IN THE SUPREME COURT OF FLORIDA

BILLY LEON KEARSE,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 90,310
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
______________________________	)	

REPLY BRIEF OF APPELLANT

RICHARD L. JORANDBY
Public Defender

JEFFREY L. ANDERSON
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 374407
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Billy Leon Kearse

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ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO HAVE THE NEW PENALTY PHASE IN THE COUNTY WHERE THE OFFENSE OCCURRED.

A. The Trial Court Abused Its Discretion In Denying Appellant's Withdrawal Of The Waiver Of His Constitutional Right To Be Tried In The County Where The Offense Occurred.

Appellee claims that a defendant cannot withdraw a waiver of a constitutional right. Such a claim is specious. E.g. Pangburn v. State, 661 So. 2d 1182, 1189 (Fla. 1995) (unless it is shown that the withdrawal was made in bad faith or would harm the public); Floyd v. State, 90 So. 2d 105, 106 (Fla. 1956); Stevens v. Marks, 86 S.Ct. 788, 793 (1966) (state may not constitutionally prohibit a defendant's withdrawal of a waiver of a constitutional right). A defendant may withdraw his waiver of the constitutional right to be tried in the county where the crime occurred even in a capital case. Woodward v. State, 1997 WL 776557 (Miss. 1997) page 2, ¶ 16 ("On remand for resentencing on the capital murder charge, the trial court granted Woodward's motion to withdraw the motion for change of venue"); Simpson v. State, 418 So. 2d 984 (Fla. 1983) (Duval County); Simpson v. State, 474 So. 2d 384 (Fla. 4th DCA 1985) (Palm Beach County); Gore v. State, 475 So. 2d 1205 (Fla. 1985) (Pinellas County); Gore v. State, 706 So. 2d 1328 (Fla. 1997) (Indian River County).

In United States v. Marcello, 423 F.2d 993 (5th Cir. 1970), it was recognized that the trial court has the authority to vacate an

order granting a defendant's request for change of venue particularly noting that a defendant's withdrawal of a waiver must be granted unless there is a "strong justification" for not doing so. 423 F. 2d at 1005-1006 (emphasis added).[1]

Appellee cites to State v. Gary, 609 So. 2d 1291 (Fla. 1992) to claim that Appellant had no right to withdraw his wavier of the constitutional right to be tried in the county where the crime occurred. However, Gary is inapposite to this case. Gary is not a case which deals with a defendant withdrawing the waiver of the constitutional right to be tried in the county where the crime occurred. The defendant did not seek to withdraw his waiver in Gary. *Instead, Gary involved a situation where one trial judge sua sponte changed another trial judge's venue order without any request of the parties, thus jeopardizing the rights of the parties:*

> ... the interests of justice require a rule designed to inhibit trial courts from engaging in a "ping-pong game" by transferring a case back and forth, thereby jeopardizing the rights of the parties and undermining public confidence in the judicial function.

609 So. 2d at 1294 (emphasis added). In Gary, it was emphasized that the action taken by the successor judge was not based on any grounds for facts independent of those that the prior judge had considered. There was merely a different conclusion of law just as

[1] In Marcello, there was no abuse of discretion in refusing to rescind the venue order where the defendant did not seek to withdraw his waiver.

an appellate court might have and the successor judge was acting as an appellate court:

> Chief Judge Gary's order was inappropriate because it amounted to appellate review of the legality of Judge Spencer's Supplemental Order. Chief Judge Gary made no independent evidentiary finding, after hearing, that Lozano could not get a fair trial in Leon County. Rather, he reviewed Judge Spencer's Supplemental Order even though chief Judge Gary had no appellate jurisdiction in this matter and no appeal had been taken. Under the circumstances presented here, it would have been up to an appellate court upon proper review to determine if the Supplemental Order was issued without legal authority.

609 So. 2d at 1294. The decision in Gary was a product of its circumstances, trial judges acting as appellate courts, and did not involve the withdrawal of a waiver of a constitutional right.[2] This Court in Gary even noted that future venue motions could be entertained by the successor judge in that case,[3] but obviously had to be based on more than a regurgitation of the same information. Justice McDonald's concurring opinion made it particularly clear

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[2] In fact, the defendant in that case did not want the trial to occur in the county where the crime occurred.

[3] Specifically, this Court wrote:

> Hence, we issue the write and quash Chief Judge Gary's order. Pursuant to the Supplemental Order entered by Judge Spencer on May 6, this cause is remanded for further proceedings in the Second Judicial Circuit. The trial judge is requested to expedite all proceedings including any further motions for change of venue so that the cause will be concluded in a timely fashion.
>
> It is so ordered.

609 So. 2d at 1294.

that the Court was condemning one trial court's overruling the order of another trial court on a legal basis as opposed to the situation where there was an independent consideration regarding venue which would have authorized another change in venue:

> I agree that the order of Judge Gary was erroneous because one circuit judge cannot overrule the order of another circuit judge. Had he independently considered and found that any of the grounds for change of venue exist in Leon County that existed in Dade County, an issue that has not been determined, under the provision of section 47.131, Florida Statutes (1991) he could have transferred venue out of Leon County. Judge Spencer transferred venue from Dade County upon the finding that a jury would, correctly or incorrectly, convict the defendant out of fear that an acquittal might result in riots. From may perception of the race relations that exist in Leon County, it is likely the same finding could be made here. At the very least a hearing on this factor should be conducted before an irrevocable trial site is determine.
>
> SHAW, J., concurs.

