecutor's denigration of appellant's exercise of his constitutional right to a jury trial is another example of egregious misconduct. See Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983)(holding that it is improper for the prosecutor to attack the defendant's exercise of his constitutional right to counsel, and that these comments, in combination with other improprieties, amounted to prosecutorial misconduct rising (or sinking) to constitutional dimension); see also Bassett v. State, 449 So.2d 803, 809-10(Fla. 1984)(Overton, J., joined by Justice McDonald, dissenting). It is also worth noting that appellant's decision to go to trial rather than enter a plea may well have been motivated by the state's insistence on aggressively seeking the death penalty (see R.710-11, 1226, 1390).

As was the case with the prosecutor's improper remarks during voir dire, the trial court overruled defense counsel's objections to the prosecutor's comments asking the jury to think of him as the thirteenth juror and casting aspersions on appellant's exercise of his right to a jury trial. Thus, the trial court evidently believed that these comments were proper. See Simpson v. State, 418 So.2d 984, 986 (Fla. 1982). Moreover, unlike his rulings during voir dire, here the trial court immediately overruled the objections without comment in the presence of the jury; these rulings stamped the court's approval on the argument and thereby aggravated the prejudicial effect. Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA

1983); see Jackson v. State, 421 So.2d 15, 16 (Fla. 3d DCA 1982). Defense counsel's objections, which were overruled, and his motion for mistrial at the close of the prosecutor's argument, which was denied, were more than sufficient to preserve these matters for review. See Simpson v. State, supra; Ramos v. State, 413 So.2d 1302 (Fla. 3d DCA 1982); Meade v. State, 431 So.2d 1031 (Fla. 4th DCA 1983); Perdomo v. State, 439 So.2d 314 (Fla. 3d DCA 1983).

ISSUE VIII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND DENYING HIS MOTIONS FOR MISTRIAL OCCASIONED BY THE PROSECUTOR'S REPEATED MISCONDUCT IN EXAMINING AND CROSS-EXAMINING WITNESSES IN THE PENALTY PHASE OF THE TRIAL, AND HIS PRESENTATION OF EVIDENCE TO THE JURY REGARDING NON-STATUTORY AGGRAVATING CIRCUMSTANCES; THIS MISCONDUCT SO PERVADED THE PENALTY PROCEEDING AS TO RENDER IT FUNDAMENTALLY UNFAIR AND DEPRIVE APPELLANT OF DUE PROCESS OF LAW, IN VIOLATION OF FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

In the guilt phase of the trial, appellant testified that when he approached the officers who were kneeling over Cliff Jackson, he did not intend to kill anybody (R.1106); that Officer Bailly wheeled around and they both began firing (R.1103); that he [appellant] was shot five times in the ensuing gun battle (R.1104); and that he was not aware that the other officer, Taylor, had been shot and killed until he was so informed at the hospital (R.1106, 1120-21, 1123). At no time during his testimony did appellant say that he was sorry or remorseful, only that he had not intended to kill anyone (R.1096-1125).

At the outset of the penalty phase of the trial, the state called Dr. Richard Slevinski as its first witness (R.1300). Defense counsel objected to Dr. Slevinski's testimony on the ground that it was irrelevant to any recognized aggravating circumstance (R.1300). The prosecutor explained his intended use of Dr. Slevinski's testimony as follows:

> Okay the defendant testified on his direct examination from his counsel yesterday that he didn't intend to kill the policeman, he was sorry for what happened, and showed some remorse on the stand. This doctor is one of his treating physicians shortly after he was shot and while he was incarcerated at the jail. During that time, he never showed any signs of remorse and was very -- bragging and boastful about the incident.
>
> (R.1300-01)

Defense counsel argued that lack of remorse is an improper aggravating circumstance under McCampbell v. State, 421 So.2d 1072 (Fla. 1982) (R.1301). The prosecutor asserted "It's not being offered as an aggravating circumstance but to rebut any mitigating circumstance which they are going to argue on the [basis] of this prior testimony" (R.1301). Defense counsel countered that to show "what [appellant] acted like when he was being treated for the injuries and on medication and reacting to baiting by jail guards and that sort of thing" was irrelevant to rebut any mitigating circumstances (R.1301-02). Defense counsel further stated that, while he did intend to present appellant's injuries and his physical condition to the jury as a mitigating circumstance, he did not necessarily intend to argue "remorsefulness" as a mitigating factor (R.1303). The trial court excluded Dr. Slevinski's testimony from the state's initial presentation, stating ". . . I think absence of remorse and his boastfulness in the hospital is not properly brought out as an affirmative matter in aggravation", but he left the door open for its introduction in rebuttal, if appropriate (R.1303). The prosecutor stated that he would keep the doctor here (R.1303).

After the state had presented its case in the penalty phase, and toward the end of the defense case, appellant was recalled to the stand (R.1375). He testified that he did not rob Brenda's Donut Shop in Mobile, but had been misidentified. The eyewitness in that case had described the perpetrator as about her height (5'8") and 120 pounds; appellant is about

6'2 1/2" and weighs about 185 (R.1376). Appellant said that at the time the Mobile robbery occurred, 2:43 A.M. on March 4, 1982, he was at home in bed (R.1377-78). The Mobile conviction was pending on appeal (R.1378). On October 19, 1982 [the day of the bank robbery and killing of Officer Taylor] appellant was shot (R.1378). He rolled up his left sleeve and showed the jury where he was shot in the arm, breaking the bone (R.1378). There was a cast on the arm for about three months (R.1378-79). Appellant was also shot in the right arm, at the elbow (R.1379). Defense counsel asked him to unbutton his shirt and show the jury several locations where he was shot in the stomach (R.1379-80). Appellant had a colostomy bag (R.1380). He had been told that it would be medically possible to "hook his bowels back up", but that this was not going to be done (R.1380-81). That is the sum total of appellant's testimony on direct examination.

On cross-examination, the prosecutor launched into the following line of questioning:

> MR. JOHNSON [prosecutor]: Yes, sir, and how long were you in the hospital?
>
> APPELLANT: Probably about five or six days.
>
> Q. And then you were in the infirmary at the jail, right?
>
> A. Yes,
>
> Q. They have nurses and doctors there, too, don't they?
>
> A. Yes.
>
> Q. You are real proud of all those shots, aren't you?
>
> A. Could you say that again?
>
> Q. Aren't you real proud that you have all of those shots?
>
> MR. TERRELL [defense counsel]: Objection, Your Honor. Improper question.
>
> THE COURT: Overruled.
>
> THE WITNESS: Well, I never had a mark on my body before, and I didn't want these here.
>
> Q. (By Mr. Johnson:) Okay. You don't think it's made you more of a man since you got shot five times and you lived?

A. Well, I don't believe that proves I am more of a man, but I am glad I am still alive.

Q. Have you ever bragged how tough you were because you could take five shots and live and the officer couldn't?

MR. TERRELL: Objection, Your Honor. Improper question.

THE COURT: Overruled.

THE WITNESS: No, I never bragged about it.

Q. (By Mr. Johnson:) Never bragged about how tough you were by getting shot five times?

A. No, I haven't.

(R.1382-83).

This series of loaded questions was clearly improper cross-examination, and defense counsel's objections thereto should have been sustained. First of all, the questions far exceeded the scope of anything appellant testified to on direct. See McCrae v. State, 395 So.2d 1145, 1151 (Fla. 1980); Buford v. State, 403 So.2d 943, 949 (Fla. 1981); Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982); Jones v. State, 440 So.2d 570, 576 (Fla. 1983). More importantly, the trial court had already ruled (and thus put the prosecutor on notice) that evidence concerning appellant's alleged lack of remorse, or his "bad attitude" in the hospital, was irrelevant to any legitimate aggravating circumstance and could not be brought forward as an affirmative matter in aggravation (R.1303). As previously discussed, nothing in appellant's penalty phase testimony could even remotely be construed as placing "remorse" before the jury as a mitigating circumstance. Just as defense counsel had earlier advised the court and the prosecutor (R.1303), appellant's testimony was strictly limited to his denial of involvement in the Mobile doughnut shop robbery and to his physical condition as a result of the injuries sustained in the incident. [For that matter, even in his earlier testimony in the guilt phase, appellant never said that he was sorry or remorseful, only that he'd never intended to

kill anybody - a claim which Dr. Slevinski's testimony in no way even tends to rebut. Nor did defense counsel argue remorsefulness, or anything close to it, as a mitigating factor in his closing argument to the jury (see R.1420-30)]. Quite simply, appellant never put the subject of "remorse", or his "attitude" while in the hospital and the jail infirmary in issue, so there was nothing to rebut. Instead, the prosecutor was merely dragging in through the back door the same prejudicial evidence of non-statutory aggravating factors which the trial court had previously (and correctly) refused to let in the front door. And once the prosecutor's foot was in the back door, through his improper cross-examination of appellant, he opened it wide for the aforementioned Dr. Slevinski.

