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IN THE SUPREME COURT OF FLORIDA

THEODORE ROBERT BUNDY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal No. 57,772
Capital Case Appeal
Second Judicial Circuit of Florida

FILED

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REPLY BRIEF OF APPELLANT

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A.

THE TRIAL COURT ERRONEOUSLY APPLIED NON-APPLICABLE STANDARDS TO DEFENDANT'S REQUESTED CLOSURE OF CERTAIN PRETRIAL EVIDENTIAL HEARINGS AND THEREFORE ERRED IN DENYING DEFENDANT'S MOTION REQUESTING THAT RELIEF AND PREJUDICING DEFENDANT'S RIGHT TO A FAIR TRIAL.

In Answer Brief, the State attempted to circumvent BUNDY's argument on appropriate standards (Appellant's Brief at 42-50) by constructing a cardhouse of principles drawn from cases involving the right to a change of venue (Appellee's Brief at 11-16). At no point did the State discuss, or even cite a case which discusses, the issue raised by Appellant, BUNDY, in his Initial Brief, i.e. closure of the suppression hearings. Id. The State avoided the issue by assertion that Appellant's discussion of closure standards was irrelevant, but it is the State's assertion based on Nebraska Press Association v. Stewart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), (a prior restraint case rather than closure) which is not relevant. (Appellee's Brief at 14-15).

The facial anomoly is apparent from the factual and legal circumstances of the BUNDY case. First, BUNDY protested the trial court's failure to close the suppression hearings. (Appellant's Brief at 42-50). At no point did the complaint extend to the court's failure to issue injunctions against the publication of prejudicial pretrial publicity. Id.

Secondly, the jurisdictional limitations which supported the restrictive application of prior restraint authorized in Nebraska Press has no relevance to the issue of closure

of pretrial evidentiary hearings. In Nebraska Press, the Supreme Court weighed the criminal defendant's Sixth Amendment right to a fair trial against the public interest in the free operation of the media guaranteed by the First Amendment. The fundamental nature of these competing interests made it incumbent upon the Court to include in its calculus the likelihood that a restraining order, which would necessarily impact on the freedom of the press, would effectively protect the defendant's right to a fair trial. Nebraska Press Association v. Stewart, supra, 427 U.S. 539, 96 S.Ct. 2791, 2806. The threat does not exist in most prior restraint cases because the court may only issue injunctions against members of the press within its jurisdiction. The news media outside the Court's jurisdiction is free to publish or broadcast whatever it chooses. For this reason, the Supreme Court imposed the comparatively strict standard in Nebraska Press.

The threat of prior restraint is absent from situations involving closure of pretrial hearings as in the BUNDY case. The trial court has authority to govern its own proceedings and thus may close hearings and seal portions of the pretrial record absent in abuse of discretion. The limitations in Nebraska Press do not exist relative to closure of pretrial hearings. Therefore, Nebraska Press is inapposite to the BUNDY case.

Nebraska Press involved a restraint on information previously adduced at an open hearing. Nebraska Press Association v. Stewart, supra, 427 U.S. 539, 568, 96 S.Ct. 2791,

2807. The trial court order, therefore, violated the settled principles that no court may proscribe the press from reporting events that transpire in the open courtroom. Id. The BUNDY case involved the trial court's refusal to close pretrial hearings which had not yet taken place. For this reason, also, the Nebraska Press principles do not apply to BUNDY's case.

Nevertheless, the four alternatives in Nebraska Press could not mitigate the prejudice that resulted from the spectacular publicity that the BUNDY hearings generated:

> (1) Change of venue does not guarantee a fair trial when the case achieves great notoriety. Miami Herald Publishing Co. v. Lewis, 383 So.2d 236, 240 (Fla. 4th DCA 1980).
>
> (2) Searching questioning of prospective jurors is not dispositive. Sheppard v. Maxwell, 384 U.S. 333, 351, 86 S.Ct. 1507, 1516, 16 L.Ed.2d 600 (1960); Irwin v. Dowd, 366 U.S. 717, 727-728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751 (1961).
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> (3) The use of instructions that jurors decide the case only upon the evidence presented. In a case as sensational as BUNDY's, jury instructions are but a judicial caveat issued after the release of inflammatory publicity (see R 333) and are at best, a weak safeguard against juror prejudice.
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> (4) Sequestration of the jury, could have had no ameliorating effect in the BUNDY case. The prejudicial publicity occurred before the jury was empaneled and sequestered. (R 333, 1042, 1046, 1069-1070, 1317, 1320).

The hearings on the admissibility of the bite mark testimony, which defense counsel made repeated motions to close until empanelment of the jury (R 2810, 2972, 3357), occurred before the sequestration and empanelment of the jury (R 2930-3357, 3923, 3949-3950, 3971, 5529). Therefore

sequestration of the jury could in no way insure against the access of jurors to prejudicial pretrial publicity.

Finally, it is important to note that the trial court by closing a single hearing from the public, could have avoided the entire situation. It would not have needed to contemplate less drastic alternatives or the "chilling First Amendment interest" (Appellee's Brief at 14-15). As the trial court did not close the hearing, the publicity generated from those hearings compromised BUNDY's trial in a manner which subsequent measures could not remedy.

B.

THE FAILURE OF THE COURT TO CONTROL THE PERVASIVE PREJUDICIAL PUBLICITY DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO BE TRIED IN THE COUNTY WHERE THE OFFENSE WAS COMMITTED.

A criminal defendant has a constitutional right to a fair trial by an impartial jury in the county where the crime was committed. Art. I §16, Fla. Const. (1968); North v. State, 65 So.2d 77 (Fla. 1952); Ward v. State, 328 So.2d 260 (Fla. 1st DCA 1976). Venue is a personal and technical right which may be waived. Singer v. United States, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1960). When, however, the defendant is faced with a Hobson's choice in an outraged community, the reviewing court should carefully scrutinize the record to determine first whether defendant's choice was freely made and second whether the trial court took every reasonable measure within its power to preserve the defendant's right to a fair trial in the county of original venue.

In the BUNDY case, the defense made numerous motions to mitigate the impact of prejudicial pretrial publicity. (Appellant's Brief at 14-15). The court denied all but one* of these motions. (R 457-461, 677-680, 1285). By its refusal to act, the trial court allowed sensational press coverage which compelled a request for change of venue. To maintain the defense action of exercising the only reasonable option available constituted a valid waiver of an explicit constitutional right

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* The media were denied permission to attend the taking of certain depositions (R 452-460).

cannot be validly entertained in view of the acts and omissions of the trial judge by the resulting histrionic treatment of the case by the media. The trial court did not take adequate precautions against prejudicial pretrial coverage. The state's expert witness "held the trial" in the media on the most crucial issue of face in the case: identity (Appellant's Brief at 54). Ultimately, the trial court must be held responsible for the conditions which forced defense counsel to move for a change of venue. As such, BUNDY did not waive his right to be tried in Leon County, Florida, and the effectual denial of this right by the court constituted error.

C.

THE USE OF HYPNOTICALLY REFRESHED EYEWITNESS TESTIMONY VIOLATED DEFENDANT'S RIGHT TO A CONSTITUTIONALLY FAIR TRIAL.

The State has argued that the use of hypnotism to refresh Nita Neary's testimony in BUNDY'S case (1) was consistent with case law of most jurisdictions (Appellee's Brief at 23); (2) affected the weight, not the admissibility of the testimony (*id.*); (3) did not prejudice BUNDY'S right to a fair trial because the prosecution's case did not "rely" on the use of hypnosis (Appellee's Brief at 24-26); and (4) was permissible because it was used for "purely investigative purposes" (Appellee's Brief at 29). Regarding the first two points, the State did not address (as did Appellant's Brief at 57) the *correctness* of its proffered majority rule. One of the most recent decisions on hypnotically refreshed testimony, *People v. Shirley*, 641 P.2d 775, 784-785 (Cal. 1982), analyzed the line of authority upon which the State relied in BUNDY'S case. Justice Mosk wrote:

> [A]n examination of the opinions discloses a significant evolution in the approach of the courts to this issue. In the earlier cases, as in *Harding* [*v. Maryland*, 436 A.2d 302 (Ct. Spec. App. Md. 1968)], the courts engaged in little or no analysis of the issue, and merely reiterated the general proposition that the fact of hypnosis "goes to the weight, not the admissibility" of the evidence. If they discussed the point at all, the courts simply noted that the witness believed he was testifying from his own memory and that his credibility could presumably be tested by ordinary cross-examination. (See *State v. Jorgenson*, 1971 8 Or. App. 1, 492 P.2d 312, 315; *Wyller*

> *v. Fairchild Hiller Corporation*, (9th Cir. 1975) 523 F.2d 1067, 1069-1070; *State v. McQueen*, 1978 292 N.C. 96, 244 S.E. 2d 414, 427; *Clark v. State*, (Fla. App. 1979) 329 So.2d 372, 375.

The lengthy citation accompanying the California Supreme Court's criticism of *Harding* and its progeny is relevant here because it comprises the main body of case law relied upon by the State (Appellee's Brief at 23). It is worthy of note that the foundation of the case favoring admission of hypnotically refreshed testimony consists of opinions which either treat the nature of hypnosis in the most superficial manner or fail to discuss it altogether. Moreover, in its assertion that its putative "majority rule" that the act of hypnotism goes to the weight, not the admissibility of the evidence, the State overlooked existing Florida precedent. Scientific evidence is inadmissible in court until it is recognized and accepted in the scientific community. *Frye v. United States*, 295 F. 1013 (D. C. Cir. 1924); *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968); *Kaminsky v. State*, 63 So.2d 339 (Fla. 1953). In *Rodriguez v. State*, 327 So.2d 903 (Fla. 3d DCA 1976), hypnotically induced evidence was excluded because the practice had not attained the requisite acceptance and recognition in the scientific community.

Jurisdictions which have carefully considered the question of admissibility of hypnotically refreshed testimony have reflected this concern. Ruling such evidence

inadmissible *per se*, the California Supreme Court has held that:

> [I]t is the consensus of informed scientific opinion today that in no case can a person previously hypnotized to improve his recollection reliably determine whether any unverified item of his testimony originates from his own memory or is instead a confusion or confabulation induced by the hypnotic experience. *People v. Shirley, supra,* 641 P. 2d 775, 806; *see, also, Commonwealth v. Nazarovitch,* 436 A.2d 170, 177 (Penn. 1981).

Reaching the same conclusion, the Minnesota Supreme Court held that:

> [T]he fact that a witness' memory results from hypnosis bears on the question of whether her testimony is sufficiently competent, relevant, and more probative than prejudicial, to merit admission at all. *State v. Mack,* 292 N.W. 2d 764, 769; *see also, Commonwealth v. Nazarovitch, supra,* 436 A.2d 170.

The reliability of the hypnotic technique is a *threshold* requirement for admissibility. *Frye v. United States, supra,* 292 F. 1012, *Rodriguez v. State, supra,* 327 So.2d 903; *Coppolino v. State, supra,* 223 So.2d 68; *Kaminsky v. State, supra,* 63 So.2d 339. It is pointless here to reiterate the vagaries of hypnotically refreshed testimony (both in the abstract and in this particular case) (Appellant's Brief at 56-67.) It suffices to note that the authorities cited by both sides on appeal and the uncontradicted testimony of Dr. Kuypers at the pretrial evidentiary hearing (R 6426-6508), failed to demonstrate the acceptance of hypnotism in the scientific community as a truth determinant or memory aid.