609 So. 2d at 1294-95.[4] In the instant case the situation and concerns in Gary simply are not present. Appellant never asked the trial court to act as an appellate court and to review a venue order. Appellant asked to withdraw the waiver of a constitutional

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[4] This is consistent with the general line of cases that a successor judges are not prohibited from entertaining motions on non-final orders (see Akins v. State, 694 So. 2d 847 (Fla. 4th DCA 1997); Haliburton v. Singletary, 691 So. 2d 466 (Fla. 1997); Bell v. State, 650 So. 2d 1032, 1034 (Fla. 5th DCA 1995) (upon granting a new proceeding the trial judge has the authority to make rulings "which were inapposite to the prior rulings"), but makes it clear that he cannot merely review the legality of the prior judge's rulings.

right and the issue should be treated as such.[5] It should be noted that resentencing is a wholly new proceeding and thus the trial court has authority to make decisions regarding this case. More importantly, unlike in Gary, the situation Appellant presented to the trial court was completely independent of anything that occurred before. Appellant was seeking to withdraw the waiver which he had not done before. In fact, initially when the subject was brought up before Judge Walsh, Appellant indicated that he approved of Indian River County as the venue T41. As a result, the trial court made a finding, in large part based on Appellant's position, that venue would be in Indian River County, but also found that a motion to withdraw the waiver of venue would be entertained if another motion was made after counsel talked to Appellant:

> THE COURT: That was your initial motion and that's what the position is. If there's any more request of inquiry, I'll be happy to do it. That's straight enough. Now, if something happens in the future, first I'm going to make a finding pursuant to the memorandum and the discussions and Mr. Kearse's position that in fact the site for the resentencing proceedings will be Indian River County. Now, we may be able to do some of the preliminary matters here in St. Lucie County just as a convenience to everybody, and we'll discuss that in a second. But from a practical standpoint, we will do it in Indian River County unless, Mr. Udell, you make another motion after talking with your client and seeing where it goes. Okay.

T41-42 (emphasis added). Subsequent to that hearing, Appellant wanted to withdraw his waiver based on a recent acquittal in St.

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[5] Which is exactly what the trial court did in ruling on Appellant's attempted withdrawal T121-122.

Lucie County T83. Obviously, Appellant felt he could receive a fair trial in St. Lucie County as evidenced by the acquittal.[6]

Appellant's decision to withdraw the waiver and his acquittal in St. Lucie County were new considerations and it cannot be said that this case is a situation where one trial court is sitting as an appellate court reviewing another trial judge as was done in Gary. As this Court noted, Gary was a unique case limited to "the circumstances presented" in that case. It is unlike the instant case and involved two judges playing "ping-pong" with a case. Gary did not involve the situation of a defendant legitimately seeking to withdraw the waiver of his right to be tried in the county where the offense occurred.

Appellee's claim that Appellant cannot withdraw his waiver of a constitutional right is contradicted by law and logic. As explained by this Court in Pangburn v. State, 661 So. 2d 1182, 1189 (Fla. 1995), a trial court abuses its discretion if it denies a defendant's withdrawal of a waiver of a constitutional right unless it is shown that the withdrawal was not made in good faith or would cause some harm to the public. See also Floyd v. State, 90 So. 2d 105, 106, 107 (Fla. 1956) (error to prohibit withdrawal of waiver where it was "not shown that justice would have been delayed or impeded ..."); Cochran v. State, 383 So. 2d 968, 969 (Fla. 3d DCA 1980) (withdrawal of waiver 2 months before trial did not indicate

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[6] Also, as noted in page 27 of Appellant's Initial Brief, there would be disadvantages to Appellant by trying the case in Indian River County as opposed to St. Lucie County where the crime occurred.

bad faith). This Court has emphasized that there is "doubtful validity" of conducting a trial at a venue other than the place where the crime occurred with out the consent of the defendant. Stone v. State, 378 So. 2d 765, 768 (Fla. 1980). As explained in Appellant's Initial Brief at pages 25-28, Appellant's withdrawal of his waiver some 5 months prior to trial can not be deemed to have been made in bad faith or that there would be any harm to the public.[7]

Appellee claims that it was appropriate for the trial court to deny Appellant's withdrawal because he allegedly could not receive a fair trial in St. Lucie County. However, the evidence is totally contrary to such a claim. There had been a considerable lapse of time between the offense and the new penalty phase (6 years) to ameliorate any concerns. See e.g. Patten v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (passage of time between first and second trial is highly relevant); Willie v. Maggio, 737 F.2d 1372, 1387 (5th Cir. 1984) (passage of 2 years between murder

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[7] There would be no delay or inconvenience in keeping the new penalty phase in St. Lucie County. All proceedings prior to the penalty phase were in St. Lucie County. All case participants were from St. Lucie County. Having the penalty phase kept in St. Lucie County certainly would be more convenient and cause less of a disturbance than moving it away from St. Lucie County. In addition, there was a significant passage of time since the first trial. The impact of the passage of time is shown by the subsequent acquittal in St. Lucie County. This also shows that Appellant's withdrawal was made in good faith. Also, he believed that the state would have an unfair advantage in Indian River County where that electorate had recently elected the prosecutor as their judge. It cannot be said that Appellant was acting in bad faith in withdrawing his waiver.

and Willie's second penalty hearing dissipated unfair prejudice). In addition, subsequent to the initial sentencing in this case, Appellant was totally acquitted of another charge in St. Lucie County and thus there was affirmative evidence that he would be treated fairly in St. Lucie County T83. Finally, where the defendant challenges a venue other than where the crime occurred due to the state's claim that an impartial jury cannot be seated, an actual attempt to seat the jury in the county where the crime occurred must first be tried to show such harm. Beckwith v. State, 386 So. 2d 836, 839 (Fla. 1st DCA 1980); Stone v. State, 378 So. 2d 765, 768 (Fla. 1980). "The state cannot be damaged in any way by a persevering attempt to empanel a jury, and the attempt may be successful...." Id. Thus, Appellee's claim is without merit. Moreover, as early as the June 27, 1996, hearing, the trial court indicated that he could not see why Appellant could not receive a fair trial in St. Lucie County T93.