It has long been recognized that it is improper to cross-examine a witness as to a matter which is collateral or irrelevant, and beyond the scope of direct examination, merely for the purpose of laying a foundation to contradict him by other evidence if he should deny it. See e.g. Stewart v. State, 42 Fla. 591 (1900); Starke v. State, 49 Fla. 41 (1905); Tully v. State, 69 Fla. 662 (1915); Atlantic Coastline Railroad Co. v. Holliday, 73 Fla. 269 (1917; Herndon v. State, 73 Fla. 451 (1917); Patterson v. State, 25 So.2d 713 (Fla. 1946); Whaley v. State, 26 So.2d 656 (Fla. 1946); Lockwood v. State, 107 So.2d 770, 772 (Fla. 2d DCA 1958); Schwab v. Tolley, 345 So.2d 747, 754 (Fla. 4th DCA 1977); Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981). "Where it is sought to impeach a witness on the basis of testimony given on cross-examination, the testimony must . . . be relevant and material . . . and the test of relevancy and materiality is whether the cross-examining party could have, for any purpose other than impeachment, introduced evidence on the subject in chief." Johnson v. State, 178 So.2d 724, 279 (Fla. 2d DCA 1965); see Gelabert v. State, supra, at 1009-10. It is error to permit cross-examination as to a collateral matter (and particularly

so where, as here, the subject is not only irrelevant but also manifestly prejudicial); if the cross-examining party receives an answer to its improper inquiry, the error is compounded if the party is then permitted to introduce on rebuttal the contradictory or impeaching testimony which his improper cross-examination was designed to set up. See Gelabert v. State, supra, at 1010.

It is patently clear that the prosecutor's cross-examination of appellant as to whether he thought he was "more of a man" because he was shot five times and lived, or whether he had bragged about how tough he was because he could take five shots and live and the officer couldn't, related to matters which could not have been introduced in the state's case in chief, since the state tried to introduce it in its case in chief through the testimony of Dr. Slevinski, and the trial court correctly excluded the testimony as irrelevant to any statutory aggravating circumstance which could be considered by the jury. Nothing in appellant's testimony or that of any other defense witness had anything to do with appellant's remorsefulness or lack of it, or his attitude in regard to the crime. The cross-examination of appellant as to these matters was nothing more or less than a vehicle for the later introduction of evidence in aggravation which had already been held improper.

At the conclusion of appellant's testimony, the prosecutor called Dr. Slevinski as a rebuttal witness. Dr. Slevinski is the medical director of the Escambia County Jail (R.1391). The prosecutor asked him to describe appellant's attitude about the shooting he was involved in (R.1393). The trial court sustained defense counsel's objection as to the form of the question (R.1393). The prosecutor asked Dr. Slevinski whether he had ever had occasion to discuss appellant's wounds with appellant (R.1393). The doctor replied "Yes. I took a bullet out of him one day. We had a sterile abscess for him, and at that time he made references to how he had been

a very tough person and had survived being wounded so many times and this event where other people had been killed'' (R.1393). On cross-examination, Dr. Slevinski was asked whether those were appellant's words, or Dr. Slevinski's interpretation of them:

> MR. TERRELL [defense counsel]: And he said that he was glad to be alive?
>
> DR. SLEVINSKI: Well, I don't remember the exact words. I didn't write them down. My recollection of what he said --
>
> Q. You are recalling on your memory?
>
> A. That's correct. My recollection of what he said was the fact that he had proved he was a tough guy, because he had survived being wounded so many times.
>
> Q. It's in fact fairly true, isn't it, he survived some fairly serious injuries?
>
> A. Yes, but I don't think that proves he's tough.
>
> Q. I agree.
>
> A. He was a fairly passive aggressive type person in the jail.
>
> Q. Just answer my questions. . . .
>
> (R.1396)

The trial court, over defense objection, asked Dr. Slevinski to describe appellant's attitude in the manner in which he spoke (R.1397). The doctor responded by comparing appellant unfavorably with Cliff Jackson:

> It's more of a passive aggression. He was proud of the fact he was involved in this incident and had been shot numerous times and was a tough dude to survive it all. It's hard for us to -- I guess I am in some respects biased, because I dealt with his partner in this area. They were just two different personalities.
>
> I mean, just the way they approached the whole thing was quite different, and it was upsetting to us in the jail. We go to great lengths not to involve people while they are there. We have -- we hardly ever question them why you are here because we don't want to do that. And yet, his lack of -- that's a bad way to say it, I don't know how to say it. The other young man involved felt bad about what he did.
>
> (R.1397-97)

Defense counsel again objected, and the trial court overruled the

objection (R.1398). The prosecutor then continued to explore the same theme:

> MR. JOHNSON [prosecutor]: What was the difference there, Doctor?
>
> DR. SLEVINSKI: Mr. Jackson, to us, in our perception felt somewhat bad about the whole event.
>
> MR. TERRELL [defense counsel]: Objection. That's irrelevant. Has no bearing on this defendant and the matters before this jury.
>
> THE COURT: Sustained.
>
> Q. (By Mr. Johnson:) What was the defendant's attitude then?
>
> MR. TERRELL: Objection. That's an opinion.
>
> THE COURT: Overruled.
>
> MR. TERRELL: Goes beyond the scope of any knowledge this witness has.
>
> THE WITNESS: We did not think it was the same.
>
> Q. (By Mr. Johnson:) What was his attitude?
>
> THE COURT: That's the question I asked him. He just got through explaining that, Mr. Johnson.
>
> (R.1398-99).

During subsequent re-direct examination of Dr. Slevinski, the prosecutor turned his attention to a different aspect of the non-statutory aggravating circumstances regarding appellant's "bad attitude" during treatment. Over objection, Dr. Slevinski testified that appellant behaved as a "passive aggressive person", that being:

> A person who does not go out -- who goes out of their way to not help you do things that need to be done. Would not help with his health care, would not help with feedings, would go -- would fight the whole time without becoming overtly aggressive. He was hard to work with.
>
> MR. JOHNSON: Was he uncooperative?
>
> DR. SLEVINSKI: Yes. He was hard to work with our nursing personnel for minimum or daily dressings, for temperature checks, so we had to watch and make sure to see if he was getting infected. People who help take care of themselves and people who make you do every little thing in terms of

> turning them, and won't make an effort on their own, and that was -- we call a passive aggressive. He was not overtly dangerous to anybody, but he was very -- he wouldn't help to help himself along.
>
> (R. 1400-01)

On re-cross, Dr. Slevinski was asked whether some of this might have been the product of the circumstances:

> MR. TERRELL [defense counsel]: Now, when you have got a patient, you are talking about someone who is not necessarily happy to be where he is at; isn't that right?

The doctor gratuitously responded "It's a lot more than that. Mr. Jackson was not happy to be where he was at, but he helped us take care of him" (R. 1401).

Dr. Slevinski agreed that appellant was recovering from very serious surgery, and that appellant was aware that he was facing the prospect of execution for killing a police officer (R.1401-02). Appellant had voiced the opinion that "he had probably not much to live for, because he had done -- he had killed a man" (R.1402).

The prosecutor concluded the examination with a question which he had to have known was rhetorical and redundant:

> Did he ever show any remorse during that time?
>
> MR. TERRELL: Objection, Your Honor, totally improper. Totally beyond the scope of this whole proceeding.
>
> MR. JOHNSON: No other questions.
>
> (R. 1402)

At the close of Dr. Slevinski's testimony, defense counsel moved at the bench for a mistrial of the penalty phase "on the basis of the improper redirect or rebuttal going beyond the scope of issues raised in defense in this matter, and responses of the witness being unresponsive, and his establishing in effect not statutory [non-statutory] aggravating circumstances" (R.1403). The trial court denied the motion (R.1403).

As this Court recognized in Miller v. State, 373 So.2d 882, 885-86

(Fla. 1979) and McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982), aggravating circumstances are limited to those provided for by statute. See also Perry v. State, 395 So.2d 170, 174-75 (Fla. 1980). Neither a defendant's failure to acknowledge his guilt nor his lack of remorse is a valid statutory aggravating circumstance. McCampbell v. State, supra, at 1075; Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). "Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." Pope v. State, supra, at 1073. The prejudicial effect of the presentation to the jury of evidence of appellant's lack of remorse and "bad attitude" in the jail infirmary was compounded by contrasting it with Cliff Jackson's feelings of remorse and Jackson's "good attitude." Like lack of remorse, neither evidence of appellant's bad attitude, his lack of cooperation with the doctors and nurses treating him, nor his being a "passive aggressive person'' have any relationship to any valid aggravating circumstance enumerated in Fla.Stat. 921.141(5). See Miller v. State, supra; Perry v. State, supra; McCampbell v. State, supra; Pope v. State, supra.

Even assuming arguendo that in a proper case, the state may introduce evidence of lack of remorse to rebut a defendant's affirmative reliance on remorse as a mitigating circumstance [but see Pope v. State, supra], this is plainly not such a case. In his guilt phase testimony, appellant claimed only that he had not intended to kill anyone. In the initial discussion regarding the admissibility of Dr. Slevinski's testimony, defense counsel expressly stated that, while he intended to introduce evidence of appellant's physical condition as a result of his injuries, he did not intend to argue remorse as a mitigating circumstance. The trial court correctly ruled that Dr. Slevinski's testimony could not be placed before the jury as affirmative evidence in aggravation. Appellant's

penalty phase testimony consisted of his denial of involvement in the Mobile robbery and showing the injuries to his arms and stomach to the jury. He did not express remorse; he did not at that point even return to the subject of his not having intended to kill anyone. None of the other defense witnesses (appellant's parents, several of his neighbors in Mobile, and the psychologist Dr. Larson) said anything which could even arguably be construed as opening the door for evidence of lack of remorse, nor did defense counsel make anything resembling a claim of remorse in his closing argument to the jury. By introducing Dr. Slevinski's highly prejudicial testimony, the state was presenting affirmative evidence of non-statutory aggravating circumstances under the guise of "rebutting" a mitigating factor which appellant never relied on (and which defense counsel informed the court and the prosecutor he would not rely on). See Maggard v. State, 399 So.2d 973, 977-78 (Fla. 1981); see also Donaldson v. State, 369 So.2d 691, 695 (Fla. 1st DCA 1979)(introduction of prejudicial testimony on rebuttal, as to a matter not properly in issue, was reversible error); Williamson v. State, 92 Fla. 980, 111 So. 124 (1926); Britton v. State, 414 So.2d 638 (Fla. 5th DCA 1982)(evidence not strictly in rebuttal may be admitted in court's discretion, so long as the evidence was admissible in the main case).

