IN THE SUPREME COURT OF FLORIDA

THEODORE ROBERT BUNDY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Appeal No. 59,128
Capital Case Appeal
Ninth Judicial Circuit of Florida

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

As in Appellant's Main Brief, the Appellant, THEODORE ROBERT BUNDY, will be referred to as either the Defendant, the Appellant, or Bundy. The Appellee, the State of Florida, will be referred to as the State.

STATEMENT OF THE CASE AND FACTS

The Appellant relies upon the Statement of the Case and Facts contained in his Main Brief.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S SEVERAL MOTIONS TO SUPPRESS THE TESTIMONY OF CERTAIN WITNESSES WHOSE RECALL HAD BEEN AFFECTED OR ALTERED BY HYPNOSIS.

Conspicuous by its absence in the State's Brief is any discussion of the current trend of legal authority that is coming forth from the Appellate Courts which have dealt with the hypnotically refreshed memories of witnesses in criminal cases. The State is apparently content to rely on what the law in Florida is now, rather than address the Defense's position of what the law in Florida should be.

Other than to bring to this Court's attention several recent cases from other jurisdictions, the Defense will not reargue its unrebutted position of what is the current weight of legal authority.

Citing the California Supreme Court's decision in People v. Shirley, 31 Cal.2d 18, 641 P.2d 775 (1982), the Michigan Supreme Court in People v. Gonzales, _____N.W. 2d _____(Mich., 1982) held that the testimony of a witness whose memory has been refreshed through hypnosis is inadmissible. The Michigan Court applied the test of Frye v. United States, 293 F. 1013 (1923) and concluded that:

> "...hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable to outweigh the risks of abuse and prejudice." (emphasis supplied) Gonzales at _____.
>
> "...Until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion, or fantasy and until the barriers which hypnosis raises to effective cross-examination are somehow overcome,

> the testimony of witnesses which has been tainted by hypnosis must be excluded in criminal cases." (emphasis supplied) Gonzales at ____.

In its Brief, the State refers to the "very complete memorandum presented by the State Attorney to the trial court". That memorandum relied upon the case of Harding v. State, 5 Md. App. 230, 246 D.2d 302 (1968) and its progeny. In 1982, the Court of Special Appeals of Maryland unequivocally receded from Harding in Collins v. State, 447 A.2d 1272 (1982).

> "...After a complete and careful review of the record in this case, as well as the decisions of other jurisidictions and the scientific literature which has been called to our attention, we are convinced that applying the standards explicated in Frye for the use of hypnosis to restore or refresh the memory of a witness is not accepted as reliable by the relevant scientific community and that such testimony is therefore inadmissible. To the extent that previous cases in this jurisdiction have permitted the admissibility of hypnotically induced testimony, we hereby overrule those cases." Collins at 1283.

The Collins Court went on to say that hypnosis may be used only for investigative purposes and under the strict guidelines, enunciated by Dr. Martin T. Orne, in State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981).

Two recent cases emanating from the First District Court of Appeal, State of Florida, underscore the Defense's previous request for this Court to make known Florida's position on hypnosis and a new request as to whether Florida follows the "Frye Rule". In Brown v. State, (Fla. 1st DCA, filed February 8, 1983) 8 FLW 475, the Court concludes that, notwithstanding the language in Kaminski v. State, 63 So.2d 339 (Fla. 1952), Coppolino v. State, 223 So.2d 68 (Fla. 2d DCA, 1968), Jent v. State, 408 So.2d 1024, (Fla.1981) and Stevens v. State, 419 So.2d 1058 (Fla. 1982), Florida does not follow the "Frye Rule", but instead follows the "relevancy approach" discussed in

McCormick on Evidence, §203 (2nd ed, 1972), whereas in Key v. State, (Fla. 1st DCA, filed Feb. 8, 1983) FLW 488, the Court concludes that Florida does follow the "Frye Rule", but found no basis for applying it to the facts of that case.

This Court should settle once and for all whether Florida does, in fact, follow the "Frye Rule".

Both of these last cited cases dealt with the issue of the admissibility of the testimony of a witness whose memory had been hypnotically refreshed.

The Brown opinion is an exhaustive treatise in hypnosis, likened to the opinions written in the cases cited in the Defense's Main Brief, in which the Court traces the problems inherent in hypnosis and its use in the forensic setting. The Brown Court concluded that the question of the admissibility of the testimony of a previously hypnotized witness was to be determined on the basis of its relevance. Both Courts cite the Hurd case with favor and while neither requires that the ORNE guidelines or safeguards be mandatory, they strongly suggest that they be considered by the trial courts in the future in their determination of the reliability of testimony from a witness whose memory has been hypnotically refreshed.