Appellee concedes that Simpson v. State, 474 So. 2d 384 (Fla. 4th DCA 1985) and Gore v. State, 706 So. 2d 1328 (Fla. 1997), as explained at pages 28-29 of Appellant's Initial Brief, are cases where after venue changed for the original trial -- on resentencing venue was changed back to the county where the crime occurred. Appellee claims that these are of no importance. However, these cases show that venue can actually be changed upon resentencing where the crime occurred and that a fair resentencing after a lapse of time can be achieved.

B. Resentencing Proceeds De Novo

Appellee never does address Appellant's de novo argument about the new sentencing on pages 28-29 of the Initial Brief. Resentencing is a '"completely new proceeding," and the trial court is under no obligation to notice the same findings' as were made at the first trial. Phillips v. State, 705 So. 2d 1320, 1322 (Fla. 1979); Teffeteller v. State, 495 So. 2d 355, 358 (Fla. 1986) ("Resentencing should proceed de novo on all issues").

Finally, Appellee concedes that the sentencing and adjudication prior to the appeal actually took place in St. Lucie County. Appellee notes that this was improper, but since the actual sentencing occurred in St. Lucie County, the venue actually ended up in St. Lucie County. Appellant relies on his Initial Brief for further argument.

POINT II

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO A MOTION TO COMPLY WITH A MENTAL HEALTH EXAMINATION WHICH FAILED TO COMPLY WITH RULE 3.202 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

Appellee argues that the state's notice was filed within the effective date of the amended rule provision and thus the state had timely filed its notice. Even though the state filed its notice within 45 days of the effective date of the amendment, this in no way means that the original or amended rule was complied with. To indicate so, is a misrepresentation of the rule.

The state's notice was clearly untimely under the amended rule. The amended rule still requires that the notice be filed a certain period after arraignment -- 45 days. The state did not

file the notice within that time period. Even if the date of this Court's mandate or the effective date of the initial rule (January 1, 1996) is used as the base date, the notice was still not filed within the required time period. While the amendment to the rule enlarges the amount of time from 10 to 45 days for filing the notice, it does not change the base date from which the notice must be filed. At best, the amendment serves to allow the notice to be filed within 45 days of January 1, 1996 -- which the state did not do.[8] Furthermore, the time period cannot be enlarged after the time for filing the notice expired. Even if one could enlarge the time for filing after the time for filing expired, it would only be enlarged to 45 days from January 1, 1996, and nothing in the rule indicates that the time period was to completely start over. The state's notice filed in June of 1996 was clearly untimely under any legitimate calculation.

Because the triggering event for a compelled mental evaluation never occurred -- the timely filing of a notice of intent to seek the death penalty -- it was error to grant the state's motion to compel a mental health examination over Appellant's objection. This cause must be remanded for a new resentencing. Appellant relies on his Initial Brief for further argument on this point.

POINT III

[8] Appellee's interpretation is akin to having a hypothetical rule allowing 10 days for filing a brief when the brief is due on January 1. A May 2 amendment to the rule to allow 45 days for filing a brief certainly would not make a June filing of the brief timely. The brief would be due on January 10. Even using the amendment, the brief would be due on February 14 (45 days later).

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CONTINUANCE.

Appellee first claims that due to the amount of time to get Appellant tested and getting experts to review the test, the "need for a continuance was of his [Appellant's] own making and did not warrant a continuance" Appellee's Brief at 19. First, this claim is factually wrong. Defense counsel explained, and this explanation was undisputed, that testing was delayed due to problems unrelated to defense efforts:

> MR. UDELL: ... We're seeking a continuance because they have only recently listed their witnesses. We're ready. In the absence of these witnesses who were just listed, we're ready. Now I'll be real surprised if you ask Mr. Mirman, and he knows whether I've delayed these tests being done, I think he'll be the first to tell you Mr. Udell's run up and down St. Lucie County two dozen times in the last month getting orders to transport. These SPECT scans, the PET scans, the MRI's just don't get done magically when you've got an inmate. Especially one under these circumstances. We have tried to get this done quicker than we did. It wasn't our fault. The last test got canceled because it was set a month ago. Literally Billy -- literally Billy was in the car on his way down to have the test in Miami when we get a call from Miami saying that the barium or whatever it is that they inject him with is in Tampa and it's raining and the plane can't take off. So we literally had to get on the phone to the sheriff's office and say, turn around. We haven't delayed this. We have done everything we could to get these tests done in a timely fashion and, in fact, they're all done. I don't doubt that they have been prejudiced by the fact that, well, they couldn't ask Lipman what's your opinion because he hasn't seen some of the test results. It sounds like they're asking for a continuance, too....

T201 (emphasis added). Appellant did not need a continuance due to a lack of diligence on his part. Instead, the real issue here is whether the defense has a reasonable opportunity to investigate.

The state witness, Dr. Martell, would not begin to examine Appellant until December 6, 1996 R538-39. The penalty phase began on December 9, 1996. The law is clear that it is an abuse of discretion to deny a short and reasonable continuance due to the opposing party's recent disclosure of a witness. Smith v. State, 525 So. 2d 477 (Fla. 1st DCA 1988); Brown v. State, 426 So. 2d 76 (Fla. 1st DCA 1983) (abuse of discretion to deny continuance where defense not informed of hypnosis session until 3 days before trial). Under the reasoning of Smith and Brown, the trial court abused its discretion in denying a continuance in this case. Appellee does not challenge or dispute the reasoning of Smith and Brown.