The prejudical effect of the prosecutor's improper cross-examination of appellant and his back-door introduction of the improper "rebuttal" testimony of Dr. Slevinski was compounded by the trial court's repeated overruling of defense counsel's objections, thereby placing the court's "stamp of approval" on the jury's consideration of this evidence. Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983). At one point the judge, who had earlier recognized the irrelevancy of Dr. Slevinski's testimony to any legitimate aggravating circumstance, began questioning the doctor himself with regard to appellant's "attitude" during treatment (R.1397-98).

Defense counsel's objections to this questioning were overruled (R.1397-98). [Appellant would note that his repeated objections, and his motion for mistrial at the conclusion of Dr. Slevinski's testimony, were more than sufficient to preserve this issue for review. King v. State, 431 So.2d 272 (Fla. 5th DCA 1973); see Maggard v. State, supra; Simpson v. State, supra; Meade v. State, supra; Perdomo v. State, supra].

In Maggard v. State, supra, at 978, this Court observed that "[m]itigating circumstances are for the defendant's benefit, and the state should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist.'' Prior to the penalty phase, Maggard had moved to exclude evidence of his prior non-violent criminal record, and advised the court that he would not attempt to demonstrate to the jury, as a mitigating factor, that he had no significant history of prior criminal activity. The trial court denied the motion. This Court held that the trial court's ruling, and the subsequent presentation to the jury of the challenged evidence, was prejudicial and reversible error. Notwithstanding the trial court's findings of at least one valid aggravating circumstance and no mitigating circumstances, the error was held to be "of such magnitude as to require a new sentencing hearing before the jury and the court''. Maggard v. State, supra, at 977. See also Perry v. State, supra, at 174-75 (because the state presented evidence of non-statutory aggravating circumstances before the jury and the trial court, death sentence was reversed and case remanded for a new penalty proceeding before a new jury); Tafero v. State, 406 So.2d 89, 95 n.13 (Fla. 3d DCA 1981)(where evidence of improper aggravating factors has been placed before the jury, the existence of other aggravating factors ''does not obviate the need for a further recommendation from the jury).

If the improper cross-examination of appellant and improper rebuttal testimony of Dr. Slevinski were the only errors, or the only examples of prosecutorial overkill, in the penalty phase, reversal of appellant's death sentence would still be required. Maggard v. State, supra; Perry v. State, supra. In point of fact, however, these were anything but isolated instances. As he had in voir dire [Issue VI] and in the guilt phase [Issue VII], the prosecutor engaged in improper and prejudicial closing argument in the penalty phase [see Issue IX, infra]. The prosecutor asked Sergeant Gerard Frank Bolton (a Mobile police officer who was the state's only penalty phase witness other than Dr. Slevinski) whether appellant was free on bond at the time of the Pensacola robbery and killing (R.1312). Wnen defense counsel objected to this question as an attempt to introduce a non-statutory aggravating factor, and the trial court asked what possible relevance the testimony might have, the prosecutor replied "Makes no difference, I'm trying to gear it up" (R.1313). [A defense motion for mis-trial based on the prosecutor's comment about bond was denied (R.1312-14)]. The prosecutor also asked appellant on cross-examination, regarding his testimony that he did not rob the doughnut shop in Mobile, "They found some of the property on you, didn't they?" (R.1383). Appellant denied this (R.1383). Upon defense objection, it was revealed at the bench that some property from the robbery was found on the person of Alfred Ladd, and that appellant was in the car with Ladd, but nothing was found on appellant linking him to the robbery (R.1384). The prosecutor withdrew the question and a cautionary instruction was given (R.1384). However, the jury was not told that nothing was found on appellant, but only that they should disregard the question and "we are not going into what happened in that offense". It has been recognized that it is improper for a prosecutor to insinuate impeaching facts without proof. Marsh v. State, 202 So.2d 222 (Fla. 3d DCA 1967); Smith v. State, *414* So.2d 7 (Fla. 3d DCA 1982);

Johnson v. State, 432 So.2d 583 (Fla. 4th DCA 1983). While appellant does not claim that either of these last two matters, in and of themselves, amount to reversible error, they are again part of a pattern of misconduct - major and minor improprieties calculated to influence the jury and to prejudice appellant - which began even before the jury was selected and continued right up to the time of closing argument as to penalty. However, one other example of prosecutorial overkill, in the form of presentation of evidence of non-statutory aggravating factors, does amount to independent reversible error, and that is the cross-examination of Dr. James Larson.

Dr. Larson, a clinical psychologist called as a defense witness, testified that when he interviewed appellant on December 31, 1982, appellant was free of any major mental illness or psychosis, but was mildly depressed, which was consistent with what one might expect of a person facing serious criminal charges (R.1315-17). Appellant had sustained physical injury of the intestine, and had undergone a colostomy (R.1317-18). Appellant described himself as being almost surprised that he was still alive, because his injuries had been so serious, and that any additional life span he had remaining was a matter of accident (R.1319). Dr. Larson administered an IQ test, on which appellant scored in the low average range overall; he scored average on the performance section and in the "borderline range" on the verbal skills section (R.1319-20). Borderline range is lower than low average and above the range of retardation (R.1320). Appellant's verbal IQ score was 76, which would place him in the bottom seven percent of the population in these skills (R.1320). Appellant's school records indicated "fairly mediocre" performance; Dr. Larson saw no indication that his reading ability, writing skills, or arithmetic skills ever exceeded a 4th to 6th grade level (R.1321). Appellant has a very poor vocabulary and basic deficiencies in his ability to communicate (R.1321-22). Dr. Larson also administered several mental status examinations, including

the MMPI; appellant's reading ability was inadequate to permit him to take this test in the usual manner, so he was asked the questions orally by Dr. Larson's nurse (R.1323-24). Similarly, on the "rotary incomplete blank test", appellant's verbal skills "were sufficiently poor that it didn't generate very much personality information" (R.1324). Dr. Larson testified that appellant was totally cooperative during his evaluation, and there was no indication that he was trying to "fake anything" or appear smarter or less intellegent than he really was (R.1325).

And that is all Dr. Larson testified to on direct examination. As previously discussed, the state must limit itself on cross-examination to questions no broader in scope than those propounded by the defense. McCrae v. State, supra; see Buford v. State, supra; Steinhorst v. State, supra; Jones v. State, supra. As previously discussed, the state may not place before the jury prejudicial evidence of non-statutory aggravating factors. Perry v. State, supra; Maggard v. State, supra. Evidence of a defendant's "dangerousness" or propensity to commit violent acts, as a result of his mental status, is not properly considered as an aggravating factor. Miller v. State, 373 So.2d 882, 885-86 (Fla. 1979). It is with these principles in mind that the prosecutor's cross-examination of Dr. Larson must be considered.

The prosecutor began by getting Dr. Larson to recapitulate his findings that appellant is not of high intelligence, but does not suffer from any mental illness (R.1327). Over defense objection, the prosecutor then queried "There is nothing to indicate that people of low intelligence are any less dangerous than people of higher intelligence, is there?" (R.1327). Dr. Larson said he was not aware of anything to indicate that (R.1327). The prosecutor also elicited from Dr. Larson that appellant had poor impulse control (R.1329). From this base, the prosecutor proceeded with the following prejudicial and

and egregiously improper line of cross-examination:

MR. JOHNSON [prosecutor]: Okay. Now, these people with poor impulse control often, frequently have problems with law enforcement, don't they?

DR. LARSON: Oftentimes.

Q. They often set aside any long range goals, dont' they, Doctor --

A. That's correct.

Q. -- for any short time goals or pleasure, is that right, sir?

A. Yes.

Q. They seek immediate gratification, is that right?

A. Oftentimes, yes.

Q. And if they need money they try to go find them some money, don't they?

A. I'm not really sure how *to* answer that.

Q. Well, Doctor, one thing if he needs money and he is seeking immediate gratification for his need for money, he might go do something illegally to get that money; wouldn't he?

MR. TERRELL [defense counsel]: Objection. Improper question.

THE COURT: Overruled.

THE WITNESS: Yes.

Q. (By Mr. Johnson:) That's one of the ways he would seek his immediate gratification?

A. It's a possibility.

Q. He wouldn't necessary conform to the mores that the rest of us would, would he?

MR. TERRELL: Objection, Your Honor, improper question.

THE COURT Overruled.

THE WITNESS: Would you repeat the question.

Q. (By Mr. Johnson:) He wouldn't necessarily conform to the laws and the mores that the rest of us would, would he?

A. That's correct.

Q. He might violate the laws to seek his immediate gratification, wouldn't he?

A. That's correct.

Q. Yes, sir. Those type of people often even have difficulty with fighting, don't they?

A. Yes, they do.

Q. And other forms of violence?

A. Yes, they do.

Q. And, like murder?

MR. TERRELL: Objection, Your Honor, improper question.

THE COURT: Overruled.