The State's "weight, not admissibility" argument was based, too, on grounds other than its scientific merit. In passing, the State urged adoption of the "common sense" approach of *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982) (Appellee's Brief at 28.) *Chapman* provides an interesting variant of the "weight, not admissibility" argument advanced by the State. The Wyoming Supreme Court refused to apply the safeguards* outlined in *State v. Hurd*, 432 A.2d 86 (N.J. 1981), to its own rule regarding introduction of hypnotically refreshed testimony. The court outlined the variables which could enhance the probability of confabula-

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/* Briefly stated, the safeguards adopted in *State v. Hurd*, *supra*, 432 A.2d 86, are as follows:

(1) The psychologist or psychiatrist conducting the session must be experienced in the use of hypnosis;

(2) He must be independent of the prosecution, police, or defense;

(3) Any information about the incident to be recalled under hypnosis which is given to the professional must be recorded;

(4) The hypnotic subject should give a detailed description *before hypnosis* of any facts she remembers concerning the incident;

(5) All contacts between the hypnotist and the subject must be recorded;

(6) Only the hypnotist and the subject should be present during any phase of the hypnotic session.

432 A.2d 96-97

tion and memory distortion. Among these is mentioned the degree of involvement in the hypnotic trance, the difficulty of detecting "role playing" in a hypnotic subject, and the probability of suggestion. The Wyoming Supreme Court reasoned that, since the three factors mentioned above were the crucial determinants of the reliability of hypnotically refreshed testimony, and since the guidelines enunciated in *State v. Hurd, supra,* 432 A.2d at 96-97, did not "make allowance" for these factors, the *Hurd* test was inapplicable to the competence of such testimony. As such, the *Chapman* court would place emphasis on credibility (weight) rather than competence (admissibility.) *Chapman v. State, supra,* 638 P.2d 1280, 1283-1284.

By taking this approach, the *Chapman* court betrayed a fundamental misunderstanding of the *Hurd* rationale. It is almost universally recognized that no way exists to determine whether the suggestion, confabulation, and role playing that *Chapman* deemed so dispositive of reliability have been introduced by hypnosis. *People v. Shirley, supra,* 641 P.2d 775, 782, 794, 806; *State v. Mack, supra,* 292 N.W. 2d 764, 769; *Commonwealth v. Nazarovitch, supra,* 436 A.2d 170, 174, 176; *State v. Hurd, supra,* 432 A.2d 86, 93, 94; Kevin L. Pelanda, "The Probative Value of Testimony from Hypnotically Refreshed Recollection," 14 Akron L. Rev. 609, 620, 621, 624 (1980); Bernard L. Diamond, "Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness," 68 Cal. L. Rev. 313, 333,

337, 340 (1980). The *Hurd* court realized the impossibility of any such determination, and enacted a set of safeguards designed to reduce the probability that confabulation or inappropriate suggestion would occur. The "rigid" *Hurd* test is therefore merely a procedural safeguard *in lieu of* verifiable determination of reliability. Its implementation was intended to liberalize the admission of evidence of doubtful competence by allowing consideration of circumstantial guarantees of reliability. Although the safeguards may be inadequate to guarantee reliability, it is no answer to eliminate the safeguards.

Chapman's dependence on witness demeanor and cross-examination to determine the reliability of hypnotically refreshed testimony is equally specious. Hypnotism removes all doubts and uncertainties regarding any statement made during the hypnotic session. The subject's utter, unshakable conviction in the truth of his statements effectively prevents any meaningful opportunity to cross-examine him. *People v. Shirley, supra,* 641 P.2d 775, 785; *State v. Mack, supra,* 292 N.W. 2d 764, 769; *Commonwealth v. Nazarovitch, supra,* 436 A.2d 170, 176-177; *State v. Hurd, supra,* 432 A.2d 86, 94; Pelanda, *supra,* at 615; Diamond, *supra,* at 336, 339-340, 343; Robert S. Spector and Teree E. Foster, "Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?," 38 Ohio L.J. 567, 593 (1977); Neil J. Dilloff, "The Admissibility of Hypnotically Influenced Testimony,"

4 Ohio Northern U. L. Rev. 1, 9 (1977). Hypnotically refreshed testimony, then, must be excluded on either ground addressed in the authorities cites *supra*. The court may not determine hypnotic competence (hence, its admissibility) because no means exist to determine whether inappropriate suggestion, role playing, or witness confabulation occurred during the hypnosis. The jury may not determine its credibility because no means exist to negate the unassailable conviction hypnosis imbues in the subject of the truth of his statements. Thus, "weight, not admissibility" argument is irrelevant because such testimony can be neither credible nor competent.

Appellee's Brief advanced a number of arguments based on the proposition that the fact of hypnosis was irrelevant to the reliability of Nita Neary's identification of Appellant. In it, the State asserted that Ms. Neary's description of the intruder, given to her roommate long before the hypnosis session or the photographic identification, did not change after hypnosis and that none of the additional details brought out during the session were included in her testimony.

The State's first theory of irrelevance is based on *State v. Freber*, 336 So.2d 426 (Fla. 1978). Under *Freber*, the court may consider the length of time between the crime and the witness's initial identification of the suspect as a factor in determining the reliability of any subsequent identification procedures.

The *Freber* rule would be relevant in cases in which an eyewitness identified a suspect immediately or very shortly after a crime and subsequently reidentified the suspect in court. Such a set of facts did not occur in the BUNDY case. Shortly after the crime, Nita Neary gave a *description*. She made no identification until nearly three months after her brief encounter with the intruder*. *Freber* never discussed the consistency of the witness's description. Rather it dealt with the temporal proximity of an identification to the incident upon which it was based. Because of the in applicability of the *Freber* rule to the case at hand, the State's argument may be characterized, for want of a better term, as a "red herring."

The State further argued that the fact of hypnosis bore no relevance to Ms. Neary's testimony because, since her description did not waver, no confabulation could have occurred (Appellee's Brief at 28.) The argument overlooks the essential fact that Ms. Neary's description of the intruder was of only marginal importance to her testimony. The crucial portion of Neary's testimony did not consist of a recitation of facial characteristics, but of her *identification* of THEODORE BUNDY as the man she saw leaving the Chi Omega house on the morning of 15 January 1978. No showing

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/*The reliability of her identification will be discussed *infra*.

was made (nor could have been made) of consistency (*à la Freber*) of Ms. Neary's identification before and after hypnosis*. No proof exists that Neary's mental image of the intruder did not change during the hypnotic session. In fact, there was substantial evidence that it did.

During the hypnosis session, Ms. Neary, at the command of Dr. Arroyo, produced images of hair, eyebrows, shoes, and facial features (R 6454, 6460, 6462, 6465, 6467-6470, 6492.) Her confabulations were not made irrelevant by her subsequent "repudiation" of them or their nondisclosure at trial. Her production of images did provide almost irrebuttable evidence that confabulation did occur. The transcript of the hypnosis session demonstrated that her mental image of the intruder was altered in several important respects by Dr. Arroyo's suggestions. Therefore, reason exists to exclude Ms. Neary's testimony beyond the fixation of her commitment to the accuracy of her description which, had hypnosis not occurred, might have been adequately tested by cross-examination. The record shows that *distortion* of Ms. Neary's memory occurred. As such, it is immaterial that the State did not "rely" on the additional details produced under hypnosis.

/* Appellee's Brief, at 28, makes reference to Ms. Neary's identification of BUNDY before and after the hypnosis session. Since it is a matter of record that the hypnosis session occurred on 23 January 1978 (R 5934) and the photographic array occurred on 7 April 1978 (R 5946), the Court should not be misled by Appellee's misnomer.

the fact that distortion occurred made Nita Neary's testimony unreliable and, hence, inadmissible.

Appellee's Brief, at 24, also argued that the jury was not unduly influenced by the fact of hypnosis because Dr. Arroyo never testified. Therefore, the State argued, the jury could not have given undue weight to Dr. Arroyo's expert testimony. Appellee's argument misses the point. It is the *process* of hypnosis, not merely the credentials of the person administering it, which conveys the "aura of infallibility". *United States v. Brown*, 557 F.2d 541, 556, (6th Cir. 1977); *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1970.) Experts in the field have asserted that the "great danger in the use of hypnosis is the credibility which laymen commonly associate with the *technique.*" (Emphasis supplied.) Dilloff, *supra*.

The California Supreme Court likewise recognized that the "misleading aura of certainty" associated with hypnosis inheres to the procedures as well as the expert testimony given in support thereof. *People v. Shirley*, *supra*, 645 P.2d 775, 796. When a jury observes the testimony of a witness possessed of an unassailable conviction of the truth of her testimony (the inevitable attendant of hypnotically refreshed testimony*) and reflects that her memory was

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/* *Commonwealth v. Nazarovitch*, *supra*, 436 A.2d 174-176; Pelanda, *supra*, at 621; Diamond, *supra*, at 336; Dilloff, *supra*, at 4; Spector and Foster, *supra*, at 585.

"refreshed" by a process commonly believed* to have mysterious, truth-telling powers, the jurors are likely to accord undue weight to the testimony. Admission of Nita Neary's testimony was made under such circumstances and was prejudicial. The trial court's denial of Appellant's motion to suppress was error.

Finally, the State asserted that the hypnosis session did not taint the identification procedure because it was used for investigative purposes. The State did not, however, explain why the purpose of the hypnotic session had any bearing on the admissibility of subsequent testimony. As discussed *supra*, the use of hypnosis in BUNDY'S case irreparably tainted her identification and, thus, her subsequent testimony in court based on hypnosis. The basic fact of the unreliability of her identification was relevant to the admissibility of her testimony; the pretext for employing the procedure which rendered it unreliable was not. As such, the characterization of the hypnotic session as "purely investigative" does not render admissible Ms. Neary's otherwise inadmissible identification testimony.

People v. Shirley, *supra*, 641 P.2d 775, the authority quoted in support of Appellee's final argument (Appellee's Brief at 29), upon closer examination reached a result incon-

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/* The best available scientific data notwithstanding.

sistent with the position advanced by the State. The full quotation cited by the State is reproduced below:

> Second, like the court in *Mack* (fn. 28 *ante*), we do not undertake to foreclose the continued use of hypnosis by the police for purely investigative purposes. *People v. Shirley, supra,* 641 P.2d at 790.

Footnote 28, mentioned above, defined the scope of the rule regarding the investigatory use of hypnosis enunciated in *State v. Mack, supra,* 292 N.W. 2d 764, 771. *Mack* allowed such use of hypnosis "as long as the material remembered during hypnosis is not subsequently used in court as part of an eyewitness' testimony." *Id.* Ms. Neary's testimony was distorted and altered during hypnosis. No necessity for investigative freedom can justify the inclusion of unreliable evidence. Ms. Neary's testimony, the fruit of an identification procedure tainted by hypnosis is unreliable and prejudicial. As such, the trial court erred in refusing to exclude it.

D.

THE IDENTIFICATION OF APPELLANT BY NITA NEARY WAS THE FRUIT OF IMPROPER IDENTIFICATION PROCEDURES AND THEREFORE DENIED APPELLANT A FAIR TRIAL.

Both Appellant's and Appellee's Briefs recognized as controlling the five-point test enunciated in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) and *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The State mentioned that Nita Neary's opportunity to view the intruder lasted three seconds. Notwithstanding that the subject of her attention was exiting, showing only an *oblique* profile (R 6082) of a face obscured by a stocking cap, the record demonstrates that Ms. Neary was able to furnish a description of the intruder. In fact, she provided two. To police investigators she described a light complected man about 5'10" or 5'11" (R 6274). In court, she recalled a dark complected intruder, about 5'8" (R 8479-8480).

Ms. Neary's degree of attention at the time of the incident should also cast doubt on the reliability of her identification. Appellee's strident disclaimers notwithstanding, the witness had been drinking on the night of the incident. Although she was coming down with a cold, she stayed at the keg party for seven (7) hours (R 6025, 6060, 6067). Her lack of surprise indicates that she paid no attention to the man's exit, and she suspected no foul play at the time (R 6076). In addition, to her diminished

capacity to pay attention, when she saw the intruder she had no particular motivation to attend. She was a by-stander, a casual observer who lacked the involvement in the situation observed, which involvement existed in every case which has upheld the admission of eyewitness testimony on the basis of opportunity to view and degree of attention. *Neil v. Biggers, supra,* 409 U.S. 188, *Judd v. State,* 402 So.2d 1279 (Fla. 4th DCA 1981); *Grant v. State,* 390 So.2d 341 (Fla. 1980); *State v. Britton,* 387 So.2d 556 (Fla. 2d DCA 1980); *State v. Fischer,* 387 So.2d 473 (Fla. 5th DCA 1980); *Smith v. State,* 362 So.2d 417 (Fla. 1st DCA 1978); *Baxter v. State,* 355 So.2d 1234 (Fla. 2d DCA 1978). No reason is provided to accord Ms. Neary's testimony threshold reliability for admission based on these factors.