In the Brown case, the Defendant's conviction was reversed because of the questionable hypnosis protocols employed. Brown also quoted with approval the exact language from Hurd which the Defense quoted in its Main Brief at pages 46 and 47. The case was remanded to the trial court to determine whether or not the State could satisfy its burden to demonstrate by clear and convincing evidence that the hypnosis session and the use of that evidence would not cause undue prejudice or mislead the jury.

In the Key case, the conviction was affirmed. However, the Court noted

that five of the six Hurd safeguards were implemented in the case. Tragically, the one safeguard which was omitted was the recording of the hypnotic session. Admittedly, the witness' hypnotic session was not for the purpose of helping her to identify the assailant, per se, but when she was hypnotized to relieve her anxieties so she could identify him, the result is the same.

The failure to record a hypnotic session of a potential eye witness in a criminal case is the most violent violation of the ORNE safeguards. How else can the hypnotic session be adequately preserved so that it can be reviewed to make certain no improper suggestions or clues were given the witness?

Both the Brown and Key cases affirmed the First District's decision in Clark v. State, 379 So.2d 372 (Fla. 1st DCA 1979) in which the Court held that a witness who had been hypnotized would be allowed to testify and the issue of his credibility was for the jury.

The Brown court stated that the application of the "relevancy approach" was implicit in the Clark case. However, the court expounded on the manner in which a trial court should use the "relevancy approach" to determine the admissibility of such testimony. The court stated that there are two forms of relevancy: logical and legal and any evidence must be both to be admissible. The Court held that the principle of hypnosis was sufficiently reliable to be legally relevant, but added that the determination of legal relevance was a two-pronged test; the second prong being the technique or procedure utilized by the hypnotist on the witness.

While the Defense does not necessarily agree that the issue of hypnosis and its application in the forensic setting can be resolved by the "relevancy approach", even under Brown's approach, the Defendant's conviction must be

reversed because of the failure of the second prong of the relevancy test.

> "Although the principle of hypnosis may itself be reliable and thus probative, our examination of the problems inherent in the process of hypnosis reveals that admissibility of such testimony will hinge on a case-by-case examination of the technique used to hypnotize the witness. The examination of the particular procedure employed in order to determine its reliability interrelates with the second prong of the relevancy test: legal relevancy. Due to the peculiar nature of hypnosis and its inherent potential pitfalls, the admissibility of hypnosis, as a tool for refreshing a witness' memory, is not so much a question of the reliability of the principle of hypnosis as it is a question of the reliability of the particular technique or procedure used in a given case. Hence the probative value of hypnosis rests on both the reliability of the principle and the technique or procedure employed, both of which are inseparably intertwined. The Court must first evaluate such evidence pursuant to Section 90.403, Florida Statutes, by weighing its probative value in an effort to decide if its admissibility would be substantially outweighed by dangers of unfair prejudice, confusion of the issues, misguidance of the jury or needless presentation of the issues."
> Brown at _____. (emphasis supplied)

The Brown case demands that this case, at the least, be remanded to the trial court to determine whether the State can fulfill its burden of establishing legal relevance. But, even under the Brown decision, the record in this case clearly demonstrates that the State could not meet that burden.

Save and except for tape recording the Keene and Burnette hypnotic episodes, Keene and Burnette, along with the State, violated every other guideline and safeguard recommended in all the recent case law in jurisdictions which still allow witnesses to be hypnotized. Compound that with the fact that C. L. Anderson should never have been hypnotized in the first

place, and the prejudicial effect his testimony would have upon the Defense, and the State cannot sustain its burden of establishing legal relevancy under §90.403, Florida Statutes.

In its Brief, the State ignores the legal arguments advanced by the Defense and argues, as it did below, that the hypnotic episodes had no effect on C. L. Anderson's testimony. The State argues that Anderson's testimony before and after the hypnosis was the same. The fallacy in this position is, first, the definition of "before". The State's definition of "before" is immediately before the first hypnotic session when Anderson made his first statement to Assistant State Attorney Dekle (Defense Ex. 24). The Defense's definition of "before" is the approximate six months time it took Anderson to have any memory of the alleged abduction at all.