Q. (By Mr. Johnson:) Murder is violence, right?

A. At the level he tested --

Q. Just answer my question, Doctor. Sometimes these people do have this type of difficulty, don't they?

A. Yes, they do.

Q. And this defendant has had that type of difficulty, hasn't he?

A. My understanding is that he has.

(R.1329-31)

Q. Found [him] to be free of every mental defect, disease, and infirmity which you examined him for, didn't you, Doctor?

A. That's true.

Q. You didn't find that he was under any type of emotional disturbance or mental disturbance at the time he committed this criminal offense; did you?

A. I did not.

Q. There was no indication that he didn't know what he was doing that day, was there, Doctor?

A. There is not.

Q. So, in your opinion, he is merely normal except maybe a little low educated?

A. That's correct.

Q. Yes, sir. And maybe a little bit mean because of his impulse control?

MR. TERRELL: Objection, improper question.

THE COURT: Overruled.

THE WITNESS: Mean is not a psychological term. I have an opinion on that.

Q. (By Mr. Johnson:) Okay. He gets a little aggressive at times, then, doesn't he?

A. Yes, he does.

(R.1332-33)

In the guise of cross-examination, the prosecutor put before the jury a heavy dosage of "mental aggravation", some of it relating to appellant, but most of it relating to "these people" with poor impulse control. "These people", the jury learned, frequently have problems with law enforcement, seek immediate gratification, fail to conform to the mores of society, violate the laws, and have difficulty with fighting and other forms of violence "and, like murder". Interestingly, other than the instant crimes and the conviction for the armed robbery of the Mobile doughnut shop, there was no evidence that appellant had a history of such difficulties; only that appellant had "poor impulse control'' and that people with poor impulse control often have violent and/or criminal propensities. The cross-examination of Dr. Larson created the misleading impression that appellant has had "that type of difficulty", i.e. murder and other forms of violence, in the past. Florida's death penalty statute, however, clearly and expressly limits what may be considered concerning a defendant's criminal history to violent offenses for which the defendant was previously convicted. Perry v. State, supra, at 174-75. If the cross-examination of Dr. Larson is interpreted as relating not to appellant's criminal history but only as to his dangerousness or his propensity to commit violent acts, that is equally prejudicial and equally improper. Miller v. State, supra. In his closing argument to the jury, the prosecutor actually argued that "if anything, his [Dr. Larson's] testimony goes in aggravation" (R.1416),

and reminded the jury about "poor impulse control" and "that these people have a tendency to fight and be violent. That he seeks immediate gratification" (R.1417).

Nor can the prejudicial testimony elicited on cross-examination from Dr. Larson be justified as rebutting any mitigating circumstance offered by the defense. Defense counsel did not claim, and Dr. Larson did not testify on direct, that appellant suffered from any significant mental disturbance; indeed, Dr. Larson testified on direct that appellant was not mentally ill or psychotic. The sole mitigating factor sought to be established through Dr. Larson's testimony was appellant's relatively low intelligence, and particularly his lack of verbal skills. Defense counsel did elicit from Dr. Larson that appellant was cooperative during his examination and did not appear to be malingering or fabricating symptoms. But the only aspect of appellant's psychological make-up or personality characteristics that was even mentioned on direct was the fact that the testing failed to generate much information about appellant's personality because his verbal skills were so inadequate! A defendant's low intelligence or "dull-normal" intelligence may properly be presented to the jury and the court for consideration as a mitigating circumstance. See Meeks v. State, 336 So.2d 1142 (Fla. 1976); Neary v. State, 384 So.2d 881, 885-88 (Fla. 1980), see also Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). Surely a defendant's presentation of a psychologist's testimony concerning his low IQ and lack of reading, writing, and communications ability does not give the state carte blanche to haul in a Pandora's box full of "mental aggravation", consisting of testimony regarding the violent and criminal propensities or the "dangerousness" of people with general personality characteristics similar to the defendant.

The introduction before the jury, through the improper cross-examination of Dr. Larson, of non-statutory aggravating factors regarding appellant's

poor impulse control, and (as one of "these people" with poor impulse control) his meanness, his dangerousness, his propensity to violate the laws to satisfy his need for immediate gratification, and his propensity to commit violent acts like fighting "and, like murder", was so egregiously prejudicial as to destroy the fundamental fairness of the penalty proceeding. See e.g. Hance v. Zant, 696 F.2d 940, 950-53 (11th Cir. 1983). In the same proceeding, the prosecutor employed the similar tactic of introducing before the jury, through the improper cross-examination of appellant and the improper rebuttal testimony of Dr. Slevinski, non-statutory aggravating factors regarding appellant's lack of remorse, and his "bad attitude" and passive aggressive behavior in the jail infirmary. Taken as a whole [see also Issue VI, supra; Issue IX, infra], the prosecutor's misconduct so infected the penalty phase of this trial as to deny appellant due process of law and deprive him of his constitutional rights to a fair trial and an impartial jury. See Hance v. Zant, supra, at 950-53; Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). Appellant's death sentence must be reversed and the case remanded for a new penalty proceeding before a newly empaneled jury. Perry v. State, supra; Maggard v. State, supra; see Tafero v. State, supra; Hance v. Zant, supra.

ISSUE IX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND DENYING HIS MOTION FOR MISTRIAL OCCASIONED BY THE PROSECUTOR'S IMPROPER AND PREJUDICAL REMARKS IN CLOSING ARGUMENT IN THE PENALTY PHASE.

In his closing argument to the jury in the penalty phase, the prosecutor, in asking the jury to recommend a sentence of death, argued "You must send a message to this defendant and others like him that you will [a defense objection at this point was overruled by the trial court] not tolerate this standard of conduct. You cannot gun down a policeman in the streets. You cannot gun down your fellow man and get away with it. We have got to draw the line somewhere on animalistic behavior". (R.1409-10). Antoher defense

objection, coupled with a motion for mistrial, was overruled (R.1410). The prosecutor continued "You have a duty to try to help to stop it. . . ."

Later in his argument, the prosecutor turned his attention to the testimony he had elicited during his cross-examination of Dr. Larson [see Issue VIII, supra]:

> He [defense counsel] is going to ask you to consider the testimony of the psychologist. But, if anything, his testimony goes in aggravation.
>
> (R. 1416)

After defense counsel's objection to this remark was overruled, the prosecutor contined:

> Remember, he said that certainly he was psychologically as old as his physiological age, he is twenty-four years old. He was responsible for the acts. He could find no evidence of any type of mental defect or mental disease. He was completely aware of his conduct. He knew what he was doing. He made plans to get the gun and prepare for the trip over here. He had complete recollection of the event. He has a poor vocabulary. That's about the main thing you heard from Mr. Larson. He also said because you have a lower intelligence level doesn't mean you are any less mean, but another important thing he told us was about his poor impulse control.
>
> That these people have a tendency to fight and to be violent. That he seeks immediate gratification. If he wants something he goes for it. He needed some money on this occasion. So, he decided to go rob a bank. He needed some money back in March, 1982, so he went and got him some money in Mobile, too.
>
> (R. 1416-17)

Still later, with no apparent transition from the argument which immediately preceded it, the prosecutor announced to the jury "The defendant is the enemy to the criminal justice system" (R.1418). Defense counsel's objection was overruled without comment by the court (R.1418). Soon afterward, in closing his argument, the prosecutor returned to this theme, which was strongly reminiscent of the pre-trial publicity in this case [see Issue II, supra] and his earlier remarks in the presence of the prospective jurors on voir dire [see Issue VI, supra]:

> Like I was telling you a little earlier, he is the enemy to the criminal justice system. He is the enemy to the police. There is no more tragic death than that of the policeman in the line of duty.[N]ot only is he there to protect all of us and to enforce the laws, but he tries to protect all of us. We must depend upon them to enforce our laws. We must have law. You must follow the law. You must uphold your oath. You must recommend the sentence of death in this case. Thank you.
>
> (R. 1419-20).

Following the pervasive exposure of the community and the jurors to inflammatory publicity (including, inter alia, an enraged newspaper editorial specifically urging that appellant be sentenced to death); following the prosecutor's misconduct on voir dire (including inter alia, suggesting to the jurors that the police are engaged in a war with the criminals, and that imposing the death penalty on a criminal is equivalent to killing the enemy in a war); following the prosecutor's prejudicial remarks in closing argument in the guilt phase; and especially following the state's improper tactics in the evidentiary portion of the penalty phase, which put before the jury large quantities of prejudicial evidence of non-statutory aggravating circumstances regarding appellant's "poor impulse control'', his alleged propensity, as a result thereof, to commit violent crimes and property crimes, his lack of remorse, and his "bad attitude"; the prosecutor's improper remarks in his penalty phase closing argument were the icing on the cake. In Hance v. Zant, 696 F.2d 940, 950-53 (11th Cir. 1983), it was recognized that prosecutorial misconduct in closing argument can be "so egregious as to render the trial fundamentally unfair", and that such misconduct can be of constitutional magnitude. [See also Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); Miller v. State of North Carolina, 583 F.2d 701 (4th Cir. 1978); Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975)]. The court noted that among the factors to be considered in determining whether alleged prosecutorial misconduct amounts to a deprivation of constitutional rights are:

> (1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury, and except in the sentencing phase of capital murder trials, (4) the strength of the competent proof to establish the guilt of the accused.
>
> Hance v. Zant, supra, at 950 n.7