In this case, the trial court did not deny the continuance on the basis that Appellant did anything wrong. Moreover, Rule 3.202 does not call for the sanction of a denial of a continuance. Nor should it where someone's life is on the line. Rather, the question is whether there was a full opportunity to investigate and depose. The trial court recognized that normally investigation by the defense was required but denied the continuance solely because Rule 3.202 contemplated that things be done rapidly without preparation and denied the continuance T212-13. There is absolutely nothing in Rule 3.202 that requires the penalty phase to begin a certain time period after the compelled mental health examination. Obviously, the penalty phase must begin a reasonable time after the examination, but the term "reasonable" must include

sufficient time to investigate. Smith, supra; Brown, supra. Such time was not provided for in this case. Id.

Appellee claims that the trial court did not abuse its discretion based on the speculation that the state may lose its lead prosecutor and that holiday plans might be infringed upon. However, the trial court did not consider these allegations in exercising its discretion. Rather, the trial court's discretion was solely based on the mistaken belief that Rule 3.202 automatically prohibited a continuance.[9] Appellant relies on his Initial Brief for further argument on this point.

POINT IV

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

Appellee claims that Appellant was never emotionally and mentally handicapped but his problems only really occurred because he never applied himself in school or life.[10] Appellee's position,

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[9] In addition, there was no actual showing that a short, brief continuance would have interfered with the holiday plan, etc. Presumably, a few days continuance was all that was needed. It was only the trial court's ruling that there be no continuances after the examination that prevented the continuance.

[10] Specifically, in its brief, Appellee rejects the years of evaluations and testing by a number of experts in favor of an hour session by Dr. Martell [whose conclusions conflicted with all the other experts in the case]:

representing the State of Florida, is simply shameful. Year after year the State of Florida has treated and classified Appellant as having severe emotional and mental problems. Pages 4-13 of the Initial Brief detail how the State of Florida tested and evaluated Appellant for the majority of his life and how the state placed him in programs for severely emotionally and mentally handicapped children. Now the same State of Florida shamefully pretends that Appellant has been normal all his life and asserts before this Court a myth that he has no emotional and mental handicaps or that they are of no significance. It is simply unacceptable for the state to disavow its agencies' earlier positions and make such a claim.[11] Such a position is also contrary to the trial court's

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> "Kearse presented evidence through school teachers and administrators, and through Pamela Baker, a license mental health counselor, that Kearse had a difficult time in school and was learning disabled and severely emotionally handicapped. (T XXIII 1757-60, 1764-66, 1777-86; XXV 2033-40). Dr. Martell, however, believed that Kearse made a choice not to apply himself in school because he did not want to be there. (T XXVII 2386; XXVIII 2395)."

Appellee's Answer Brief at 32. Appellee fails to acknowledge that Dr. Martell conceded that his testing was very limited and Dr. Petrilla did much more extensive testing T2377. Also, Dr. Martell based many of his conclusions on faulty information. For example, Dr. Martell based much of his opinion on Appellant's birth weight being normal and walking and talking at an early age T2374. However, the relatives who raised Appellant indicated that he was small and developed much later than normal kids T1983,1984.

[11] Although the earlier findings were made by other state agencies -- they are still part of the same State of Florida.

findings of mitigators.[12] In pages 38-34 or its brief, Appellee also takes issue with the trial court's finding of mitigators 7-39 as listed in the defense memorandum. The basis of the disagreement is that there was allegedly possible conflicting evidence. However, as explained by Appellant's Initial Brief, the evidence was not materially conflicting and the trial court found this mitigation and this mitigation was supported by evidence.

Appellee's main claim is that death is proportionate in this case because the facts are more comparable to Burns v. State, 699 So. 2d 646 (Fla. 1997); Armstrong v. State, 642 So. 2d 730 (Fla. 1994); and Reaves v. State, 639 So. 2d 1 (Fla. 1994) than to cases such as Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) and Livingston v. State, 565 So. 2d 1288 (Fla. 1988). Appellee totally misses the key distinction between the two sets of cases. Burns, etc., are cases where a cold blood heartless killer murders an officer while he is in the midst of committing another crime versus a panic situation by an individual with mental or emotional problems. The present case can be fairly characterized as an 18 year old who has been severely emotionally handicapped who panics and struggles for a gun with an officer during a routine traffic

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[12] The trial court found such mitigation as -- age (18 years, 3 months) and (from 6-39 of the list of mitigators proposed by Appellant) low IQ, impulsive, and unable to reason abstractly; impulsive person with memory problems and impaired social judgment; mildly retarded and functioned at a third or fourth grade level; the defendant was severely emotionally handicapped; improper upbringing; raised in a dysfunctional family; childhood trauma; defendant subjected to physical and sexual abuse, etc.

stop rather than a cold blooded heartless killer who murders an officer in order to cover up some other serious criminal activity.

The key to Burns v. State, 699 So. 2d 646 (Fla. 1997), is that it involved the murder of an officer while Burns was "engaged in trafficking in cocaine" thus there were unique circumstances giving the law enforcement aggravator great weight. Also, Burns had only two mitigators (age 42 and no significant criminal history) but these were almost worth nothing when one considers that in the past Burns sold crack cocaine and was guilty of a number of gambling charges. 699 So. 2d at 650. Clearly, Burns' murder of an officer while engaged in cocaine trafficking is a different category of case than the present one.

The key to Armstrong v. State, 642 So. 2d 730 (Fla. 1994), is that the murder of the officer occurred while the defendant was engaged in a robbery of a fast food store and also had the prior violent felony aggravator. Armstrong and an accomplice carefully planned the robbery and brought weapons to the robbery. These facts are far different than the present case where Appellant panicked and struggled for the officer's gun, but did not come to the routine traffic stop armed and did not have a prior violent felony aggravator.