The accuracy of either of Ms. Neary's descriptions is also unpersuasive. The underlying issue is the accuracy of her memory of the incident. The existence of two different descriptions of the intruder (regardless of the accuracy of one of them) indicates that her memory is flawed. On this basis, Ms. Neary's testimony is too unreliable to have warranted admission.

Likewise, Ms. Neary's "certainty", viz., her identification, does not establish its reliability. She testified upon in-court comparison that she saw Appellant and not Ronnie Eng leave the Chi Omega house on 15 January 1978 (R 9329-9330). This certainty did not exist when she saw the intruder and asked herself, "What is Ronnie Eng doing in the house?"

The variations in her descriptions of the intruder (discussed *supra*) also demonstrated that whatever "certainty" existed may have been superficial.

Whatever certainty Ms. Neary showed failed to constitute the index of reliability contemplated by *Manson* and *Neil* because it resulted from the improper identification procedures conducted by the State. First, as discussed *supra*, hypnosis imbues the subject with an unshakable conviction of the truth of the recollections. The hypnosis of Nita Neary destroyed the probative value of this element of the *Neil/Manson* test by artificially creating a sense of certainty before ascertaining whether a legitimate certainty existed prior to the hypnotic session. Furthermore, the record shows that Ms. Neary saw a number of photographs of Appellant between 15 February 1978 and 7 April 1978 (the date the photographic identification took place (R 6132, 6407). Among the pictures Ms. Neary saw during this period was a partial profile of Appellant* (R 5949-5950, 6140-6147).

/* The relevance of this fact should be instantly apparent. The pictures at the photographic array were profile shots (R 5946). On 15 January 1978, Ms. Neary saw an *oblique* profile of the intruder, that is, his face was turned *away* from her (R 6082). If this view of the intruder's face constituted a sufficient basis upon which to make an identification based on a full profile photograph, then the partial *frontal* profile seen by Neary in the newspaper prior to 7 April 1978 is more than sufficient to taint her recollection.

The State thus unnecessarily, by its two month delay, exacerbated the risk that its only eyewitness would lose or abandon whatever visual image she might have possessed of the actual intruder and adopt the visage highlighted by the media. See *Baxter v. State, supra,* 355 So.2d 1234, 1238. Like the hypnosis session, Neary's access to and viewing of the widely disseminated photographs of Appellant precluded the court from any opportunity to determine whether the certainty she claimed sprang from her observations or from subsequent suggestion. Since the *source* of Ms. Neary's certainty is unclear, the trial court erred in considering it as evidence of the reliability of her identification.

The issue of the amount of time which elapsed between Ms. Neary's sighting and her identification of Appellant may be dealt with briefly. Between 15 January 1978 and 7 April 1978, ample time existed for the hypnotic session to simultaneously distort her memory and eliminate any previous misgivings as to its veracity. Additionally, the two months between 15 February 1978 and 7 April 1978 was sufficient time to flood the media with pictures of Appellant and sensational accounts of the misdeeds ascribed to him. As such the relative "brevity" of time that elapsed between Ms. Neary's sighting and her identification provided no guarantee of its reliability.

None of the indicia of reliability enunciated in *Manson v. Brathwaite, supra,* 432 U.S. 98, and *Neil v. Biggers, supra,* 409 U.S. 188, were present in the instant case. By failing to promptly conduct eyewitness identification and by using a less reliable method of identification, the State heightened the existing risk of misidentification. See Appellant's Brief at 71. Threshold reliability of Nita Neary's identification of Appellant was not established. The trial court thus erred in admitting her testimony and Appellant's conviction should be reversed.

E.

COUNTS ONE THROUGH FIVE AND COUNTS SIX AND SEVEN WERE IMPROPERLY JOINED AND REFUSAL TO GRANT DEFENDANT'S MOTION TO SEVER COUNTS ONE THROUGH FIVE FROM COUNTS SIX AND SEVEN RESULTED IN A DENIAL OF DEFENDANT'S RIGHT TO FAIR TRIAL GUARANTEED BY ART. I, § 16, FLORIDA CONSTITUTION AND UNITED STATES CONSTITUTION AMENDMENT VI AND XIV.

It is a fundamental principle of law in Florida that separate and distinct crimes cannot be tried together. *Houckins v. State*, 175 So.2d 82 (Fla. 1944). However, two different crimes may be tried together in certain situations. Rule 3.151 of the Florida Rules of Criminal Procedure states "the basic guidelines for consolidation for trial of offenses charged in two or more informations, as follows:"

> (a) For purposes of these Rules, two or more offenses are related offenses if they are triable in the same court and are based on the same act or transaction or any two or more connected acts or transactions. *Paul v. State*, 365 So.2d 1063 (Fla. 1st DCA 1979) at 1064.

The present case should not be consolidated for purposes of trial under Florida Rules of Criminal Procedure, Rule 3.151, because the two crimes were not based on the same act or transaction. The two crimes occurred in two different places at two different times and the two crimes are not closely connected acts or transactions. Specifically, the Dunwoody crimes and the Chi Omega crimes are not closely connected to one another. The State cites *Smith v. State*, 365 So.2d 704, 707 (Fla. 1978), by noting that in *Smith*

the court consolidated two murders which occurred during one prolonged criminal episode. The State argued that the present case is similar as the two incidents are part of one prolonged criminal episode. However, in quoting *Smith* the state failed to mention that the two homicides were connected; in fact, that of the three men who committed the first murder, one was the victim and the other two were the assailants in the second homicide. *Smith, supra,* 365 So. 2d at 707. In BUNDY, no such connection exists between the two events. The only similarities between the Chi Omega crime and the Dunwoody crime are the facts that (1) the victims in each instance were young white women (R-7060); (2) each victim was battered with some object (R-7061); (3) the crimes occurred on January 15, 1978 (R-7060); and (4) all were asleep in bed (R-7061) and BUNDY was accused of each.

However, there are many distinct dissimilarities between the two episodes: (1) The Chi Omega situs was a large sorority house, while the Dunwoody residence was a duplex housing one person per unit; (2) the localities were different: the Dunwoody residence was "two miles" (R-7360) from the Chi Omega sorority house; (3) the two episodes were an hour and a half apart [Chi Omega at about 2:30 a.m. (R-6065) and Dunwoody at about 4:00 a.m. (R-7329, et seq.]); (4) bite marks (identification) were found only at Chi Omega; (5) the cause of death of two of the victims at Chi Omega was strangulation; there was no evidence of strangulation at

Dunwoody; (6) at the Chi Omega house a suspect (identification) was seen with a possible weapon in hand, while at Dunwoody no suspect was seen and no weapon found; and (7) at Dunwoody some signs of forced entry were found and no sure point of entry was ever determined at the Chi Omega house.

In *Hall v. State*, 66 So.2d 863 (Fla. 1953) (rehearing denied September 12, 1953), the court stated that the procedure which the Supreme Court had approved in civil cases, that of ordering consolidation of cases, is permissible for criminal cases where the causes are of the same general nature, arise out of the same event or transaction, involve the same or like issues, and depend largely on the same evidence. The *Hall* rationale precludes consolidation of the Dunwoody episode and the Chi Omega Crimes. Neither the same evidence nor the same witnesses were presented in the respective cases. The bite mark evidence was only used to "prove" identity in the Chi Omega crime. Human hair samples were used to "prove" identity in the Dunwoody crime.

In *Ashley v. State*, 265 So.2d 685 (Fla. 1972), the court refused to grant a motion to consolidate. *Ashley* also involved two separate episodes. The first episode involved four deaths, one immediately after the other, at the same place, and all were presented on the same evidence. The second episode involved one homicide an hour earlier. Factually distinguishable from the other four, the offense was committed at a different location and was based on

different evidence.

Applying *Ashley* to BUNDY, the Chi Omega and the Dunwoody crimes were improperly joined. The assaults and batteries at the Chi Omega house were in close proximity in time and space, but the single battery at the Dunwoody residence was two miles (R-7360) and more than an hour later.

The State distinguished the *Ashley* case from BUNDY by stating that the defendant in *Ashley* sought the motion to consolidate rather than the state. This is a distinction without a difference; the same criteria applies to consolidation as to severance.

Finally, the State (Brief of Appellee at 46) concludes without citation that Appellant was not legally prejudiced. *United States v. Foutz*, 540 F.2d 733 (4th Cir. 1976) recites the underlying law behind Rule 8 and Rule 14 of the Federal Rules of Criminal Procedure which are virtually identical to Florida rules. The essential ingredient in the element of prejudice is the fact that misjoinder creates a prejudice of supposed criminal disposition. *United States v. Foutz, supra*, 540 F.2d at 536. In other words, the jury would become aware and conclude that BUNDY was guilty of the Dunwoody offense simply because of being convinced of his alleged involvement in the Chi Omega incident. For instance, the bite mark and eye witness identification relative only to the Chi Omega case unnecessarily

prejudiced the prosecution of the Dunwoody case in the joint trial proceedings. *cf. United States v. Foust, supra,* 540 F.2d at 736.

As discussed in the Initial Brief of Appellant and not rebutted by the Answer Brief of Appellee, the extrinsic offense evidence which would have been admissible in a separate trial crept in through improper joinder. Reversal for a new trial is mandated.

F.

THE JURY SELECTION PROCESS VIOLATED THE *WITHERSPOON* DOCTRINE.

Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 710, 20 L.Ed.2d. 6 (1968), allows a trial court to exclude a venireman for opposition to capital punishment only when the prospective juror makes it *unmistakably clear:* (1) that he will automatically vote against the death penalty regardless of the evidence, or (2) that his attitude would prevent him from making an impartial determination of the defendant's guilt or innocence. During *voir dire* venireman Westbrook expressed that she could make an impartial determination of BUNDY'S guilt or innocence despite her reservations concerning the death penalty (R 4267-4268). That the court's subsequent obfuscation of the issue (to-wit, that the death penalty would probably ensue a finding of guilt) resulted in Westbrook's eventual equivocation on the issue (R 4273-4274) does not justify her excusal for cause*.

The United States Supreme Court addressed the issue in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d

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/* Defense counsel, contrary to the State's assertions, (Appellee's Brief at 49-50), did not waive his *Witherspoon* objections with regard to Ms. Westbrook. Counsel's statement "all right" (R 4274) followed the court's directive that counsel "[s]tate [his] objection in the record" (*Id.*). Counsel's statement thus constituted an expression of assent to the court's suggestion that he make his objection. It does not support the inference that the statement "all right" indicates a waiver of objection.

581 (1980).

> [N]either nerverousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. (Emphasis supplied.) *Adams v. Texax, supra*, 100 S.Ct. 2521, 2528-2529.

Ms. Westbrook made clear her ability to evaluate the evidence without being influenced by the possibility of capital punishment (R 4267-4268). At best, her subsequent equivocation (R 4273-4274) evidenced such an "inability to deny or confirm." Any alleged inconsistency in her responses did not constitute the clear indication that she could not impartially decide the issue of guilt which is required by law.