As in the earlier segments of the trial, the prosecutor's improper remarks in his closing argument in the penalty phase were extensive and deliberate. As in the earlier segments, the trial court not only failed to rebuke the prosecutor in order to impress on the jury the gross impropriety of being influenced by these remarks [see e.g. Deas v. State, 119 Fla. 839, 161 So. 729 (1935); Oglesby v. State, 156 Fla. 481, 23 So.2d 558 (1945); Washington v. State, 343 So.2d 908 (Fla. 3d DCA 1977); Jackson v. State, 421 So.2d 15 (Fla. 3d DCA 1982); Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983); Meade v. State, 431 So.2d 1031 (Fla. 4th DCA 1983)], but he actually overruled defense counsel's objections, thereby aggravating the prejudicial effect of the remarks. See Edwards v. State, supra; Jackson v. State, supra. For example, after he informed the jury that appellant "is the enemy to the criminal justice system" and defense counsel's objection to this remark was overruled (R.1418), the prosecutor repeated this pronouncement "[l]ike I was telling you a little earlier" that appellant is the enemy to the criminal justice system and the enemy to the police (R.1419). Appellant was supposed to be on trial on six specific criminal charges arising out of the robbery of the Freedom Savings and Loan Association and including the murder of Officer Stephen Taylor. Instead, commencing with the immediate flood of publicity and continuing through every phase of the trial, appellant was also prosecuted as a symbolic representative of "the criminals", who are "the enemy" to the criminal justice system, to the police, and to society as a whole. Just as Officer Taylor had been portrayed in the press as a symbol of law enforcement, whose

heroism and sacrifice might have saved the community from even more tragic consequences, appellant was portrayed as the killer of "law enforcement", to be held accountable not only for the crimes charged, but for crime in general.

In Brooks v. Francis, 716 F.2d 780, 790 (11th Cir. 1980) it was recognized that (among other prejudicial remarks made in that case) it is fundamentally improper for a prosecutor:

> . . . to suggest that jurors should "kill" all members of the criminal element because they are enemies of society. The American system of justice does not operate in that fashion. Sentences should be imposed upon the "individual" found guilty of committing the crime charged. The sentence must be appropriate for that individual and for that crime. All trial attorneys should assist the courts and juries in achieving that end. Fairness is essential.
>
> This does not mean that prosecutors cannot be zealous, enthusiastic and determined. What the law condemns is the imposition of a sentence for the wrong reason. Prosecutors violate their responsibilities when they urge as much.

As in Hance v. Zant, supra, the prosecutor's misconduct in Brooks was held to have infected the proceeding to the extent that it denied the defendant a fundamentally fair sentencing hearing. Brooks v. Francis, supra, at 789.

The prosecutor in the instant case not only played upon the jurors' fears and prejudices regarding violent crime in the community, and the war between "law enforcement" and the "criminal element", in much the same manner as in Brooks; he also urged the jury to "send a message" to appellant "and others like him" that this standard of conduct would not be tolerated in the community (R.1409-10). The jurors were told they had "a duty to try to help to stop it" (R.1410). In Hines v. State, 425 So.2d 589 (Fla. 3d DCA 1982), the prosecutor told the jury:

> . . . I am asking you, here to return a verdict in this case that you can feel good about it and be proud of. I am asking you to tell the community that you are not going to tolerate the violence that took place in Sewer Beach.

The appellate court found that "[t]he remark, an impassioned call to the

jury to not only determine the guilt or innocence of the accused based on the evidence presented but to send a message to the criminal community regarding violence in general, is so egregious that reversal is compelled". Hines v. State, supra, at 591. See also Perdomo v. State, 439 So.2d 314 (Fla. 3d DCA 1983); Salazar-Rodriquez v. State, 436 So.2d 269 (Fla. 3d DCA 1983); Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982); McMillian v. State, 409 So.2d 197 (Fla. 3d DCA 1982); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976); Russell v. State, 233 So.2d 154 (Fla. 4th DCA 1970); Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968). See also Brooks v. Francis, supra, at 790. While deterrence in general may be a legitimate policy consideration for the Legislature in deciding whether to authorize the death penalty at all, the potential deterrent effect on other criminals is not a proper consideration for the jury or the court in deciding whether to impose a death sentence in a given case. See Lockett v. Ohio, 438 U.S. 586, 605 (1978)(emphasizing the critical importance of an individualized determination of penalty, and stating "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases"); Brooks v. Francis, supra, at 790. Moreover, the possible deterrent effect on other members of the criminal element is not a valid aggravating circumstance under Fla.Stat. §921.141(5). Cf. Gibson v. State, 351 So.2d 948, 950 (Fla. 1977) (declining to find reversible error in the prosecutor's argument to jury that they should recommend death penalty as a deterrent to crime, where defense failed to object to these comments at trial).

Similarly, the prosecutor's invitation to the jury to consider Dr. Larson's testimony as a (non-statutory) aggravating factor (R.1416), along with his reminder that "these people have a tendency to fight and to be violent" and to seek immediate gratification (R.1417), was highly improper and prejudicial. See Miller v. State, supra, Perry v. State, supra; Maggard v.

State, supra.

As in Pait v. State, 112 So.2d 380 (Fla. 1959) and Teffeteller v. State, 439 So.2d 840 (Fla. 1983), the motivation behind the assistant state attorney's improper tactics in the penalty phase (and throughout the course of these proceedings) is apparent. "The prime ambition of the State appeared to be the electric chair for the accused". Pait v. State, supra, at 345. As in Teffeteller v. State, supra, at 845, "the remarks of the prosecutor were patently and obviously made for the express purpose of influencing the jury to recommend the death penalty", and as in Teffeteller, he succeeded in his purpose. See Gunn v. State, 78 Fla. 599, 604 (1919). While the jury's penalty recommendation is advisory, it is "an integral part of the death sentencing process". Teffeteller v. State, supra, at 845 n.2; see Thomas v. State, 403 So.2d 371, 376 (Fla. 1981). Where the fairness of the penalty proceeding has been significantly impaired, whether by the improper introduction of prejudicial evidence [see Perry v. State, supra; Maggard v. State, supra; Tafero v. State, supra] or by improper and prejudicial argument to the jury [see Teffeteller v. State, supra], the death sentence must be vacated and the case remanded for a new penalty proceeding before a newly empaneled jury. This is true even in cases where no mitigating circumstances were found by the trial court. See Maggard v. State, supra, at 977; Teffeteller v. State, supra, at 845-47.

In the instant case, it is not altogether clear whether the trial court found no mitigating circumstances or whether, as in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977), he implicitly found some mitigating circumstances but found them insufficient to outweigh the aggravating circumstances. In his sentencing order, he makes only the generalized finding that "[t]he age and background of Clarence Hill do little to mitigate the circumstances of the killing . . ." (R.1669)[see Issue XIV, supra]. But in either event, the prosecutor's improper tactics were not primarily directed to the trial court;

they were designed to influence the jury's recommendation. There was considerable evidence before the jury, in the testimony of Dr. Larson, appellant's parents and neighbors, and appellant himself, from which the jury could have found a number of non-statutory mitigating circumstances; and it is entirely likely that they did, since even with all of the improper influences brought to bear by the media and the assistant state attorney, the death recommendation was not unanimous (R.1665). Clearly then it cannot be assumed that the persistent misconduct of the prosecutor did not affect the jury's weighing process or contribute to the advisory recommendation of death. See Elledge v. State, supra; Teffeteller v. State, supra; Maggard v. State, supra. To the contrary, appellant submits that not only did the improper tactics employed by the prosecutor in every phase of this trial, which in turn rested on a foundation of inflammatory pre-trial publicity, "affect" the jury's penalty recommendation, it destroyed the fundamental fairness of the entire proceeding. See Hance v. Zant, supra; Brooks v. Francis, supra. A death sentence imposed pursuant to such a proceeding is constitutionally intolerable and must be vacated Hance v. Zant, supra]; appellant is entitled, at minimum, to a new sentenc ng proceeding before a new advisory jury. Teffeteller v. State, supra.

ISSUE X

THE CUMULATIVE EFFECT OF THE ERRORS DISCUSSED IN ISSUES II THROUGH IX DEPRIVED APPELLANT OF HIS RIGHTS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS TO A FAIR TRIAL BY AN IMPARTIAL JURY, AND TO DUE PROCESS OF LAW.

It has frequently been observed that a defendant is entitled to a fair trial, not a perfect trial. See e.g. Lackos v. State, 326 So.2d 220, 221 (Fla. 2d DCA 1976); Parker v. State, 295 So.2d 312 (Fla. 1st DCA 1974). Appellant, thus far, has had neither.

In Carter v. State, 332 So.2d 120, 126-27 (Fla. 2d DCA 1976), the appellate court wrote:

> While a defendant is not entitled to a perfect trial, he certainly is entitled to a fair and impartial one. See United States Constitution, amend. VI and XIV. We have endeavored to point out in this opinion several errors that occurred during the course of this trial, the accumulation of which improprieties was so great as to warrant a new trial. See Douglass v. State, 1938, 135 Fla. 199, 184 So.756. Any one of these errors standing and considered alone may not be cause for reversal, still when considered collectively and in relation to one another and upon review of the entire record, we are compelled to conclude that the defendant was denied his constitutional right to a fair and impartial trial before a fair and impartial jury. Accordingly, we reverse and remand for a new trial.