The key to Reaves v. State, 639 So. 2d 1 (Fla. 1994), is that Reaves was found with a gun at a 911 call for a convenience store. Reaves murdered the officer. Reaves also had the prior violent felony aggravator. Reaves had no mitigation and his actions were those of a heartless cold blooded killer. Burns, Armstrong, and

Reaves all involved the murder of an officer during the commission of other serious crimes by individuals who had a bad criminal past which all led to the conclusion that they were cold blooded heartless killers for which the death penalty is reserved. Whereas, in the present case, there was a routine traffic stop during which a severely emotionally handicapped 18 year old panicked and killed an officer. This situation is distinguishable and not legitimately comparable to Burns, Armstrong, and Reaves.

This case is more comparable to Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) and Livingston v. State, 565 So. 2d 1288 (Fla. 1988). As noted above, this case and Fitzpatrick and Livingston involve emotionally handicapped individuals rather than the cold blooded heartless killers in Burns, Armstrong, and Reaves. While Appellant may not have the same identical mitigation that was present in Fitzpatrick and Livingston, he certainly has significant mitigation (see pages 41-44 of the Initial Brief) and the actual crime is much less aggravated than in Fitzpatrick (5 aggravators) or Livingston (2 aggravators). Appellee does not address Appellant's analysis of these cases at pages 44-45 of the Initial Brief. Instead, Appellee merely points out that the facts of these cases are not identical. Well, no two cases can be identical. But, the important thing to remember is that these cases show killing by an individual who has emotional problems and who has panicked versus the cold blooded heartless killer as shown in the other cases.

Appellee also does not address the fact that for all practical purposes that there was only one real aggravating circumstance in this case as explained at pages 40-41 of Appellant's Initial Brief. The only aggravation in this case is that Appellant panicked and grabbed an officer's gun and shot him while the officer was trying to arrest him. All the aggravation relates to this one fact. Nor can it be legitimately disputed that there was a lifetime of mitigation leading up to this one single incident. Under the totality of the circumstances, it cannot be said that this is one of the most aggravated and least mitigated cases for which the death penalty is reserved. It is more akin to the cases where but one practical aggravating circumstance exists. Obviously, where only one aggravating circumstance exists death will be disproportionate unless there is almost no mitigation. Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991). Death is not proportionate under the circumstances of this case. Appellant relies on his Initial Brief for further argument on this point.

POINT V

THE TRIAL COURT ERRED IN FAILING TO EXPRESSLY EVALUATE THE MITIGATION IN ITS SENTENCING ORDER.

Appellee claims that the trial court's summary reference to mitigators 6-39 was sufficient under Campbell v. State, 571 So. 2d 415 (Fla. 1990), and the trial court was merely categorizing the mitigation. However, Campbell does not authorize a summary reference to mitigation -- especially by stating "Items 6 through

39" as was done in this case. Moreover, the trial court did not categorize the mitigation as Appellee claims. The trial court merely stated that items 6-39 related to Appellant's difficult childhood and his psychological and emotional condition because of it. Contrary to Appellee's claim, in Hudson v. State, 708 So. 2d 256 (Fla. 1998) and Jackson v. State, 704 So. 2d 500 (Fla. 1997), this Court condemned a more detailed listing of mitigating circumstances. As explained in Jackson: "To ensure meaningful review in capital cases, trial courts must provide this Court with a thoughtful and comprehensive analysis of the mitigating evidence in the record." 704 So. 2d at 507. Stating that "items 6 through 39" are of some weight does not meet this requirement and was even less detailed than in Hudson and Jackson. These 34 mitigating circumstances were more than Appellant's difficult childhood and included, but were not limited to, Appellant's low IQ and impulsiveness, mildly retarded and functioned at a third or fourth graded level, severely emotionally handicapped, malnourished and living on the streets and subject to abuse. It was error not to address this mitigation in the context of this case and merely summarily clump it together as "items 6 through 39." Such treatment of mitigation certainly does not constitute a thoughtful and comprehensive analysis of the nature and weight of mitigation so as to ensure a meaningful review by this Court.

Finally, in this point, Appellee does not challenge Appellant's argument on page 49 of Appellant's Initial brief that under Jackson, supra, the trial court, after rejecting the

statutory mental mitigation in its "order should explain why the evidence offered by the experts does not amount to nonstatutory mitigation." It is undisputed that the trial court never made the required explanation. Resentencing is required.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO EVALUATE THE NONSTATUTORY MITIGATING CIRCUMSTANCE OF EMOTIONAL OR MENTAL DISTURBANCE.

Although the trial court found that the statutory mental mitigators were not extreme or substantial, Appellee claims that the trial court's findings that Appellant had mental and emotional problems constituted a finding that he was under the influence of a mental or emotional disturbance at the time of the killing and he had an impaired capacity to appreciate the criminality of his conduct. While the deduction that Appellant was under the influence of a mental or emotional disturbance during the killing and he had an impaired capacity to appreciate the criminality of his conduct is totally logical and shown by the evidence in this case -- the trial court did not make this finding clear in his order pursuant to Jackson v. State, 704 So. 2d 500, 507 (Fla. 1997). Thus, a resentencing is required.

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE PROSECUTOR.

Appellee claims that any prejudice to Appellant from having a recently elected judge from Indian River County prosecute the penalty phase in Indian River County could have easily been

remedied by questioning "the venire about Mr. Morgan's recent election to the bench to determine whether any of the jurors had voted for him or would otherwise be biased or partial because of his election." Appellee's brief at 49. Appellee's solution is not feasible. It is outrageous to claim that jurors could be asked specifically how they voted in an election. Ballot boxes have curtains for a reason. How one casts his vote is supposed to be secret. One should not be forced to reveal his secret ballot because he is performing his civic duty of jury service.