The *voir dire* of venireman Constance reflects a similar abuse. Constance's responses to the questions of both counsel (R 5390-5395) indicated conscientious scruples against the death penalty, but did not demonstrate any clear indication that his beliefs would prevent him from performing his duty as a juror. He stated that he did not know if he could return a guilty verdict "knowing that it *might* lead to the imposition of the death penalty." (Emphasis supplied) (R 3591). Only when the court asked him if he could return a verdict of guilt knowing that it *would* subject the defendant to capital punishment did venireman Constance express that he "didn't believe" that he could do so (R 5394-5395). Thus, as with venireman Westbrook, the court held that venireman Constance could not perform his duty to render an

impartial verdict unless he was willing to impose the death penalty upon a finding of guilt. "A state may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon v. Illinois, supra,* 391 U.S. at 521. The exclusion of a single venireman in violation of the *Witherspoon* rule invalidates any resulting death sentence. *Davis v. Georgia,* 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). Therefore, since both veniremen Constance and Westbrook were improperly excluded, BUNDY'S sentence should be vacated.

G.

THE COURT ERRED IN DENYING DEFENDANT'S CHALLENGE TO THE GRAND JURY AS UNTIMELY AND THE FAILURE TO TIMELY APPOINT COUNSEL DENIED DEFENDANT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In its Answer Brief, the State made a number of attacks on BUNDY'S right to challenge the impanelment of the grand jury which subsequently indicted him and his right to appointed counsel for that purpose. First, the State asserted that grand jury proceedings are not adversary in nature. Appellee's Brief at 56, citing *Antone v. State*, 382 So.2d 1205 (Fla. 1980); *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); and Annotation "Accused's Rights to Assistance of Counsel at or Prior to Arraignment;" 5 A.L.R. 3d 1269-1351 and 1981 pocket part at 174. The "adversariness" of the proceedings is relevant because case law has determined that it is the *critical stage* of the prosecutorial process which triggers the right to counsel after the commencement of an adversary judicial criminal proceeding. *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 2200, 53 L.Ed.2d 240 (1977); *Gerstein v. Pugh*, *supra*, 420 U.S. 103; *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199,

12 L.Ed.2d 246 (1964); *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); *Michel v. Louisiana*, 350 U.S. 91, 76 S.Ct. 158 (1955); *Reece v. Georgia*, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 27 (1953).

In the BUNDY prosecution, both hearings cited by the State were adversary judicial criminal proceedings. Firstly, prosecuting and defense attorneys appeared and presented opposing arguments (R 2640-2676, SR 266-288). The hearings were held before two different judges, and were judicial in character. *Id.* Finally, had either court granted BUNDY'S grand jury challenge, the form of the hearings would have been substantially similar, i.e. adversary and criminal proceedings, motions to quash on the basis of a tainted grand jury, and any other hearings that the two trial judges might have allowed on the grand jury challenge, were, and would have been, adversary judicial criminal proceedings. As such, the right to appointed counsel accrued upon maturation of a grand jury challenge.

The State also asserted that BUNDY'S failure to timely raise objections to the composition of the grand jury constituted a waiver of his right to object. Appellee's Brief at 56. The failure to object before the impanelment, however, sprang from the unavailability of counsel, who had standing and the opportunity to raise the issue (SR 276-277). The right to object to a grand jury presupposes an opportunity to

exercise that right. *Reece v. Georgia, supra,* 350 U.S. 85, 89. It is absurd to insist that BUNDY had the right when counsel was not appointed for that purpose until after impanelment of the grand jury. *Id.*

Even if, as the State urged (Appellee's Brief at 59), BUNDY had constructive notice that the grand jury would consider him a suspect in the Chi Omega slayings, his failure to object before impanelment did not waive his right to object thereto. The State's argument is predicated on the assertion that the search of BUNDY'S mouth gave him "constructive notice" of the grand jury's investigation (Appellee's Brief at 55, 59). Although the State never made it clear, its rationale *seemed* to be that murder is a capital crime and an indictment by a grand jury is a prerequisite to any prosecution. Article 1 § 15, Fla. Const. (1968); § 782.04, Fla. Stat. (1976). As such, the State apparently believed that the police inquiry into the existence of any evidence linking BUNDY to the crimes notified him of the grand jury's consideration of his case.

The Florida Supreme Court has addressed this issue. In *State v. Lewis,* 11 So.2d 337, Fla. (1943), the defendant (unlike BUNDY) was formally charged with the offense (rape) which the grand jury later considered. Both defendant and his counsel were present at the arraignment where they were informed (again, unlike BUNDY) that the grand jury would be impanelled to investigate the charge. *State v.*

Lewis, supra, 11 So.2d 337, 338. Arguably, the Florida Supreme Court *could* have reached the conclusion (nothwithstanding the actual notice) that the rape charge constituted notice that a grand jury investigation would ensue. When *Lewis* was decided, rape was a capital crime. § 794.01(1), Fla. Stat. (1941). Then, as now, prosecution for capital crimes could only occur following indictment by a grand jury. Article 1 § 15, Fla. Const. (1968), Preamble § 10, Fla. Const. (1868). The Florida high court *might* have inferred (as the State would have it now infer) notice of the grand jury proceedings from the fact of the criminal charge. Such a holding would have precluded the defendant from objecting to the composition of the panel. § 905.05, Fla. Stat. (1941)*.

The Florida Supreme Court in *Lewis* did not adopt such a rationale.

> It is hardly consistent with the spirit of fair trial to assume that a capital offense will be lodged against them and then require them to challenge the competency of the grand jury before it is drawn. They would in other words be required to defend against a probability that may never become a reality. If one charged with a crime is to be accorded a reasonable time to prepare his defense, *he is not required to assume that he will be indicted.* (Emphasis supplied.) *State v. Lewis, supra,* 11 So.2d at 339.

/*The statute is substantially identical to the statute in effect, § 905.05, Fla. Stat. (1978), at the time of prosecution.

Even with actual notice and the assistance of counsel, the defendant did not have to predict the grand jury's finding in order to preserve his right to challenge. In the instant case, BUNDY had neither notice nor counsel to enable him to assert his rights before impanelment. He was in effect required first to assume that the grand jury would investigate his case and then that an indictment would follow for a crime for which he was neither arrested nor arraigned. *Lewis* requires the defendant to make neither assumption in order to preserve his rights. Therefore, BUNDY did not waive his right to object to the composition of the grand jury.

The State also alleged that under *Rojas v. State*, 288 So.2d 234 (Fla. 1973), transferred to 296 So.2d 627, *cert. den.* 419 U.S. 851, 95 S.Ct. 93, 42 L.Ed.2d 82, BUNDY did not make a sufficient factual showing to raise a reasonable suspicion that the panel was improperly drawn. Appellee's Brief at 58. To require such a standard would be to require BUNDY to prove his case before he could present it. The very purpose of a grand jury challenge is to determine *whether* the jury members are impartial*. The State would

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/*This point also relates the State's argument that BUNDY failed to establish prejudice to him resulting from the denial of his motion. Appellee's Brief at 60. Unlike age, sex, or race, juror prejudice cannot be ascertained from a venire list. Only *voir dire* can establish whether a) the jurors were exposed to pretrial publicity and b) they were affected by it. BUNDY cannot show *this type*

require BUNDY to prove juror impartiality before the court would allow him to gather the information necessary to prove the point. The Florida Supreme Court rejected this "Catch-22" rationale in favor of the more sensible approach adopted in *Rojas v. State*, *supra*, 288 So.2d 234, and *Dykman v. State*, 292 So.2d 633 (Fla. 1974), citing *Rojas*. The *Dykman* decision specifically rejects the suggestion made by the State (Appellee's Brief at 58):

> This requirement of showing a factual basis for the challenge in order to require a full-scale investigation of the panel does not, of course, require that the challenger show the panel to be improperly constituted, but *does* require the challenger to assert *facts* tending to raise a doubt as to whether the panel *may* improperly constituted; if such factual assertions are made, an inquiry will then follow to see if such suspicion, duly alleged, is supported by proof. (Emphasis in original.) *Dykman v. State*, *supra*, 294 So.2d 633, 637.

The exhibits attached to BUNDY'S motion establish the existence of persuasive, sensational pretrial publicity. The fact of the media's histrionic coverage of the Chi Omega case would easily have justified an inference that a grand jury panel might have been affected thereby. Because of this, the trial court should have allowed an inquiry into whether the possibility of impartiality and prejudice was in fact a reality. The court's failure

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/ of prejudice because the court's decision prevented him from determining its existence. It was this denial of opportunity which has resulted in irreparable prejudice.

to do so constituted error.

The State has further urged that BUNDY had no right to appointed counsel for the purpose of a grand jury challenge. Appellee's Brief at 57. The State's proffered rule would create a conflict between the statutes governing the issue. § 27.51(1), Fla. Stat. (1977) guaranteed public defender assistance to all indigent persons arrested for or charged with a felony. Rule 3.111(a), Fla. R. Crim. P. (1972) further required that counsel be appointed an indigent person "when he is formally charged with an offense, or *as soon as feasible after custodial restraint* or upon his first appearance before a committing magistrate *whichever occurs earliest*." By law, BUNDY was entitled to appointed counsel as soon as he was subject to custodial interrogation in Pensacola regarding the Chi Omega slayings. §§ 905.03-05, Fla. Stat. (1970) granted BUNDY the right to challenge the grand jury. The course advocated by the State would deny BUNDY the opportunity to assert a statutory right through counsel after the point in time when his right to counsel accrued as a matter of law. The State's assertion that "Appellant had not right to appointed counsel prior to his indictment (Appellee's Brief at 57) flies in the face of logic and the law.

The only authority cited in support of the State's assertion was *United States v. Halley*, 431 F.2d 1180 (9th Cir. 1970). The complete discussion of a defendants'

preindictment right to counsel in the decision is reproduced below.

> Defendant was not entitled to the assistance of appointed counsel during the period from the time he became a suspect, November 25, 1966, to the time the indictment was returned on the bank robbery charge, April 10, 1968. *United States v. Halley, supra,* 431 F.2d 1180, 1181.

The *Halley* decision cited no precedent, relied on no statute, and offered no rationale for its holding. The section of the opinion reproduced above has not been cited in any subsequent decisions in any court. *Halley* is nothing more than a record of a judicial *result*. It provides neither authority nor principle to support the State's position.

Finally, the State argued that Judge Rudd's self-reversal on the appointement of counsel indicates that he would have appointed counsel for the grand jury challenge if BUNDY had so requested prior to impanelment. Appellee's Brief at 60. This action presents an analog to the principle enunciated in *Reece v. Georgia, supra,* 350 U.S. 85 *Reece* noted the irony inherent in any situation in which one law granted a right and another law precluded its exercise. *Reece, supra,* at 89. Here, the court granted the opportunity to exercise the right while denying the right itself. It strains credibility to proffer this act as evidence that the court was "determined to err if err at all on Appellant's side." Appellee's Brief at 57. The court's action was equally consistent with the theory that he was committed to grant the right to counsel only after it could do BUNDY

no good whatsoever. This alternative theory is not offered to ascribe any motive to the court's actions. It is offered to demonstrate the futility of predicting what the court might have done on the basis of what it did in a factually dissimilar situation. The State's prognostication is thus without foundation and is not probative.

In conclusion, it was the State, and not BUNDY that was placed in the "heads I win, tails you lose" predicament. BUNDY, a lay person, was held to "know" by virtue of statutory notice the existence of the grand jury investigation when his attorneys (for all anyone can see) were unaware of the proceedings. Even if the attorneys had been aware of the impanelment, they had only been appointed to represent BUNDY with regard to charges unrelated to the grand jury investigation. Thus, BUNDY'S attorneys could preserve his rights only if they went beyond the scope of their authority and challenged the panel of a grand jury investigating charges completely unrelated to those for which they were appointed. In fact, BUNDY'S attorneys did precisely that (SR 266-288, R 2640-2676). If their challenge was, as the State suggested (Appellee's Brief at 58), a shot in the dark, it is only because the circumstances permitted no other. They, as discussed *supra*, were under obligation to *assume* neither investigation nor indictment. Even if they were under such an obligation, they had no clear indication that they had the authority to raise such a claim. Even

the trial judge (Rudd) vacillated on the point.