In Knight v. State, 316 So.2d 576 (Fla. 1st DCA 1975), the defendant contended that the introduction of irrelevant and prejudicial testimony and prosecutorial comments throughout the course of the trial denied him a fair trial. The appellate court noted that "[s]ome of these . . . comments and testimony were objected to; some were not. When objections were made, some were sustained; some were not". The court, in reversing for a new trial, wrote:

> As noted previously by this Court, "a defendant in this jurisdiction is not entitled to a perfect trial but is entitled to a fair trial." (Simmons v. Wainwright, Fla.App. 1st 1973, 271 So.2d 464, 466) Sub judice, the comments and actions of the prosecutor rendered the appellant's trial neither perfect nor fair. The State now asserts that because appellant's trial counsel did not object to each improper comment, appellant is now precluded from alleging error on this point on appeal. The Florida Supreme Court, however, has spoken to the type of situation with which we are now faced: "The State points out that in some instances there was an absence of objection in the present trial and in other instances an objection to the improper inferences was sustained. Such absence will not suffice where the comments or repeated references are so prejudicial to the defendant that neither rebuke nor retraction may entirely destroy their influence in attaining a fair trial." (Wilson v. State, Sup.Ct.Fla.1974, 294 So.2d 327, 328-329).
>
> The record indicates that the actions taken by the prosecutor prejudiced the defendant. A prior statement by this Court is applicable here: "When the improprieties revealed by the record are such as to cast an unfairly favorable light upon the State and an undeserved unfavorable light upon the defendant the prejudice is apparent and the entire trial is thereby tainted." (Flicker v. State, Fla.App.1st 1974, 296 So.2d 109)
>
> In closing, we set forth what is to be expected of the representative of the State of Florida in the conduct of a criminal trial:
>
> "* * * It is the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which

> would or might tend to affect the fairness and impartiality to which the accused is entitled. His duty is not to obtain convictions but seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client."[1]
>
> [1]Cochran v. State, Fla. App. 1st 1973, 280 So.2d 42,43].

Knight v. State, supra, at 578-79

See Hance v. Zant, supra; Brooks v. Francis, supra. See also Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977)(cumulative effect of prejudicial comments resulted in a denial of the defendant's constitutional right to a fair trial; "[w]hile a defendant is not entitled to an error free trial, he must not be subjected to *a* trial with error compounded upon error").

Appellant's conviction and, to an even greater extent, his death sentence were the products of a trial with error compounded upon error. Assuming arguendo that the immediate tidal wave of inflammatory publicity at the time of the crime was not in and of itself sufficient to completely destroy appellant's right to a fair trial by an impartial jury, the prosecutor's improper tactics and remarks, reminiscent of that publicity, which occurred at more or less regular intervals throughout the trial, certainly eroded whatever was left. Every juror, and every prospective juror, had been exposed to the pre-trial publicity. The nature of that publicity was inherently prejudicial [see Issue II]. The trial court did virtually nothing to minimize the effects of the jurors' exposure to prejudicial media coverage. He denied appellant's motion for change of venue [Issue II]. He refused to allow the jurors to be examined outside of one another's presence [Issue III]. He denied defense challenges for cause to a number of jurors who acknowledged having formed opinions, and denied a challenge for cause to at least one prospective juror who acknowledged having come to court with a presumption based on what he'd learned about the case from the media, that the death penalty should be imposed, and acknowledged that he had not discarded that presumption [Issue IV]. The trial court refused defense counsel's request for additional peremptory challenges after appellant's minimum allotment of ten had

been exhausted

[Issue V]. He overruled appel ant's objection and denied his motion for mistrial when the prosecutor suggested to a prospective juror, in the presence of all of the other prospective jurors, that the police are engaged in a war with the criminals, that the criminal is the enemy to the policeman, and that imposing a death sentence on a criminal is equivalent to killing the enemy during a war [Issue VI]. [If the jurors had "put aside" their familiarity with the pre-trial publicity in this case, it is hard to think of remarks better calculated than those to bring it all back into their collective consciousness]. The trial court overruled appellant's objections and denied his motion for mistrial when the prosecutor invited the jury to think of him as the "thirteenth juror", and cast aspersions on appellant's exercise of his right to a jury trial [Issue VII]; which is particularly ironic in that appellant's decision to go to trial was motivated by the state's aggressive insistence that appellant receive the death penalty (see R.1390). In the penalty phase, when the state further stacked the deck by introducing testimony of non-statutory aggravating circumstances by means of improper cross-examination of Dr. Larson, improper cross-examination of appellant, and improper rebuttal testimony of Dr. Slevinski, the trial court again consistently overruled defense counsel's objections and denied his motions for mistrial [Issue VIII]. Finally, in the penalty phase, when the prosecutor sought to influence the jury to recommend a death sentence because appellant is "the enemy to the criminal justice system" and "the enemy to the police", and in order to "send a message" to appellant "and others like him" that this standard of conduct would not be tolerated in the community; and where the prosecutor asked the jury to consider Dr. Larson's testimony (which had been improperly elicited on cross) as a factor in aggravation; the trial court again overruled defense counsel's objections without comment [Issue IX].

In Kirk v. State, *227* So.2d *40, 42* (Fla. 4th DCA 1969), it was observed

that:

> It is the duty of the trial judge to carefully control the trial and zealously protect the rights of the accused so that he shall receive a fair and impartial trial. The trial judge must protect the accused from improper or harmful statements, or conduct by a witness or by a prosecuting attorney during the course of a trial.

Similarly, "[to] safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pre-trial publicity." Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979); see Sheppard v. Maxwell, 384 U.S. 333 (1966); United States v. Hawkins, 658 F.2d 279, 285 (5th Cir. 1981).

These crucial constitutional protections were not forthcoming in the instant case, and as a result the fundamental fairness of the proceedings was destroyed. See Hance v. Zant, supra. Appellant's conviction and death sentence must be reversed and the case remanded for a new trial, (in a location outside the reach of the Escambia County print and broadcast media). See e.g. Manning v. State, supra; United States v. Hawkins, supra; Singer v. State, supra; Thomas v. State, supra; Washington v. State, supra; Miller v. State, supra; Maggard v. State, supra; Perry v. State, supra; Teffeteller v. State, supra; Hance v. Zant, supra; Carter v. State, supra.

ISSUE XI

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE TESTIMONY CONCERNING IRRELEVANT COLLATERAL CRIMES.

In the guilt phase of the trial, over defense objection (R.933-35), the state introduced testimony of Shanivania Green Robinson to the effect that the gun used in the robbery and shooting incident belonged to her; that appellant, who was a friend of hers, had been at her house on the day of the crime; and that the next day she discovered that the gun was missing (R.936-39). The state also introduced, over defense objection and motion for mistrial (R.1046-47, 1053-56, 1059), the testimony of Janet Pearce to the

effect that around noon on October 19, 1982 in downtown Mobile, appellant, accompanied by another man, dragged her out of her car, placed a sharp object at her back, stole her purse, and drove off in the car (R.1056-59), and the testimony of police officer Gregory Moody to the effect that Mrs. Pearce's car was recovered in downtown Pensacola, on the evening of the robbery of Freedom Savings, about a block away from the bank (R.1047-51). The defense contended that the foregoing evidence showing the commission of collateral crimes by appellant was prejudicial and irrelevant. The prosecutor argued, and the trial court appeared to agree, that the testimony was relevant to show premeditation (see R.935,1055).

The state's theory of this case was that after the bank robbery was interrupted by the police, and after appellant saw that the police had his companion Cliff Jackson on the ground, appellant (who, according to the state's theory, had "made a clean break" and was headed back to his car) doubled back, snuck up behind the officers, and deliberately fired, killing Officer Taylor and wounding Officer Bailly. Appellant himself was wounded five times in the ensuing shootout. Appellant admitted that he and Jackson decided to rob the bank before they arrived in Pensacola (R.1098). Appellant admitted that he was heading back to the parked car, when he turned around and saw that the police had Jackson on the ground (R.1100-01). He testified as follows:

> MR. LOVELESS [defense counsel]: Clarence, when you went in to rob that bank, did you intend to hurt anyone?
>
> APPELLANT: No, I didn't.
>
> Q. Why did you have the gun if you didn't intend to hurt anyone?
>
> A. Well, I figure if I had went in there without a gun, I probably wouldn't have got what I went in there for.
>
> Q. You went in there to rob the bank? You went in there to get the money; is that right?
>
> A. Yes.

Q. When you came out, you saw Cliff on the ground, the officers over him, did you at that time intend to hurt anyone?

A. No, I didn't. I thought probably I could just persuade him to put his gun down. That's why I approached him from the blind side.

Q. At any time during this whole incident, did you intend to kill anybody?

A. No, I didn't. I didn't know anybody was killed until I got the word when I was in the hospital.

(R.1105-06).

Thus, it is apparent that appellant's identity as the person who committed the bank robbery and shot Officers Taylor and Bailly was not at issue. Similarly, there was no issue as to whether or not the robbery was premeditated, since appellant admitted that it was, and since that premeditation does not automatically transfer to the murder. See Gorham v. State, ___ So.2d ___ (Fla. 1984)(case no. 62,882, opinion filed July 19, 1984)(9 FLW 310,311). The only issue for the jury to decide was whether the murder of Officer Taylor was premeditated, which in turn depends on appellant's state of mind as he approached the officers who were kneeling over Cliff Jackson - whether he intended, as he testified, to try to free his companion without bloodshed, or whether he intended to kill the officers. The fact that the car and gun used in the bank robbery were stolen sheds no light on this question, and the state's presentation of evidence of these crimes served no purpose except to show appellant's bad character and propensity to commit crimes. It was thus inadmissible under the Williams rule. See e.g. Williams v. State, 110 So.2d 654 (Fla. 1959); Drake v. State, 400 So.2d 1217 (Fla. 1981); Jackson v. State, 451 So.2d 458 (Fla. 1984).