More importantly, how does one deal with the fact that jurors just recently elected Mr. Morgan as their judge. One cannot tell a juror that Mr. Morgan's position as a judge gives him no special credence. Judges necessarily must be given special credence for the jury system to work. Jurors must take what a judge says as gospel and follow it without question. If they do not, the jury system would not function properly. Even if the jury is informed that they are not to give Mr. Morgan any extra credence due to his being an elected judge, they subconsciously cannot help but give someone who has been placed in the elevated position of a judge more credence. After all, they are told that the only words they are required to follow come from a judge. A judge instinctively has more credence to a juror. Also, realistically what good would such questioning do (other than to highlight the extra importance of Mr. Morgan)? It does no good for Appellant to use peremptory challenges. To win the election, Mr. Morgan received over 50% of the votes. No one knows for sure how many of those voters would be

on the venire. However, it is obvious that Appellant would probably have to use all of his peremptory challenges due to Morgan's election -- when Appellant should not have been placed in the position of having to use any of his challenges due to Morgan having been elected a judge in Indian River County. If these jurors could have been challenged for cause due to the election, a whole new problem occurs. If there is a possibility of excusing over 50% of the venire due to the way they voted, then the jury selection process would be very long and drawn out (if completed at all).[13] It would be improper and impractical to ask jurors about the election of Judge Morgan in their county.

Appellee also claims that the appearance of impropriety, no matter how great, will not be sufficient to disqualify a judge. However, this Court has directly disagreed with Appellee's position and has made it clear that there are situations where an appearance of impropriety may demand disqualification:

> Bogle argues that, under these circumstances, the trial judge erred in allowed the state attorney's office of the Thirteenth Judicial Circuit to prosecute him at the second penalty phase proceeding.... We have stated that the <u>appearance of impropriety created by certain situations may demand disqualification</u>, we have evaluated such situations on a case-by-case basis.

<u>Bogle v. State</u>, 655 So. 2d 1103, 1105 (Fla. 1995) (emphasis added). The question is whether the appearance of impropriety in this case is of the nature that disqualification is required. Appellant submits that under the unique circumstances of this case the

[13] It seems at some point that Mr. Morgan would start challenging jurors who voted against him.

disqualification of Mr. Morgan was required. The unique circumstances in case was that, due to the prosecutor's insistence on having venue at a place other than where the crime occurred, Judge Morgan was arguing to his constituents that Appellant be sentenced to death.[14] In being a newly elected judge in the community, Judge Morgan carried a certain status in the eyes of the community. A jury, viewing judges as neutral, would not believe that their newly elected judge would be asking them to sentence a person to death unless it was the right thing to do. After all, a jury's recommendation is deemed to be the conscience of the community and their judge, one of the elected leaders of the community, was advocating death.

POINT VIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR MADE IMPROPER AND INFLAMMATORY REMARKS WHICH RENDERED THE PENALTY PHASE UNFAIR AND VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION.

As Appellee has acknowledged, this issue is preserved pursuant to Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994) and James v. State, 695 So. 2d 1229 (Fla. 1997) ("As we explained in Spencer,

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[14] It is not a situation of a retired judge practicing law. Nor does it involve the ordinary practice of law by a newly elected judge who is in the process of closing down his practice. Instead, it involves the unique situation of Judge Morgan, two months after his election, deciding to take on the responsibility of prosecuting the penalty phase before the very people who had voted him a judge. This was a deliberate calculation by the prosecutor. If the case had been tried in the venue where the crime occurred, Judge Morgan would not have been arguing to his constituents.

... defense counsel may conclude that a curative instruction will not cure the error and choose not to request one”).

Appellee also acknowledges that the comment was improper, but claims that it did not warrant a mistrial because it was a single comment. However, Appellee has overlooked the fact that the prosecutor emphasized that the bottom line of the case was that Appellant should be shown the same mercy that he showed the victim. In other words, he was attempting to persuade the jury to reach its decision based on an improper matter. Thus, this situation is unlike a mere single comment.

POINT IX

REPEATEDLY INFORMING THE JURY OF THE FACT THAT AN APPELLATE COURT HAD AFFIRMED THE CONVICTION BUT HAD SENT THE CASE BACK FOR RECOMMENDATION OF A DEATH SENTENCE DEPRIVED APPELLANT OF A FAIR AND RELIABLE SENTENCING.

Appellee points out that there was no objection to the prosecutor telling the jury that the Supreme Court had directed there should “be a proceeding to recommend death” upon remand of the case. It is correct to say there was no objection, but as pointed out in the Initial Brief the error was fundamental and may be reviewed without objection. See Piat v. State, 112 So. 2d 380 (Fla. 1959) (comment about defense having right to appeal constitutes fundamental error).

Appellee also claims that informing the jury about the Supreme Court remanded for “a proceeding to recommend death” was cured by jury instructions to weigh aggravation and mitigation. This has no

merit because the jury would reasonably interpret that the Florida Supreme Court had already evaluated the nature of the case (including aggravation and mitigation) and had decided death was appropriate. In fact, the prosecutor made things worse by taking advantage of the repeated instructions about the case being remanded by the Florida Supreme Court to lend credence that they had decided there should "be a proceeding to recommend death." The instructions did not cure the error.

POINT X

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR LEAVE TO INTERVIEW JURORS.