Under these circumstances, neither BUNDY nor his attorneys attempted the grand jury challenge prior to impanelment. As such, the State has argued, BUNDY waived his right to challenge, but, for practical purposes, did not have the opportunity to so do. After impanelment, the belated appointment of counsel (for the purpose of the challenge) afforded him the opportunity, but he was denied the right. To borrow the State's idiom, "heads, the State wins; tails BUNDY loses." Forced to choose between the impossible and the unacceptable, BUNDY was held to have waived his rights before he had the chance to exercise them. The court's denial of the motion to challenge the panel denied BUNDY due process of law and thus constituted prejudicial error.

H.

THE TRIAL COURT ERRED IN ADMITTING THE BITEMARK IDENTIFICATION TESTIMONY.

The State has attempted to support the trial court's admission of the bitemark testimony by employing a two-pronged argument. Citing *Jent v. State*, 400 (sic) So.2d 1024 (Fla. 1982)* and *Peek v. State*, 395 So.2d 492 (Fla. 1980), the State analogized bitemark evidence to hair analysis which has been held admissible despite the inability to render a positive identification. (*See* Appellee's Brief at 62). In *Peek*, however, the State employed a method of hair analysis so precise that only 2 persons in 10,000 could have produced hair samples which were exactly consistent with each other. *Peek v. State, supra*, 395 So.2d 494. In the instant case, 4 out of 5 dental samples were "consistent" with the State's photograph of the bitemarks. (R 9203-9204). The evidence was too unreliable to have warranted admission by the trial court. *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968).**

1. Qualifications

Dr. Souviron;s partiality and bias should have disqualified him from testifying in the BUNDY trial. *People v. Kelly*,

* The citation is a mistake, see 408 So.2d 1024.

**_Coppolino_, although much relied on by the State, does not support its case. In _Coppolino_, the test used produced _positive_ results, not as here, negative inferences.

549 P.2d 1230 (1976). He deliberately violated the trial court's order to remain publicly silent on the bitemark evidence until a jury had been empanelled. This action severely jeopardized BUNDY's right to a fair trial. (R 1142-1144). In Court, Dr. Souviron testified first that the meeting he addressed was closed to the public, that he was not aware of Judge Miner's closure order and, finally, that he could testify objectively at trial. Before the Court accepts (as has the State) Dr. Souviron's self-serving assertions it should examine the truth of the one statement that can be verified from the record. However, "closed" the meeting may have been, it was certainly "public" enough to enable a member of the press to publish a story entitled, "Bundy's Teeth Match Bite on Girl's Body, Expert Says," in which the writer included direct quotations from Dr. Souviron to the effect that no other set of teeth could have made the marks. (R 333-335)* The State's paeans to judicial discretion change neither the evidence of Souviron's misconduct nor the impact of such misconduct on prospective jurors. Dr. Souviron's actions established his bias, and the trial court committed error in allowing him to testify.

2. Factual Basis

Following its discussion on the photographic enlargement of the bitemark, the State "distinguished" *United States v.*

*The date of the article does not appear in the record. The article, however, mentions that Dr. Sourviron's statements were made at a forensic conference in Orlando. The article also states that BUNDY was still taking depositions at the time of the writing. This establishes that the conference occurred during the effective period of the order.

Tranowski, 659 F.2d 750 (7th Cir. 1981), on the basis of the clarity of the photographs in the BUNDY case. (Appellee's Brief at 70-71). The State has not merely made a distinction without a difference, it has failed altogether to address the issue crucial to both the *Tranowski* decision and the BUNDY case.

In *Tranowski*, the government introduced the testimony of an astronomer to prove that a picture (introduced by the defendant to establish an alibi) could not have been taken on a certain date. The astronomer attempted to establish the date by computing the sun's azimuth (the number of degrees from true south) and altitude (the number of degress above the horizon) by measuring the shadows in the photograph and computing the angles trigonometrically. The Seventh Circuit faced on appeal, the issue of the competence of the evidence. The court relied on Federal Rule of Evidence 201(b), which empowers courts to take judicial notice of facts not subject to reasonable dispute. The Rule provides of judicial notice of facts:

> (1) generally known within the territorial jurisdiction of the trial court; or
>
> (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b), 28 U.S.C.

On the authority of Rule 201(b), the appellate court addressed the merits of the government's case, and found the astronomer had failed to account for the possible slope of the ground which would have affected the computation of

the sun's altitude. The government's expert also failed to establish the orientation of the backwall of the house, without which there existed no point of reference from which to derive the sun's azimuth. After taking judicial notice of the foregoing predicate facts, the Seventh Circuit panel ruled the admission of the astronomer's measurements erroneous and reversed the defendant's conviction.

In the BUNDY case, as in *Tranowski*, the crucial missing factors are *angles*. It is a matter of common experience* that the apparent size and shape of an object will vary according to the angle and distance from which the viewer observes it. The only evidence the record shows of the distance from the camera lens to the bitemark is the post hoc approximation of Officer Winkler made over eighteen months after he took the photograph. (R 2780). More importantly, at no point does the record indicate the angle from which Officer Winkler took the photograph. As such, the State failed to lay an essential piece of evidentiary foundation. The trial court had no way of ascertaining whether the view preserved by the bitemark photographs corresponded, in terms of the angle perspective, to the acetate overlays used to make the comparison. The State's failure to preserve the angle of perspective of the bitemark photographs renders, *vel non*, the bitemark evi-

* Of which this Court may take judicial notice, as did the court in *Tranowski*, under §90.201(11), (12) Fla.Stat. (1976), which is virtually identical to Fed. R. Evid. 201(b).

dence without foundation, and hence, inadmissible.

Another matter of common experience reveals the faulty foundation which underlay the bitemark evidence. The witnesses for the State made bitemark comparisons with a plastic replica of BUNDY's teeth. The model was lowered into a medium and photographed. From these photographs the witness made acetate overlays which were used, along with the model itself, for comparison to the photograph of the bitemark. (R 2812-2861). Dr. Souviron made the comparison by placing the acetate overlay over the bitemark photograph and by pressing the plastic model straight down into the photograph. (R 2832, 8712). Human beings (excepting freaks of nature) do not bite objects by opening their mouths to a 180° angle and lowering their upper and lower jaws onto the object being bitten. But that was the precise technique used to produce the result that the BUNDY mould would produce an identical impression to the impression preserved on acetate.

The angle of the bitemark itself, as well as that of the camera could not logically match that used to make the comparison. No basis for comparison exists in fact, between the bitemark picture and the exemplars used by Dr. Souviron. The absence of a foundation for comparison rendered the trial court's admission of the evidence erroneous.

3. Opinion of Guilt

The State offered four-pronged defense of Dr. Souviron's personal observation outside the scope of his expertise. The

State asserted that the *question* which elicited Dr. Souviron's response was improper. No rationale was offered to support the assertion. Again, the State treats Dr. Souviron's bare, unsupported allegations as the measure of truth. Investigation of the record reveals that defense counsel was trying to establish the age parameters within which the assailant could have fallen. Counsel based his query on a previous response by Dr. Souviron that a "large child" could have made the bite. (R 8787). Since the resolution of the defense's line of questioning related to the size of the population whose members could have inflicted the bite, the question was reasonable, relevant and proper. Dr. Souviron's nonresponsive exasperation to counsel's detailed cross-examination did not render the question immaterial or spurious.

The State next argued that defense counsel's question initiated Dr. Souviron's response. (Appellee's Brief at 72). In a strict sense, this is true, but the Court should not confuse (as has the State) the initiation of a *response* with the invitation of *error*. *Id*. Counsel could not get a responsive answer to his question whether a 13 or 14 year old could have made the bitemark (R 8788). When he pressed the issue, Dr. Souviron made the remark here addressed. *Id*. Although the response followed a question by counsel, Dr. Souviron's answer exceeded the scope both of the question and his expertise. Counsel's question did not address, nor

did Dr. Souviron's area of expertise authorize the consideration of "ancillary evidence." (R 8788). It was further irrelevant to the purpose of the cross-examination in general and to the thrust of counsel's question in particular that there was blood on the rectal areas. *Id.* Finally, Mr. Harvey *did not ask*, nor did resolution of the bitemark identification issue in any way require the jury to determine, whether the victim was beaten to death. In no way did defense counsel provoke or encourage the response that Dr. Souviron gave. To adopt the State's interpretation of invited error would license opposing witnesses to make improper prejudicial comments with impunity. It would further deny the injured party recourse because he would have "waived" his objecttion to prejudicial comments merely by exercising hi right of cross-examination. The innocuous question did not invite error because it was the witness who used it as a vehicle to make an improper statement. Dr. Souviron's misconduct, and no other, gave rise to the error complained.

The State further asserted that BUNDY waived his claim of error because his counsel failed to make a contemporaneous objection to Dr. Souviron's improper comment upon the evidence. (Appellee's Brief at 72). In support of the contention, the State cited, but did not discuss, *Castor v. State*, 365 So.2d 701 (Fla. 1978) and cases cited therein.*

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* *Clark v. State*, 363 So.2d 331 (Fla. 1978); *Dorminey v. State*, 314 So.2d 134 (Fla. 1975); *Williams v. State*, 285 So.2d 13 (Fla. 1973); *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970); *Brown v. State*, 124 So.2d 481 (Fla. 1960) *Jackson v. State*, 307 So.2d 826 (Fla. 4th DCA 1975); *Rivers v. State*, 307 So.2d 826 (Fla. 1st DCA 1975); *York v. State*, 232 So.2d 767 (Fla. 4th DCA 1969); *Bagley v. State*, 119 So.2d 400 (Fla. 1st DCA 1960).

Without exception, the cases relied upon by the State involve defense counsel's failure to object to a jury charge. *Castor v. State, supra,* 365 So.2d 701, and cases cited in footnotes below.* Analysis of cases involving evidential questions in addition to the issue of waiver of objection to jury charge reveals that Appellant's contention is a distinction with a difference.

The bitemark evidence constituted a major portion of the State's evidence. The State founded the bulk of its case on identity evidence, such as the bitemark analysis. The bitemark evidence goes both to the foundation of the case and to the merits of the cause. Therefore, any assignment of error regarding the admission of the evidence is an assignment of *fundamental error* which need not be raised at trial in order to be addressed on appeal. *Clark v. State,* 363 So. 2d 331, 333 (Fla. 1978); *Sanford v. Rubin,* 237 So.2d 134 (Fla. 1970).

Even if the trial court's admission of the bitemark evidence did not constitute fundamental error, this Court may consider it on appeal. *York v. State,* 232 So.2d 767 (Fla. 4th DCA 1969) involved a jury charge objection waiver issue *and* evidential issue concerning the sufficiency of identification testimony. The Fourth District panel deemed that defense counsel's failure to register a contemporaneous objection to the jury charge effectively waived defendant's right to raise

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* This is also true with regard to *Johnson v. State,* 314 So. 2d 21, 248 (Fla. 1st DCA 1975).

the issue on appeal. *York v. State, supra,* 232 So.2d at 768. With regard to the evidential sufficiency issue, however, the appellate court overlooked the failure of defense counsel to make any objection at trial and because the defendant's liberty was at stake, agreed to consider the evidential issue for the first time on appeal.

In *Gibbs v. State,* 193 So.2d 460 (Fla. 2d DCA 1967), the Second District panel addressed the propriety of a judicial comment on the evidence. In deciding to address the issue on its merits, the appellate court noted that:

> Objections were not made in the lower court and the making of those comments was not such fundamental error of law as to constitute the sole cause of reversal. However, *the error may be considered with other assignments of error in determining whether the substantial rights of the defendant have been injuriously affected.* (emphasis supplied)
> *Gibbs v. State, supra,* 193 So.2d at 463.

Whether fundamental or not, BUNDY's objections may be considered for the firts time on appeal.