In Marion v. State, 287 So.2d 419, 421 (Fla. 4th DCA 1974), the appellate court quoted the following statement of Justice Thornal in State v. Norris, 168 So.2d 541, 543 (Fla. 1964):

> In Williams v. State, supra, we undertook to examine in depth the rules governing the admissibility of similar fact evidence as proof of a fact in issue in a criminal case. We there held that similar fact evidence is admissible if relevant, except to prove bad character or criminal propensities. Such evidence is not objectionable merely because it points to the commission of another crime. The objective to be accomplished by allowing such evidence is not proof of a collateral crime outside of the indictment. Its purpose is to prove a fact in issue in the case before the Court. Its relevancy will not be destroyed merely because it would also be relevant to the proof of a separate crime. . . .

With regard to this principle, the court in Marion continued:

> We deem the underlined words to be the essential determinative standard, i.e., relevant, that is to say, "to prove a fact in issue in the case before the Court". If there is no fact "in issue" there is no relevancy and the collateral evidence should not be admitted. See 13 Fla.Jur. Evidence § 113. Evidence is admissible if it is relevant to prove identity, to show a common scheme or design, to show guilty knowledge, to prove intent, motive or pattern, to show absence of mistake, to show a system of general pattern of criminality, to disprove an alibi, to disprove unlawful entrapment, or as a part of the res gestae. If none of these elements are "in issue" relevancy disappears and such evidence is inadmissible. Obviously, if a person's identity is not at issue, e.g. eyewitness testimony clearly identifying the accused, how is it relevant to introduce evidence that the defendant was "identified" as having participated in another criminal act. . . .
>
> Marion v. State, supra, at 422

In the present case, appellant's identity was not in issue. Premeditation of the robbery was not in issue. Premeditation of the murder was in issue - was the only issue - but the evidence presented by the state concerning the theft of the gun from Ms. Robinson and the robbery of Mrs. Pearce and the taking of her car and purse was wholly irrelevant to whether the killing was premeditated. The challenged evidence showed criminal propensity and bad character, and nothing more. Its admission was prejudicial, and reversible, error. Drake v. State, supra; Jackson v. State, supra.

ISSUE XII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE A PHOTOGRAPH OF THE VICTIMS'S BODY, TAKEN AT THE AUTOPSY AND DEPICTING THE RESULTS OF EMERGENCY MEDICAL PROCEDURES PERFORMED AFTER THE SHOOTING, WHERE THE PHOTOGRAPH WAS GRUESOME, INFLAMMATORY, AND IRRELEVANT TO ANY ISSUE IN THE CASE.

In Rosa v. State, 412 So.2d 891 (Fla. 3d DCA 1982), the appellate court applied an exception to the general rule that photographs of a murder victim are admissible even if gruesome and inflammatory, and reversed Rosa's conviction of second degree murder upon a holding that "the photograph of the deceased's blood-spattered body, which depicted the results of emergency procedures performed after the stabbing, including protruding surgical tubes and sutures, was irrelevant". See also Dyken v. State, 89 So.2d 866 (Fla. 1956); Beagles v. State, 273 So.2d 796 (Fla. 1st DCA 1973). This exception recognizes that where the condition of the body has been altered or distorted by medical procedures or other factors extraneous to the issues in the case, the relevancy of the photograph may be destroyed. See also Fla.Stat. 590.403, which provides that even relevant evidence is inadmissible if its probative value is substantially outweighed by its prejudicial effect.

In the present case, appellant specifically objected to the admission of a photograph depicting the results of the emergency medical precedures and showing Officer Taylor's face (R.968). The prosecutor said the photographs were being offered to show identity, and to show the location of the wounds, and asserted that the state had no photographs which did not show the emergency medical procedures (R.968, 970). The trial court observed that he doubted seriously whether the defense was disputing the identity of the victim, and defense counsel agreed that he was not (R.968). The court also stated that there was some question in his mind as to whether he wanted to let "these horrible things" go to the jury (R.969). He ruled that he would allow the photographs into evidence, and allow the medical examiner, Dr. Birdwell, to refer to them in his testimony, but he would not yet allow the state to publish them to the jury (R.970). At the close of the state's case, however, and long after the conclusion of the medical examiner's testimony, the court overruled the defense objections and allowed the photographs to be published to the jury.

Appellant submits that these photographs were irrelevant to any matter in issue [see Marion v. State, 287 So.2d 419, 421-22 (Fla. 4th DCA 1974)], and that they (particularly the photograph which shows the victim's face) are unnecessarily gruesome and inflammatory. Their prejudicial effect clearly outweighed whatever minimal probative value they may have had, and they should not have gone to the jury. Rosa v. State, supra; Fla.Stat. 590.403.

ISSUE XIII

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE JURY SPECIFIC INSTRUCTIONS AS TO NON-STATUTORY MITIGATING CIRCUMSTANCES IT COULD CONSIDER.

Through the penalty phase testimony of appellant, his parents and neighbors in Mobile, and Dr. Larson, the defense's effort to persuade the jury to recommend a life sentence rather than the death penalty was primarily geared to the presentation of non-statutory mitigating circumstances. During the charge conference for the penalty phase, defense counsel contended that the standard jury instruction that the jury may consider "any other aspect of the defendant's character or record, or any other circumstance of the offense" (see R.1432) was not sufficiently specific to guide the jury's consideration of non-statutory mitigating factors (R.1288). Defense counsel submitted a written list of non-statutory mitigating circumstances which would be supported by the evidence, and requested the court to instruct the jury accordingly. [Note that defense counsel was not asking the court to instruct the jury that these mitigating circumstances were established; but only that the court "instruct them according to this list saying that we have presented these matters and then it is for the jury to decide whether or not they constitute specific mitigation" (R.1288)]. Among the requested instructions as to mitigating factors which the jury might consider were that appellant has been helpful to the ill and elderly in his community; that appellant maintains the love of his family; that appellant has low

intelligence; and that appellant has suffered from anticipation of execution and from the pain of his injuries (R.1664). Over defense objection, the trial court refused to give any instructions on specific non-statutory mitigating circumstances (R.1289, 1664); he told defense counsel that he could present the evidence and argue it under the "any other aspect" instruction (R.1289).

The trial court subsequently instructed the jury, as to aggravating circumstances, as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.
>
> First, that the defendant has been previously convicted of a felony involving the threat of violence to some person. The crime of first degree robbery is a felony involving the threat of violence to another person. The crimes of robbery with a firearm are felonies involving the threat of violence to another person.
>
> Second, the defendant in committing the crime for which he is to be sentenced knowingly created a great risk of death to many persons.
>
> Third, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or flight after committing the crime of robbery.
>
> Fourth, that the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest of effecting an escape from custody.
>
> Fifth, the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> (R.1431-32).

In contrast to the concrete and focused list of aggravating factors, the instruction on mitigating factors was as follows:

> Among the mitigating circumstances you may consider, if established by the evidence, are the age of the defendant at the time of the crime, and any other aspect of the defendant's character or record, and any other circumstance of the offense.
>
> (R. 1432)

Where the instructions to the jury in the penalty phase of a capital trial fail to adequately inform the jury about the nature and function of mitigating

circumstances, those instructions are constitutionally deficient. See Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983); see also Gregg v. Georgia, 428 U.S. 153, 192-93 (1976). Under the principles expressed in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), the mitigating circumstances which are available to a capital defendant, if established by the evidence, cannot constitutionally be limited to those in the statute. See Songer v. State, 365 So.2d 696, 700 (Fla. 1978).

By refusing to give the jury specific instructions on non-statutory mitigating circumstances which were supported by the evidence and which were requested by the defense, the trial court not only failed to adequately guide the jury in its consideration of these circumstances, he also subtly denigrated the evidence in mitigation presented by the defense and implied to the jury that it was worthy of little weight, thereby violating the constitutional principles of Lockett v. Ohio, supra.

In State v. Johnson, 257 S.E.2d 597, 616-17 (1979), the Supreme Court of North Carolina held that, when properly requested to do so, the trial court must instruct the jury on specific non-statutory mitigating circumstances:

> Frequently . . . there may be a number of things, including good character, which a defendant contends the jury should consider in litigation. In order to insure that the trial judge mentions these to the jury in his instructions the defendant must file a timely request. Otherwise failure of the court to mention any particular item as a possible mitigating factor will not be held in error so long as the trial judge instructs that the jury may consider any circumstance which it finds to have mitigating value pursuant to G.S. 15A-2000(f)(9)....
>
> If, however, a defendant makes a timely request for a listing in writing of possible mitigating circumstances, supported by the evidence, and if these circumstances are such that the jury could reasonably deem them to have mitigating value, we are of the opinion that the trial judge must put such circumstances on the written list.
>
> The legislature did not intend to give those mitigating circumstances expressly mentioned in the statute primacy over others

> which might be included in the "any other circumstance" provision. Such an intent, if it existed, might run afoul of Lockett v. Ohio, supra, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973.
>
> . . .
>
> Under Lockett a legislature would be free to provide that the existence of certain mitigating factors would preclude the imposition of the death penalty, while the existence of others should simply be considered, but not as controlling, on the question. A death penalty sentencing statute, however, which by its terms or the manner in which it is applied, puts some mitigating circumstances in writing and leaves others to the jury's recollection might be constitutionally impermissible under the reasoning of Lockett. For if the sentencing authority cannot be precluded from considering any relevant mitigating circumstance supported by the evidence neither should such circumstances be submitted to it in a manner which makes some seemingly less worthy of consideration than others.
>
> Thus we are satisfied that our legislature intended that all mitigating circumstances, both those expressly mentioned in the statute and others which might be submitted under G.S. 15A-2000 (f)(9), be on equal footing before the jury. If those which are expressly mentioned are submitted in writing, as we believe they should be, then any other relevant circumstance proferred by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted in writing.