Appellee claims pursuant to the standards set forth in Baptist Hosp. of Miami, Inc. v. Maler, 579 So. 2d 97 (Fla. 1991) and State v. Hamilton, 574 So. 2d 124 (Fla. 1991), Appellant had no right to interview the jurors in this case. However, those cases involve formal judicial inquiries into jury misconduct. Of course, there must be strong evidence obtained prior to receiving a formal judicial inquiry. The instant case does not involve a request for a formal judicial inquiry. Instead, this case involves trial counsel's request the he be allowed to interview the jurors.[15]

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[15] Once defense counsel interviews the jurors he may be able to obtain the necessary information required in order to meet the standards set forth in Maler and Hamilton to receive a formal judicial inquiry. The point is that defense counsel must have the opportunity to initially gather information before he seeks a full blown, formal judicial inquiry.

There are no criminal rules regarding trial counsel's interviewing of jurors. Roland v. State, 584 So. 2d 68, 69 (Fla. 1st DCA 1991). While the Florida Rules of Civil Procedure require counsel to file a specific motion, there is no comparable rule of criminal procedure. Roland, supra, at 69. There only has to be some form of notice to the trial court and opposing counsel. Rule of Professional Conduct 4-3.5(d)(4).

In this case the state had notice and an opportunity to object if it believed that defense counsel's interview would be in bad faith or to harass jurors. No such claim was ever made. It was undisputed that defense counsel was acting in good faith and there was a basis for the interview. The state's only real complaint has been that Appellant did not meet the standards for an interview pursuant to Maler and Hamilton. As explained above, those cases involve formal judicial inquiries and are not relevant to the present issue. Where defense counsel is seeking in good faith to gather information to demonstrate prejudice, it is error to prevent him from interviewing jurors. Lamar v. State, 583 So. 2d 771, 773 (Fla. 4th DCA 1991); *Diaz v. State, 435 So. 2d 911, 913 (Fla. 4th DCA 1983).*

POINT XI

THE TRIAL COURT ERRED IN CONDUCTING PRETRIAL CONFERENCES IN APPELLANT'S ABSENCE.

Appellee concedes that it was error to hold the January 30,1996, hearing in Appellant's absence because there was no written waiver until February 6, 1996. However, Appellee claims

that this error was harmless. Appellee acknowledges that at the January 30, 1996, hearing the state agreed that venue would be in St. Lucie County (T18) and that if Appellant had been personally present both parties would have been in agreement that the penalty phase would occur in St. Lucie County (See T18). Obviously, Appellant's absence from this hearing made a difference. However, Appellee claims that the error was harmless because the trial court could reject the parties agreement as to venue. Such a claim is specious and contrary to the record. The trial court indicated that if the parties were in agreement that the penalty phase would occur in St. Lucie County T84. Thus, Appellant's absence from the January 30, 1996, hearing cannot be deemed harmless.

Appellee also claims that in written waiver in February of 1996 waived Appellant's right to be present at the June 7, 1996, hearing. However, Appellee ignores that for the waiver to be effective there must be an inquiry demonstrating that the waiver of presence is knowing, intelligent and voluntary. See Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995) ("court must certify through proper inquiry"); Turner v. State, 530 So. 2d 45, 49 (Fla. 1987) (defendant must be made aware of rights he was waiving to knowingly and intelligently waive). Contrary to Appellee's representations, trial counsel's representations will not substitute for proper waiver inquiry of the defendant.

POINT XII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO THE GRANTING OF THE STATE'S CHALLENGE FOR CAUSE AGAINST A PROSPECTIVE JUROR.

As explained in Appellant's Initial Brief, this issue is controlled by this Court's recent decision in Farina v. State, 680 So. 2d 392, 397-98 (Fla. 1996) which explained that a juror will not be deemed unqualified because she voices conscientious or religious scruples against the infliction of the death penalty unless there is some unyielding conviction or rigidity regarding the death penalty. Appellee completely ignores this Court's decision in Farina. Nor does Appellee challenge the fact that the prospective juror Jeremy explained that *"I'm a law abiding citizen, I know I could follow the law" and later indicated that the evidence could change her mind* about not recommending the death penalty T387. Nor does Appellee challenge the fact that Jeremy did not have an unyielding conviction regarding the death penalty. Instead, the challenge of Jeremy was argued to be proper due to her conscientious scruples against the death penalty. Farina has been ignored. Clearly, under this Court's decision in Farina, it was error to exclude Jeremy for cause.

POINT XIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CAUSE CHALLENGES OF PROSPECTIVE JURORS BARKER AND FOXWELL.

Appellee claims that Appellant did not properly challenge juror Barker. Such a claim is without merit. Appellee misrepresents this issue by claiming that in the brief Appellant never raised the issue of Barker wanting an assurance that there would be no possibility of parole. In the Initial Brief, Appellant raised the impartiality of Barker as follows:

> Prospective juror Barker indicated that she would not consider a life sentence unless she could be assured that Appellant would have no possibility of a conjugal visit <u>and there was no possibility of parole</u> ...

Appellant's Initial Brief at 70 (emphasis added).

Also, contrary to Appellee's representations, defense counsel's grounds for excusing Barker were to <u>her statements</u> about assurances regarding release and conjugal visits. Defense counsel wanted to exclude Barker due to "her <u>statements</u> concerning she wants some assurance that Mr. Kearse will never be allowed out of jail" T1099. This <u>statement included</u> conjugal visits where Barker was indicated that she wanted assurance of no release or conjugal visits:

> MS. BARKER: Oh, yes, I think so. I too had a very troubled night last night. I was -- wrestled with myself with a death penalty or life in prison without the hope of parole. <u>I would have to be assured that the perpetrator would not be put into a prison where conjugal visits</u> would be allowed <u>or perhaps the fact that he could get out</u> on a technicality. I am a proponent of the death penalty, I always have been. It isn't anything that I felt likely should happen. I could go both ways. As long as I was assured that there would be <u>no chance of parole</u> at any time, I could be swayed for life in prison.