Finally, the State has contended that Dr. Souviron's testimony was neither prejudicial nor improper because Dr. Souviron did not express his opinion on the ultimate issue of fact regarding the factual basis of the bitemark testimony. (Appellee's Brief at 73). The State is partially correct. Dr. Souviron's statement did not address the factual basis of his testimony at all. Dr. Souviron expressed his opinion on a subject beyond the scope of both his expertise and his personal observation with no factual

basis whatever. His excursion beyond the limits of the permissible scope of his testimony resulted in an improper and highly inflammatory statement. It strains credibility to maintain that such behavior is either permissible of non-prejudicial. Dr. Souviron's statement, *vel non*, made the admission (or at least the further use of) his testimony fundamental error.

4. Standards

Discussion of the question of standards must begin with the concession by the State's expert witness that there currently exist no standards for positive bitemark identification (R 2873, 8728). No forensic odontologist may conclude that one bitemark identically matches a given set of teeth. (R 2868). He may only conclude that the set of teeth is or is not inconsistent with the bitemark.* For such a bitemark "standard" to have any meaning, it must be sufficiently precise to exclude, by its application, a significant number of other sets of teeth. The test applied in the BUNDY case failed to do so. Out of five sample sets of teeth, Dr. DeVore could only exclude one because of "morphological peculiarities." (R 9203-9204). The standard used to prove Appellant's identity as the assailant, to-wit, that the bitemarks were not inconsistent, "identified" three persons as the assailant. To allow an expert witness to cloak such a feeble discriminator with the label "reasonable

* The expert witnesses on both sides of the case agree on this "standard." (R 2868, 8728, 9204, 9216, 9218).

degree of dental certainty" makes his testimony not merely unreliable, but affirmatively misleading. In fact, the model of BUNDY's teeth was so "consistent" with the photograph of the victim's bitemarks that the same finding of "consistency" was found regardless of which teeth was placed in which bitemark. (R 9192-9193). In other words, no matter which way the acetate overlay was placed over the picture, the consistency was the same. *Id.* Given the persuasive value of expert testimony and the unreliability of the test used, admission of the testimony was prejudicial and improper.

I.

THE TERM "FAILURE" CONTAINED IN THE JURY INSTRUCTIONS AMOUNTED TO JUDICIAL COMMENT ON THE ACCUSED'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

Over the strenuous objection of defense counsel (R 9476-9477), the trial court refused to delete (or at least alter) the following language from the jury instruction:

> [A] defendant's failure* to take the witness stand must not be considered in any manner an admission of guilt, nor should his failure to take the witness stand influence your verdict in any manner whatsoever (R 9749).

The State has argued that BUNDY waived his right to object to the above instruction because of his "acquiescence" therein. Appellee's Brief at 78. Its rationale went thus. The defense requested an instruction to the effect that the exercise of one's right to remain silent could not justify an inference

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/*The undesirability of the use of a term such as "failure" to describe the exercise of a constitutionally guaranteed right while perhaps obvious, in the interests of absolute clarity merits repetition. "Failure" is defined as an "omission of performance of an action or a task, esp. neglect of an assigned, expected, or appropriate action." *Webster's Third New International Dictionary* (Merriam Co.; Springfield, MA 1971). To use a term with such negative implications to describe the exercise of an "absolute right" (See R 9749) gives rise to an extreme (and completely unnecessary) risk of prejudice. If the purpose of the instruction is to prevent the jury from making unwarranted inferences of guilt from the defendant's silence, it seems peculiar that a court committed to protecting this interest should insist on such language as "failure to" in preference to the "does not" language of defense's proposed instruction (See R 1522, 9476-9478).

of guilt (R 1522). Once the defense requested such an instruction, the court could not refuse as a matter of constitutional law. *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981). Since the defense requested and received the instruction the defendant was estopped from raising it as error on appeal. Appellee's Brief at 78.

The State's theory of necessity relied on several omissions of material fact. The record simply fails to support any theory of "acquiescence" on the part of the defense. The court rejected the defense's proposed instruction (R 1522). Defense counsel timely objected to the court's inclusion of the "failure" language in the instruction on defendant's silence, stating explicitly the specific grounds therefor (R 9476-9478). To-wit: Ms. Good objected to the pejorative impact of the term "failure to testify" and that the mention of any inference of guilt might suggest that the jury reach such a conclusion" (R 9476). The court itself recognized that there existed "no question about the fact that [the defense] reserved the objection (R 9478).

The State cited a number of cases in support of its "estoppel" argument (Appellee's Brief at 78), none of which control the instant case. The State forwarded *United States v. Williams*, 521 F.2d 950 (D.C. Cir. 1975) as authority for its position. Appellee's Brief at 78. In *Williams*, the trial court gave an instruction (requested by one of several defendants) regarding the accused's absolute right "not to

testify"* over the objection of the other defendants. The District of Columbia Circuit upheld the trial court's action "[n]otwithstanding the merits" (discussed *infra*) on two procedural grounds. *United States v. Williams, supra,* 521 F.2d 950, 955-956. The codefendants did not timely object, nor did they state with specificity the grounds therefor. *Id.* As such, the court held that they had waived their right to so object. Since, in the instant case, defense counsel timely objected and stated with specificity the basis for her objection, she did not waive BUNDY'S right to so object. Therefore, *United States v. Williams* is here inapposite.

Likewise, the State sought to rely on *McPhee v. State,* 254 So.2d 406 (Fla. 1st DCA 1971) to support its estoppel argument. In *McPhee*, defense counsel moved (somehow sucessfully) to require the State to elect between two counts of a facially valid indictment. Defense counsel argued that one of the acts alleged in an indictment constituted a lesser included offense of the other. In fact, this was not the case. At trial the court charged the jury in accordance with the amended indictment. When the defendant was convicted, defense counsel stated the erroneous charge as grounds for its motion for a new trial. On appeal, the First District

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/* Note that this language was proposed by the defense in the instant case (R 1522, 9476).

Court of Appeals upheld the conviction on two grounds. First, since the defendant moved for and received the charge he was estopped from claiming it as error. Second, since he did not make his claim of error until the motion for a new trial, his "objection" was not timely and hence waived. Only the first ground requires discussion inasmuch as the timeliness issue was addressed *supra*. In the instant case, BUNDY did not claim as error that for which he asked. BUNDY claimed as error that on which the court insisted over defense counsel's objections (R 9476-9478). He therefore did not "occupy inconsistent positions in the course of a litigation." *McPhee v. State*, *supra*, 254 So.2d 406, 409. BUNDY'S position is now what it was at trial; that the court's inclusion of the failure language constituted a prejudicial judicial comment on the exercise of his right to remain silent. Thus, *McPhee* does not apply to the instant case.

Smith v. State, 375 So.2d 864 (Fla. 3rd DCA 1979), merits only cursory discussion. In *Smith*, defense counsel did not object to the offensive instructions at trial and thus waived the defendant's right to object. As discussed supra, defense counsel in the instant case timely and with specificity objected, thus obviating any question of waiver. Like *Williams* and *McPhee*, *Smith* does not here control. The State has nonetheless advanced its "gotcha" argument, citing *State v. Belien*, 379 So.2d 446 (Fla. 3rd DCA 1980). As with *McPhee*, *Belien* included a true estoppel situation. Defendant

moved for and was granted a continuance, then attempted to secure a dismissal under the speedy trial rule. Like *McPhee, Belien* got what he requested, then claimed that what he received constituted error. As discussed *supra*, BUNDY did not assume contrary positions at trial and on appeal. Therefore, the estoppel principles in *Belien* like those enunciated in *McPhee* are inapplicable to BUNDY'S case.

Even notwithstanding defense counsel's objections* and the court's statement into the record preserving the issue, the defenses's final acceptance of the State's instruction (R 9478) cannot under the circumstances operate as a waiver of right. It is a matter of constitutional right that a defendant may request and receive a charge instructing the jury not to infer guilt from the exercise of his right to remain silent. *Carter v. Kentucky, supra,* 450 U.S. 288. *Carter* imposed on trial courts the constitutional obligation to minimize the danger that the jury will consider the defendant's silence as evidence of guilt. *Carter v. Kentucky, supra,* 101 S.Ct. at 1122. The Supreme Court noted that:

> No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.

/* Ms. Good's "acquiescence" was made "subject to those other objections [she] just noted" (R 9478).

In the instant case, the trial court granted the request, but it took with one hand what it gave with the other. It instructed the jury regarding BUNDY'S right to remain silent, but twice referred to his "failure to take the witness stand" (R 9749). The defense team timely objected to the presence of such prejudicial language in an instruction ostensibly intended for the defendant's benefit (R 9476-9478). But the trial court made it clear that the defense would take the instruction he proposed or lose it altogether (R 9478). The court confronted BUNDY with a Hobson's choice: either to accept the instruction as it was, laden with the pejorative baggage of the references to his "failure" to testify, or to renounce altogether the right to receive the instruction*. The court thus made the exercise of BUNDY'S absolute right conditional upon the inclusion of language which undermined the very purpose of the right granted. This "Scylla and Charybdis" approach violated BUNDY'S right to due process of law. By no rationale could the defense counsel's forced

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/* The District of Columbia Circuit (whose precedent the State would have this Court adopt) (Appellee's Brief at 78), voiced the same concern in *United States v. Williams, supra,* 521 F.2d 950. In upholding the defendant's right to an instruction charging the jury not to infer guilt from silence, even over the objections of codefendants, the District of Columbia panel observed that the right to such an instruction:

> [I]s duly circumscribed when a defendant must choose between the substitute instruction . . . and no instruction at all. *United States v. Williams, supra,* 521 F.2d at 955.

acceptance of the court's partially erroneous instruction constitute a waiver of BUNDY'S right to object thereto.

The State's second major assertion is that state and federal courts have "repeatedly rejected" the argument upon which BUNDY has based this part of his appeal. Appellee's Brief at 79. The State has omitted to explain how any court may repeatedly reject an argument it has not encountered. None of the cases cited in Appellee's Brief involved jury instructions which called the jury's attention to the defendant's "failure to testify"*. As the title might suggest, the "failure" language formed the basis for BUNDY'S claim of error on this point. Appellant's Brief at 110. Furthermore, the entire body of law relied upon by the State to support its assertion that a trial court may give a "no inference of guilt from silence" instruction (a) involved cases in which, for tactical reasons, the defendants wanted no such instruction given and (b) was premised on the principle that judges have an obligation to protect defendants from jury speculation on their right to remain silent. *Lakeside v. Oregon*, 435 U.S. 333, 339, 98 S.Ct.1091, 1095, 55 L.Ed.2d 319 (1978); *Diez v. State*, 359 So.2d 55, 56 (Fla. 3d DCA 1978); *Delaine v. State*, 230 So.2d 168, 175 (2d DCA 1970); *Lloyd v. State*, 218 So.2d 490, 491 (Fla. 2d DCA 1969); *Fogler v. State*, 117 So.694 (Fla. 1928).

/* In *Delaine v. State*, 230 So.2d 168, 175 (Fla. 2d DCA 1970), the term "failure" is used in defendant's appeal brief, but nothing indicates that it was used in the jury instruction.

In the instant case, defense counsel moved for an instruction on the right to remain silent (R 1522). Counsel merely objected to that part of the instruction which might have fueled the very juror speculation which such instructions are intended to deter (R 9476-9478).

As the cases cited *supra* by the State suggest, courts have a very strong interest in avoiding any adverse comment or inference which might arise when a defendant does not testify. *Id.* Courts have an obligation to serve this interest even in the presence of the contrary wishes of the defendant. *Id.* If, however, the instruction is to serve (as it is intended) the defendant then its form should further and not hinder this end. Anytime a judge, in the interest of fairness to the defendant, requires an instruction prohibiting an inference of guilt by silence, he or she ought to bear in mind the consideration voiced by Justice Stevens in his dissent in *Lakeside v. Oregon, supra,* 435 U.S. 333:

> Even if jurors try faithfully to obey their instruction, the connection between silence and guilt is often too direct and too natural to be resisted. When the jurors have in fact overlooked it, telling them to ignore the defendant's silence is like telling them not to think of a white bar.
>
> The court thinks it would be very strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect. Ante at 1095 . . .. I wonder if the court would find petitioner's argument as strange if the prosecutor or *even the judge,* had given the instruction three or four times, in *slightly different form,* just to make sure the jury knew that silence, like killing Caesar, is

consistent with honor. *Lakeside v. Oregon, supra,* 435 U.S. 333, 345-346.