For the reasons expressed in State v. Johnson, supra, appellant submits that the trial court's refusal to instruct the jury on specific non-statutory mitigating factors was error of constitutional dimension, which requires that his death sentence be reversed and the case remanded for a new penalty hearing before a newly empaneled jury.

ISSUE XIV

> THE TRIAL COURT'S FINDINGS IN SUPPORT OF THE DEATH SENTENCE ARE UNCLEAR WITH REGARD TO WHETHER HE CONSIDERED ALL OF THE EVIDENCE OF NON-STATUTORY MITIGATING CIRCUMSTANCES OFFERED BY APPELLANT; AND ARE UNCLEAR AS TO WHAT, IF ANY, MITIGATING CIRCUMSTANCES HE FOUND.

Perhaps symptomatic of the trial court's implicit denigration of non-statutory mitigating circumstances [see Issue XIII, supra] is the court's superficial treatment, in his findings of fact, of the evidence offered by appellant to show the existence of non-statutory mitigating factors. The

trial court's sentencing order, after setting forth in narrative form his factual findings as to aggravating circumstances, recites only the following with regard to mitigating circumstances: "The age and background of Clarence Hill do little to mitigate the circumstances of the killing of Officer Taylor" (R.1669). From this brief, enigmatic statement, it is impossible to discern whether the trial court found that appellant's age (24) and ''background" do not establish any mitigating circumstances, or whether he found that they do establish one or more mitigating circumstances, but accorded them little weight as compared to the aggravating circumstances he found. See Hall v. State, 381 So.2d 683, 684 (Fla. 1978)(Order for Clarification); Mann v. State, 420 So.2d 578, 581 (Fla. 1982). In addition, it is impossible to discern, from the trial court's use of the nebulous phrase "age and background of Clarence Hill", which of the non-statutory mitigating factors offered by appellant were even considered by the trial court, much less to discern which factors were found. See Lockett v. Ohio, supra; Eddings v. Oklahoma, supra. For example, was appellant's low intelligence and lack of verbal skills considered as part of his "background"? Was it found as a mitigating circumstance? Were the physical injuries sustained by appellant in the shooting incident, and the colostomy he subsequently underwent, considered as part of his "background"? Was this found as a mitigating circumstance? From the trial court's sentencing order, it is impossible to tell.

In Hall v. State, supra, the trial court found, with regard to mitigating circumstances, only that "there are insufficient/mitigating circumstances as enumerated in Section 921.141, Florida Statutes, to outweigh the aforesaid aggravating circumstances. . . ." This Court held that more detailed findings of fact were required to enable the Court to properly review the death sentence (imposed after a jury life recommendation) in accordance with the standard set forth in Tedder v. State, 322 So.2d 908 (Fla. 1975). In

Mann v. State, supra (in which the death sentence was imposed after a jury death recommendation), the trial court stated in his findings that "[t]he only mitigating circumstance apparent to the Court which is based solely upon the opinion of Dr. Alfred Fireman, a local psychiatrist, is that the defendant suffered from psychotic depression and paranoid feelings of rage against himself because of strong pedophilic urges". On appeal, this Court said:

> From this we are unable to discern if the trial judge found that the mental mitigating circumstances did not exist. If so it appears that he misconstrued the doctor's testimony. On the other hand, he may have found them to exist and weighed them against the proper aggravating circumstances. We, however, cannot tell which occurred. The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found; this case does not meet the test.
>
> Mann v. State, supra, at 581.

In the present case, the trial court's findings of fact as to aggravating circumstances (like his jury instructions as to aggravating circumstances) are specific and unmistakably clear. On the other hand his finding of fact as to mitigating circumstances (like his jury instruction as to mitigating circumstances)is a general, nebulous, "catch-all" determination that whatever there may be in mitigation in appellant's "background", it "does little" (in the trial court's view) to mitigate the circumstances of this crime. It is necessary to speculate as to what (if any) specific non-statutory mitigating circumstances the trial court considered, and what (if any) non-statutory mitigating circumstances he found. The trial court's findings fail to demonstrate that he fully and fairly considered the evidence presented by appellant for the purpose of establishing non-statutory mitigating circumstances, and thus the death sentence imposed in this case violates the principles expressed in Lockett v. Ohio, supra and Eddings v. Oklahoma, supra. In addition, the trial court's findings are insufficiently clear to permit proper appellate review. Hall v. State, supra;

Mann v. State, supra, Appellant's death sentence should be vacated and the case remanded for resentencing.

ISSUE XV

THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

During the course of the robbery of the Freedom Savings and Loan, when appellant and Cliff Jackson became aware of the presence of the police, Jackson left by the front entrance and was immediately apprehended by Officers Bailly and Taylor, while appellant left by the back door and was headed to his parked car. As he headed down the street, appellant saw that Jackson had been caught, whereupon appellant turned around to try to rescue his companion. These facts are reflected in the trial court's sentencing order (R.1668), and in appellant's testimony as well (R.1099-1103).

Appellant testified that he did not intend to kill anyone; that he began firing when Officer Bailly wheeled around and started firing at him (R.1103-06, 1119-23). Officer Bailly testified that he "heard a bang" and felt a sting on the left side of his neck before he wheeled around and commenced firing (R.868-69). Based on the testimony of Officer Bailly and other state witnesses, the jury evidently concluded that the circumstantial evidence of premeditation was sufficient to refute appellant's testimony that he did not intend to kill anyone.[12]

The trial court based his finding of the "cold, calculated, and premeditated" aggravating circumstance on the evidence that appellant approached the two officers from the rear, undetected, and drew his pistol and fired, wounding Officer Bailly and killing Officer Taylor (R.1668-69). Bailly

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12 While appellant does not concede this as a matter of fact, he will concede, for purposes of this appeal, that the evidence was legally sufficient to permit the jury to find that the killing was premeditated.

himself testified that he heard only the one shot, and felt the sting on his neck, whereupon he turned and fired six rounds, until his gun was empty (R.868-69). Bailly did not know how many times appellant fired back, and did not realize that Officer Taylor had been hit until considerably later, when he (Bailly) had returned after chasing Cliff Jackson into an alleyway (R.869-72). Appellant submits that while the evidence may have been legally sufficient to support a finding of premeditation, it was clearly insufficient to show the heightened degree of premeditation or calculation necessary to support the aggravating circumstance.

Simple premeditation is not sufficient to support a finding of the aggravating circumstance established by Fla.Stat. 921.141(5)(i); the evidence must show beyond a reasonable doubt that there was a "heightened degree of premeditation, calculation, or planning." Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983); see also White v. State, 446 So.2d 1031, 1037 (Fla. 1984); Preston v. State, 444 So.2d 939, 946-47 (Fla. 1984.) In Richardson v. State, supra, this Court observed that the evidence did not support a finding of the "cold, calculated, and premeditated" aggravating circumstance:

> The facts and circumstances show that the victim discovered appellant, a person known to him, committing a burglary and that the murder was extemporaneously committed for the purpose of avoiding a lawful arrest. The evidence does not show beyond a reasonable doubt that there was any heightened degree of premeditation, calculation, or planning.

Similarly in the instant case, appellant and Cliff Jackson were interrupted in the midst of a bank robbery by the arrival of the police. [As recognized in Gorham v. State, ___ So. 2d ___ (Fla. 1984)(case no. 62,882, opinion filed July 19, 1984)(9 FLW 310), the fact that the robbery may have been premeditated in a cold and calculated manner does not automatically transfer to the murder itself]. Finding himself in this highly stressful situation, appellant made the very bad decision to try to help his companion

escape. The trial court concluded from the evidence that appellant came up on the officers from the rear and fired the first shot. In any event, a shoot-out ensued, in which Officer Taylor was killed, appellant was seriously wounded, and Officer Bailly and Cliff Jackson were also wounded. The facts and circumstances of this case indicate that the shooting incident, if premeditated, was more the product of adrenaline than calculation; done in hot blood rather than cold blood.

The evidence does not establish beyond a reasonable doubt the existence of the "cold, calculated, and premeditated" aggravating circumstance. See Richardson v. State, supra. Since there was considerable evidence of non-statutory mitigating circumstances before the trial court, and since his sentencing order is unclear as to whether he found any of these mitigating circumstances to be established, the error in finding an unproven aggravating circumstance requires resentencing. Mann v. State, 420 So.2d 578 (Fla. 1982).

V CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court grant the following relief:

Reverse the conviction and death sentence and remand for a new trial [Issues I, II, III, IV, V, VI, VII, X, XI, XII].

Reverse the death sentence and remand for a new penalty proceeding before a newly empaneled jury [Issue I (alternative relief), VIII, IX, XIII].

Reverse the death sentence and remand for resentencing by the trial court [Issues XIV, XV].

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to J. Tiedemann , Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to appellant, Clarence Hill, #089718, Florida State Prison, Post Office Box 747 Starke, Florida 32091 on this 19th day of September, 1984.

Steven L. Bolotin

STEVEN L. BOLOTIN