T883. Thus, Barker was challenged due to requiring assurances regarding no release or conjugal visits. Assuming <u>arguendo</u>, that only the assurance regarding no release was present, it would still be improper not to excuse Barker.

Appellee extensively quotes Barker's answers indicating that she could be fair and impartial in listening to witnesses and evidence to claim that Barker had been rehabilitated. Such a claim

is specious. It does not matter that Barker could listen fairly and impartially to evidence where she could not vote for life unless given the assurance that Appellant would never be released and would never have conjugal visits (assurances she would never receive). Barker was never rehabilitated because she never took back or relinquished her position that she would need the assurances of no release and no conjugal visits before she would vote for life. Because these assurances were not given she would be an automatic vote for death -- no matter how fairly she evaluated other evidence. Under any standard,[16] Barker could not be said to be fair and impartial.

Finally, Appellee claims that the error was harmless because Appellant has not challenged on appeal any of the jurors who actually sat on the jury. Such a claim is specious and directly contrary to Florida law. In Trotter v. State, 576 So. 2d 691 (Fla. 1990), this Court made it clear that reversal is mandated where a cause challenge is denied, peremptory challenges are exhausted and an objectionable juror had to be accepted -- and that an objectionable juror could be 1) a juror that had been challenged for cause; 2) juror attempted to be challenged peremptorily; or 3) a juror objectionable after the challenges had been exhausted:

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[16] The standard used by this Court is well-settled. If there is any reasonable doubt as to a juror's possessing the state of mind which will enable her to render an impartial verdict she should be excused. Singer v. State, 109 So. 2d 7, 22 (Fla. 1959); Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989). Even statements about being fair will not erase such a reasonable doubt when reservations have been expressed. Williams v. State, 638 So. 2d 976 (Fla. 4th DCA 1994).

> Under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted. Pentecost v. State, 545 So. 2d 861, 863 n.1 (Fla. 1989). By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after the peremptory challenges had been exhausted.

Trotter v. State, 576 So. 2d 691, 693 n.1 (Fla. 1990) (e.s.). Contrary to Appellee's representations, four jurors who Appellant had actually sought to challenge for cause -- Walker, Matthews, Aldrich and Grass (T1088,1092,1101) -- served on the jury. Furthermore, Appellant specifically identified Walker and Matthews as objectionable jurors T1105-08. Appellant renewed all motions and objections before the jury was sworn T1111. Thus, the error was not harmless.

POINT XIV

THE COMPELLED MENTAL HEALTH EVALUATION CONSTITUTES A ONE-SIDED RULE OF DISCOVERY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee claims that the issue of Rule 3.202's one-sided discovery requirements, in violation of Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 2211-12, 37 L.Ed.2d 82 (1973), was addressed and disposed of in Dillbeck v. State, 643 S. 2d 1027 (Fla. 1994). Such a claim is specious. The Wardius issue was never present nor discussed in Dillbeck. In addition, the issue was never discussed in Elledge v. State, 706 So. 2d 1340, 1345 (Fla. 1997) and Davis v.

State, 698 So. 2d 1182 (Fla. 1997). In fact, it would have been impossible to deal with this issue in Dillbeck. Dillbeck did not require the defense to disclose the exact nature of all mental mitigation and disclose the names and addresses of all defense mental health experts. It was only until Rule 3.202 was created that these disclosure requirements came into being. Thus, the Wardius violation only occurred when Rule 3.202 was created. Thus, Appellee's claim that Dillbeck resolved the *Wardius issue is simply wrong. In its brief, Appellee fails to offer any argument that Rule 3.202 is not in violation of the Wardius principle. Reversal is required.*

POINT XVIII

THE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION IN EVALUATING AGE AS A MITIGATING CIRCUMSTANCE.

Appellee has misrepresented the nature of this issue. This issue is about the trial court not exercising discretion in evaluating the age mitigator. Instead of discussing this issue, Appellee merely gives its own views of the evidence. Even though Appellee's views of the evidence cannot be substituted for those of the trial court, it has demonstrated the lack of exercise of discretion by the trial court. The trial court made a bare bones conclusion that Appellant was sophisticated. As explained in the Initial Brief at page 88, such a bare bones conclusion does not show any reasoning to support an exercise of discretion especially where Appellant for years functioned at or near a retarded level and was severely emotionally handicapped. The trial court abused

its discretion in this case by failing to link Appellant's lifelong severe emotional and mental handicaps to his age of 18 years. See Mahn v. State, 714 So. 2d 391, 400 (Fla. 1988) (abuse of discretion not to link age to history of emotional problems caused by physical and alcohol abuse).

POINT XIX

THE TRIAL COURT ERRED IN CONSIDERING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN THE COMMISSION OF THE CRIME OF ROBBERY WHERE IT WAS BASED ON THE SAME ASPECT OF THE OFFENSE AS OTHER AGGRAVATING CIRCUMSTANCES.

Appellee claims that this issue is controlled by law of the case. However, the law of the case doctrine does not apply when there is new intervening caselaw. Brunner Enterprises Inc. v. Dept. of Revenue, 452 So. 2d 550 (Fla. 1984). Under the subsequent case of United States v. McCullah, 87 F.3d 1136 (10th Cir. 1996), the same underlying conduct cannot be used to support more than one aggravating circumstance. Appellee does not challenge that reversal is required under the standard set forth in McCullah. Appellee does not contend that McCullah does not control this issue. Reversal is required.

CONCLUSION

For the reasons stated in Point IV, Appellant respectfully requests this Court to vacate his death sentence and remand for imposition of a sentence of life. Based on the remaining Points, Appellant respectfully requests this Court to vacate his sentence of death and to remand for a new sentencing phase.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

____
JEFFREY L. ANDERSON
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 374407
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARA D. BAGGETT, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of October, 1998.

____
Of Counsel