"Failure to testify" and "not testifying" denote similar inactions, but the connotations implicit in the "slightly different form" insisted upon by the trial court undermine "the very constitutional provision it is intended to protect."

The language used in the instant case (R 9749) permitted to occur subtly that which is more candid forms has been declared unconstitutional; a judicial comment on BUNDY'S refusal to testify. Yet even subtle, indirect comments on silence constitute reversible error. *Tolliver v. State,* 133 So.2d 305, 306 (Fla. 2d DCA 1966); *Trafficante v. State,* 92 So.2d 811, 814 (Fla. 1957). The State, however, has contended that the court's refusal to grant BUNDY'S profferred instruction constituted harmless error. Appellee's Brief at 81. Although comments on refusal to testify are considered to be in the category of "non-fundamental" error, to which the harmless error rule *may* apply (*Chapman v. California, supra,* 386 U.S. 18.

A series of Florida decisions, however, has provided the direction needed to dispose of the issue. As discussed in Appellant's Initial Brief (at 112), a comment which is "fairly susceptible" of being interpreted by the jury as referring to a criminal defendant's refusal to testify constitutes reversible error *without resort to the harmless error doctrine. David v. State,* 369 So.2d 943 (Fla. 1979); *King v. State,* 143 S.2d 458 (Fla. 1962); *Trafficante v. State,*

92 So.2d 811 (Fla. 1957); *Layton v. State*, 346 So.2d 1244, (Fla. 1st DCA 1976); *Kolsky v. State*, 182 So.2d 305 (Fla. 2d DCA 1966); *Tolliver v. State*, 133 So.2d 565 (Fla. 2d DCA 1967); *Milton v. State*, 127 So.2d 460 (Fla. 2d DCA 1961). The references to "failure" to testify constituted an improper judicial comment on BUNDY'S constitutional right to remain silent, and as such warrants reversal of his conviction.

J.

DEFENDANT'S RIGHT TO COUNSEL WAS VIOLATED BY THE TRIAL COURT'S DENIAL OF HIS MOTION TO PERMIT APPEARANCE OF *PRO BONO* OUT-OF-STATE COUNSEL *PRO HAC VICE*.

The State contended that the trial court acted within its discretion in denying Millard Farmer's petition to appear *pro hac vice*. Appellee's Brief at 82). *Bundy v. Rudd*, 581 F.2d 1126 (5th Cir. 1978) and *Leis v. Flynt*, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979) upon which the State relied (Appellee's Brief at 82) did not foreclose the issue of BUNDY'S right to appointed counsel. The opinions therein limited their discussions to the attorney's right to represent a particular client. Neither case relied on the defendant's Sixth Amendment rights. *Bundy v. Rudd* and *Leis v. Flynt* are not applicable.

The right to counsel is absolute. But a defendant's right to particular counsel must be balanced against the public interest in orderly judicial procedure and the court's inherent power to control the administration of justice. *United States v. Salinas*, 618 F.2d 1092 (5th Cir. 1980) *reh. den.* 622 F.2d 1043, *cert. den.* ____ U.S. _____, 100 S.Ct. 374; *United States v. Kitchin*, 592 F.2d 900 (5th Cir. 1979), *cert. den.* 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56; *United States v. Brown*, 591 F.2d 207, 310 (5th Cir. 1979); *United States v. Burton*, 584 F.2d 485 (D.C. Cir. 1978), *cert. den.* 439 U.S. 1069, 99 S.Ct. 837, 59 L.Ed.2d 34, *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir. 1978),

United States v. Poulack, 556 F.2d 83 (1st Cir. 1977), *cert. den.* 434 U.S. 986, 98 S.Ct. 613, 54 L.Ed.2d 480; *United States v. Dinitz*, 538 F.2d 1214 (5th Cir. 1976), *reh. den.* 542 F.2d 1174, *cert. den.* 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556; *Ross v. Reda*, 510 F.2d 1172 (6th Cir. 1975), *cert. den.* 423 U.S. 892, 96 S.Ct. 190, 46 L.Ed.2d 124.

The authorities do not support the interpretation advanced in Appellee's Brief. The State string cited a number of cases holding that the court's interest in orderly judicial procedure outweighed the defendant's right to particular counsel. *United States v. Burton, supra*, 584 F.2d 485; *Gandy v. Alabama, supra*, 569 F.2d 1318; *United States v. Poulack, supra*, 556 F.2d 83; *United States ex rel Carey V. Runde*, 409 F.2d 1210. Without exception, the circumstances of each case involved defendants who refused court appointed counsel and who insisted on retaining private counsel who were unavailable. In each case, the trial court granted an initial continuance to enable the defendant to procure desired counsel. When it became evident that the desired counsel either (a) remained unavailable or (b) could not prepare for trial in time to avoid undue delay, the trial court then refused further continuance. *Id.* In all State cited cases the crucial issue was the "prompt and efficient administration of justice." *Gandy v. Alabama, supra*, 569 F.2d 1318, 1323. BUNDY did not request a continuance when he

petitioned the trial court to approve Millard Farmer's appointment to the case. His request posed no problems of delay. The cases cited by the State (Appellee's Brief at 83) do not apply and cannot support the trial court's denial of the motion for appointment of counsel *pro hac vice*.

Likewise, the "misconduct" cases cited by the State (Appellee's Brief at 84) do not apply to BUNDY'S situation. Niether *United States v. Kitchin*, *supra*, 592 F.2d 900, nor *United States v. Salinas*, *supra*, 618 F.2d 1092, involved contumacious behavior of any sort. In *Kitchin*, the court disqualified a defense attorney on the ground that he had worked on the same case for the United States attorney during the preindictment phase. In *Salinas*, a defense attorney was disqualified because he was implicated in the same transactions for which his client in that case was on trial.

United States v. Dinitz, *supra*, 538 F.2d 1214, and *Ross v. Reda*, *supra*, 510 F.2d 1172, both dealt with indiscreet or bellicose conduct on the part of attorneys. In *Dinitz*, the Fifth Circuit upheld a trial court's decision on retrial to refuse to admit *pro hac vice* an attorney whose antics resulted in the initial mistrial. In *Ross*, the Sixth Circuit upheld the denial of a similar motion because the attorney refused to limit his out of court statements about the trial during its pendency. In both

cases, the courts based their denial of the motions to appear *pro hac vice* on the *attorney's behavior before the court that excluded them in the same cause from which they were excluded.* That situation was not present in BUNDY'S case. Millard Farmer's "misconduct" did not occur before a Florida court nor did it involve the subject matter presented in the instant case. *Dinitz* expressly limited its holding to cases in which the court ruling on a motion to appear *pro hac vice* had had prior experience with the attorney making the motion. *Dinitz, supra,* 538 F.2d 1214, 1223.

In BUNDY, the trial court was not faced with the circumstance of admitting an attorney to practice who had already made the case more difficult. The BUNDY trial judge had had no experience with Farmer. It should have recognized (as the Fifth Circuit did in *Dinitz,* 538 F.2d 1223) that the court's evaluation should be governed by the standards applicable to a pretrial motion to appear *pro hac vice* as enunciated in *In re Evans,* 524 F.2d 1004 (5th Cir. 1975). The *Evans* court noted that admission to a state bar is the basic determination of an attorney's professional qualification. *In re Evans, supra,* 524 F.2d 1004, 1007; *see also Sanders v. Russell,* 401 F.2d 241, 246 (5th Cir. 1968). Admission and membership of good standing thus create *a*

presumption of good character which may not be rebutted except on a showing of such misbehavior as would warrant disbarment. *In re Evans, supra*, 524 F.2d at 1007-1008. The record does not show evidence of any disciplinary proceedings brought against Farmer by the Georgia Bar. Since the record is devoid of legally sufficient evidence of Farmer's unfitness to practice before Florida courts, the trial courts refusal to grant his motion to appear constituets legal and constitutional error.

K.

THE COURT'S INCLUSION OF JURY INSTRUCTION PERMITTING JURORS TO INFER KNOWLEDGE OF GUILT FROM FLIGHT CONSTITUTED ERROR.

As Appellee conceded (Appellee's Brief at 88), defense counsel, Ms. Good, objected to the State's proposed instruction on flight and tendered a proposed instruction (R 9511-9517). Appellee nonetheless argued that Appellant was estopped from raising the issue because Ms. Good did not contemporaneously object to the court's instruction. In so doing, the State relied on *Lucas v. State*, 376 So.2d 1149 (Fla. 1979), which stated the principle that an appellate court could not hear claims of error at trial if the defendant did not timely object to the alleged error.

Appellee's reliance on *Lucas* is misplaced. In *Lucas*, the defendant made no objection at trial to the error on which he based his appeal. In the instant case, Appellant timely objected to the State's proposed instruction and further stated its grounds for so objecting (R 9511, 9512, 9515). Furthermore, the grounds upon which Ms. Good objected were identical to those raised by Appellant in his initial brief (Appellant's brief at 117). As Ms. Good stated at the charge conference:

> It's unfair to allow the State to make these inferences from evidence of flight when you know that the jury isn't being apprised of the real and immediate circumstances, being other crimes committed by the defendant which would give rise to that flight (R 9512).

She also disapproved of the proposed instruction's failure to instruct jurors that "there has to be any relationship with flight to the crime for which defendant is on trial."

The facts of Appellant's case thus make the situation more analogous to that addressed in *Williams v. State* 395 So.2d 1236 (Fla. 4th DCA 1981), and in *Austin v. State* 406 So.2d 1128 (Fla. 4th DCA 1981). In *Williams*, defense counsel objected at the charge conference to the trial court's refusal to instruct the jury on the defense of alibi. Ruling that the defendant was not estopped from raising the trial court's refusal as a point of error on appeal, the court reasoned:

> If a jury instruction is requested and the basis for the request is verbalized to the court and made a part of the record, failure to object to rejection of the instruction or to repeat the grounds in the form of an objection does not preclude appellate review. The underlying purpose of Rule 3.390(d) [Fla. R. Crim. P. (1972)] has been met; the trial court is placed on notice that refusal to give the requested instruction may be error. . . . Thus, it is unnecessary to raise objections both at the charge conference and at the end of the court's instruction to the jury. (Emphasis supplied.) *Williams v. State, supra,* 395 So.2d 1236, 1237.

At the charge conference, Ms. Good objected to the State's proposed instruction because it ignored issues she wished to raise in her alternative proposed instruction (R 9513-

9514). She also stated the specific grounds for her objection, thus placing the court on notice.* To require further objection would constitute a procedural superfluity and a purposeless exaltation of form over substance. *See Austin v. State, supra,* 406 So.2d 1128, 1132.

The substantive justification for the flight instruction offered by Appellee likewise lacks merit. Making a reasonable inference of guilt of a particular offense from flight requires that there be some evidence (other than the flight itself) that knowledge of guilt of that particular offense motivated the flight. As this Court noted in *Profitt v. State,* 315 So.2d 461 (Fla. 1975):

> The defendant's leaving at a time which could have been after the crime, although at an unusual hour, is, when standing alone, no more consistent with guilt than with innocence. *Profitt v. State, supra,* 315 So. 2d at 465.

Florida cases upholding flight instructions have involved situations in which the defendant's flight immediately followed the crime. *Villaglieu v. State,* 347 So.2d 445 (Fla. 3rd DCA 1977); *Profitt v. State, supra,* 315 So.2d 461 (Fla. 1975), aff'd per curiam 428 U.S. 242; *Williams*

/* The record illustrates this point. When Mr. Harvey, defense counsel, reiterated Ms. Good's objections, the court noted that "[w]e have got that in the record and preserved for posterity" (R 9515).

v. State, 268 So.2d 566 (Fla. 3rd DCA 1972); *Hargrett v. State*, 255 So.2d 298 (Fla. 3rd DCA 1969).

Hargrett v. State, supra, 255 So.2d 298, upon which the State relied heavily in its Answer Brief, does not justify the instruction given in the instant case. In *Hargrett*, the defendant objected to the flight instruction on the grounds of his assertion that there was no evidence of flight. The issue put before the jury was not (as it was in Appellant's case) whether the defendant's flight resulted from knowledge of guilt of a particular offense, but whether, in fact, he fled after the crime. The issue decided on appeal was that there was sufficient evidence of flight to justify finding that defendant actually fled. *Hargrett v. State, supra*, 255 So.2d 298, 300.

Hargrett is inapposite to the instant case on two additional grounds. *Hargrett* "was in Miami (the site of the crime) prior to the crime; he could not be found in Miami after the crime; and he was apprehended two weeks after the crime in Ocala, Florida." *Id.* The circumstances evidenced in *Hargrett* indicated that the defendant left town immediately after the crime. Appellant was in Tallahassee for almost a month after the crime with which he was eventually charged (R-6792-6794, 7920-7929, 7959-7962). Remaining near the scene of a crime for nearly a month does not indicate an intent to flee. *Hargrett*, like the other Florida cases cited *supra*, involves motivations for flight based on know-

ledge of guilt of the particular crime charged. At every instance of flight forwarded by the prosecution, there existed verifiable motivations for fleeing unrelated to any knowledge of guilt of the crime for which BUNDY was charged. The flight from Officer Daws occurred when BUNDY was in constructive possession of a stolen auto tag (R 9644-9645). Fear of arrest for its theft would seem the most likely motivation for flight. Likewise, BUNDY'S Utah conviction, the stolen license tag on his vehicle and his theft of credit cards provide certain verifiable instances of possible motivations for his flight from Officer Lee in Pensacola (R 6792-6794). The evidence of flight was considerably more consistent with guilt of the above-mentioned offenses than with guilt of the crimes with which he was charged. As the Fifth Circuit has noted:

> The more remote in time the alleged flight is from the commission or accusation of an offense the greater the likelihood that it resulted from *something other than feelings of guilt concerning that offense.* (Emphasis supplied.) *United States v. Myers*, 550 F.2d 1049, 1051 (5th Cir. 1977).

The jury instruction given misled the jury. The jury could not have known that BUNDY had motivations to flee independent of the speculated knowledge of guilt of the Chi Omega slayings. Over defense counsel's objection, the Court failed to instruct the jury that it could consider flight as evidence of guilt only if the flight indicated guilt *of the crime charged.* The instruction given prejudiced the defendant's chances of a fair consideration of the issue of guilt.

The defense's proposed instruction would not have rewarded BUNDY for the numerosity of his crimes. Rather it would have prevented the State from introducing evidence of guilt of lesser crimes to persuade the jury of BUNDY'S guilt of a greater, yet totally unrelated crime. The court's instruction was confusing and almost certainly misled the jury. Because it effectually enabled the State to base its case on irrelevant evidence, the trial court's refusal to either exclude the State's instruction or include the defense's cautionary instruction constitued error and merits reversal. *Batey v. State*, 355 So.2d 1271, (Fla 1st DCA 1978); *Barnes v. State*, 348 So.2d 599 (Fla. 4th DCA 1977).

L.

THE TRIAL COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING ON THE EFFECTIVENESS OF ASSISTANCE OF HIS TRIAL COUNSEL.

From the State's perspective, BUNDY was an intolerable commander (Appellee's Brief at 93-107), an amateur strategist, an intrasigent client and an armchair general who called the shots and was "hoisted (sic) on his own petard." (Appellee's Brief at 94, 95, 98, 106). The thrust of the State's argument is that BUNDY's argumentative, disputatious style so hindered his counsel and was so offensive as to merit whatever adverse consequences might result. It is pointless to debate whether a defendant's personality may decide the issue of effectiveness of counsel. The issue is whether an evidentiary hearing was required.

The State cited three "representative" instances of BUNDY's consultation with counsel as evidence of obstreporousness. (Appellee's Brief at 102). Three interruptions do not an intransigent defendant make. Such a showing constitutes little more than "fly specking" with no extended discussion in support of the contention made. (See Appellee's Brief at 98). The State also attempted to "prove" by means of lengthy quotation from the record that counsel regularly conferred with BUNDY during the trial.

The Court should note that such an example of "judicial exasperation" which occurred near the end of a long and arduous trial, the duration and difficulty of which is ob-

vious. (R 5338). As such, the tone of the trial court's statement may be taken with the proverbial grain of salt. Furthermore, aside from the underlined portion of the State's quotation, the trial judge did not address the issue of consultation with counsel.

The State pointedly asserted that BUNDY "over[rode] the decisions of his professional staff, [and] insisted on putting on witnesses who (sic) Public Defender Mike Minerva refused to put on." (See Appellee's Brief at 95). This "intransigence" occurred at a hearing on a motion to suppress, (not trial), at which BUNDY called Captain Poitinger, Dr. Souviron and Nita Neary to testify. (R 3619). Given the import of these witnesses to the State's case*, it is inconceivable that the State would not have called them to testify (if only to rebut the defense's case) if BUNDY had not done so. BUNDY's calling of these witnesses was not an act of unruly petulance, but a tactical decision upon which he and his counsel differed.

Finally, the State has characterized BUNDY's complaint of inadequate opportunity to consult with counsel

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* Captain Poitinger conducted the photographic array at which witness Nita Neary identified BUNDY's picture. Nita Neary was the only witness who saw the assailant leaving the scene of the crime. Dr. Souviron's testimony was the sine qua non for effective presentation of the State's bite mark evidence.

as an attack on the competence or good faith of his defense team. (Appellee's Brief at 100-102). In so doing the State has ignored the record citations given in support of BUNDY's claim in his initial brief. BUNDY objected to the trial court's failure to allow him to consult with counsel for the purpose of determining whether they were prepared with regard to an important evidentiary issue. (R 2597). He later objected to his inability to effectively consult with counsel as a result of the conditions in jail. He further objected the court's denial of permission to consult with counsel outside jail, because conditions in the jail made it impossible to effectively and confidentially discuss the case there (R 2959). See Boren v. State, 410 So.2d 1343 (Fla. 1982). BUNDY's counsel made similar protestations at a later stage in the proceedings. (R 5336-5337). These incidents reflect an intention on the part of BUNDY to cooperate with, not to hinder, the efforts of counsel on his behalf. The instances of "difficulty" cited by the State cannot sustain a caricature of BUNDY as an imperious meddler insistent on ruling his superiors. The State's reliance on conclusory allegations without factual illustration indicates the weakness of its case in this regard. (Cf. Appellee's Brief at 94, 97-98).

The State answered BUNDY's allegation that counsel was insufficiently prepared for the bite mark challenge by asserting that his expert witness testified that he had considered the evidence. (Appellee's Brief at 98). This non

sequiter fails to reach the issue whether counsel was prepared, which was the explicit complaint raised on appeal. The expert's consideration of the evidence is irrelevant; it is counsel who must conduct direct and cross-examination. Counsel cannot effectively examine a witness unless he or she is familiar with the evidence. The lack of knowledge in the area cannot be but prejudicial.

The State has further argued that, since BUNDY had no counsel at the proper time for a grand jury challenge, he could not have had incompetent counsel. The State's argument assumes that a claim of ineffective assistance of counsel may only occur in cases of attorney misfeasance. Such a narrow view of this category of error overlooks the near-axiomatic principle that it is not the attorney's duty, but the defendant's right to competent legal representation which underlies a claim of ineffective assistance of counsel. It is the deprivation of effective legal assistance as needed which constitutes the fundamental wrong against which the Constitution safeguards. Gerstein v. Pugh, 420 U.S. 108, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); Coleman v. Alabama, 399 U.S. 1, 88 S.Ct. 2, 19 L.Ed.2d 22 (1970); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Deprivation of this fundamental right may occur by other means than attorney misconduct. A valid claim of ineffective assistance of counsel, then does not absolutely require an ommission or wrongful act on the part of defense counsel.

As discussed in Issue G, supra, BUNDY's right to effective assistance of counsel was denied him during the selection of the grand jury. Therefore, the absence of any challenge to the empanelment of the grand jury which indicted BUNDY (regardless of where the fault lay) constitutes prima facie evidence of ineffective assistance of counsel.

In rebuttal to BUNDY's assertion that counsel were not prepared to challenge the bite mark evidence, the State attempted to draw negative inferences from the timing of counsel's contrary assertions.* Without additional evidence it is useless and impossible to belabor the discussion with an analysis of the credibility of the claims and counterclaims. The actions (or more correctly, the omissions) of counsel speak more clearly on the issue. The evidence consisted of a photograph of BUNDY which revealed one of his central incisors on 16 February 1978 (R 9583-9588). The tooth was chipped when Dr. Souviron made a wax impression of BUNDY's teeth in April, 1978. Id. Thus the evidence could have shown that the bite marks, which BUNDY would have made in January, 1978, differed, significantly from those he made for Dr. Souviron several months later. (R 9983). If admitted, the pictures could have case serious doubt on the reliability of the State's evidence. The defense did

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* Specifically that since the assertions occurred long after the initial statement of unpreparedness they must be true.

not attempt to introduce these photos into evidence even though they were available many months prior to trial.* In addition, the court noted they would have been admitted if timely produced. (R 9830, 9988). Such flagrant omission must obviously have resulted from neglect or ignorance rather than from informed professional deliberation. Knight v. State, 394 So.2d 997 (Fla. 1981). As a matter of law, defense counsel's misfeasance constituted ineffective assitance of counsel. Id.

Finally, the State has emphasized Robert Haggard's experience and Margaret Good's subsequent specialization in capital appeals to rebut Appellant's assertion that the case concluded with no counsel with capital case experience. (Appellee's Breif at 103-104). Appellant cannot here discuss the issue because the State has cited no section of the record establishing either Mr. Haggard 's prior capital case experience or Ms. Good's status as a capital appeals specialist.

Both the negligent omissions and blameless incapacities of defense counsel deprived BUNDY of his right to

*The State has cited Dr. DeVore's testimony (R 9989), to establish that this evidence was immaterial because it would not have changed his testimony. (R 9151-9228). Dr. DeVore testified that he could not say the chip in the tooth made any difference because he couldn't match any specific tooth to any specific mark. (R 9989, see also 9192, 9196). In fact, of five cases of five different sets of teeth, Dr. DeVore could only say that one of them could not have made the bite marks. If the State contends that Dr. DeVore was correct in his analysis then it admits that bite mark analysis here lacks any probative value. If it argues that Dr. DeVore's analysis is incorrect then it cannot logically assert that his conclusions, that the chip would make no difference in the outcome, is correct.

effective assistance of counsel. Specifically, counsel's failure to familiarize themselves with the bite mark evidence; and to obtain the necessary photographs (discussed supra) prejudiced BUNDY's chances to exclude, or at least compromise the effectiveness of, a crucial weapon in the State's arsenal against him. The unavailability of counsel or their misfeasance, assuming they had standing to raise the issue, precluded BUNDY from receiving any kind of legal assistance, effective or otherwise, with regard to the grand jury challenge. As a consequence, a statutorily and constitutionally guaranteed right was waived without notice. See Issue G, supra. The resultant prejudice mandates a new trial, or at least, an evidentiary hearing as requested. Dickson v. Wainwright, ____F.2d_____(11th Cir/ 8-16-82) Appeal No. 81-5013.

CONCLUSION

The final summary of each section contains a "conclusion" which summarizes the precise relief sought respective to each argument. Rule 9.210(b)(5), Fla. R. App. P. For these reasons variously propounded, a reversal and new trial are in order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to the Attorney General, The Capitol, Tallahassee, Florida 32302 by hand/~~mail~~ this 13 day of September, A.D., 1982.

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