The second fallacy on the State's position is its misinterpretation of the Defense's claim "that extensive media coverage created the suggestion which caused C. L. Anderson to confabulate his testimony" (State's Brief at Page 7). It is the Defense's claim that the extensive media coverage made Anderson an unlikely candidate for hypnosis and that the information he had been exposed to for approximately six months very likely led to his "recalling" under hypnosis facts which were confabulated responses.

The third fallacy in the State's position is that neither Anderson nor his story were the same "before and after" the hypnotic episodes. For approximately six months before, he had had "nagging doubts", and "thought he may have seen something", and even in his statement to Dekle, he still has doubt. After he was hypnotized, Anderson had no doubt. He is positive that on February 9, 1978, he saw the Leach girl being led away from the Lake City Junior High School by a man who looked "a hell of a lot" like Bundy.

After hypnosis he remembered the date, which he could not before; he can describe details of clothing, which he could not before; and most important, he can now "remember" the series of events which led him to be there in the first place when he is told, between the two hypnotic episodes, that his work records revealed he was on duty at the time he was supposed to have seen the events described.

The State questions that if Anderson's testimony was hypnotically supplemented by external influences, why was not his identification of Bundy and of the football jersey more positive? The answer is found in the response given by Dr. Kline at the suppression hearing and quoted at page 24 of the Defense's Main Brief.

The final fallacy of the State's position is that it ignores the issue of an accused's right of confrontation. Anderson himself is not the same "before" and "after". He was hypnotized. As has been discussed in the Defendant's Main Brief, the nature of hypnosis is such that the witness becomes absolutely convinced of the truthfulness and accuracy of his recall.

The Defense agrees with the State's statement, "If we exclude those details made clear by hypnosis, we are left with relevant, untainted testimony" (State's Brief at page 8). Certainly, Anderson's pre-hypnotic testimony would have been relevant and certainly not tainted by hypnosis. However, this conceded observation totally ignores the fact that the trial court, at the suppression hearing, and the jury, at the trial, heard his post-hypnotic testimony. The Defense could have had an opportunity to challenge his credibility before, but not after.

Because there is no doubt that hypnosis in the forensic setting has not gained general acceptability in the scientific community and because of all the dangers, such as confabulation, distortion, fantasy, suggestion, and

denial of the right of confrontation inherent in the process of hypnosis, the Defense urges this Court to adopt the position enunciated in State v. Mack, 294 N.W. 2d 764 (1980) and now followed in California, Maryland, Michigan and Pennsylvania. An accused's constitutional right to a fair trial and to confront the witnesses against him are too precious to be put in jeopardy by a scientific technique fraught with doubt by its own practitioners.

In the event this Court should decide that Florida does not follow the "Frye Rule", then the Defense would urge that this Court, at a minimum, follow the New Jersey approach as set forth in State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), and followed in New York. The potential for abuse and misuse of hypnosis is too great not to make the Orne guidelines, as set forth in Hurd, mandatory and to require the proponent of the testimony of a previously hypnotized witness to bear the burden of establishing its admissibility by clear and convincing evidence.

Bundy should be granted a new trial, absent the testimony of C. L. Anderson.

II. THE TRIAL COURT ERRED IN DENYING THE MOTION TO LIMIT DEATH QUALIFICATION OF JURY; ALLOWING SUCH QUALIFICATION: AND EXCUSING FOR CAUSE THOSE JURORS OPPOSED TO THE DEATH PENALTY NOTWITHSTANDING THEIR ABILITY TO VOTE FOR GUILT OR INNOCENCE.

A. The issue was effectively preserved at trial. Appellant's Motion to Limit Death Qualification of the Jury, together with Defense counsel's specific and timely objections to the exclusion for cause of the venirepersons in question (see Appellant's Main Brief, Page 31) gave the trial judge full and fair notice of the existence and nature of this issue. See Maggard v. State, 339 So.2d 973, 975 (1981)

In his Motion, Appellant stated that the trial court should not "Excuse any jurors whose scruples against a death sentence would not interfere with their ability to fairly weigh the Defendant's guilt or innocence" (R. 1459), which is precisely the same position he takes here. He based his claim on his Sixth Amendment right to a jury representing a fair-cross-section of the community and his Fourteenth Amendment right to due process of law; the same constitutional grounds he raises here. He relied, in part, in the Motion on Duren v. Missouri, 439 U.S. 357 (1979), as his principal fair-cross-section case, as he has in this Appeal; and while citing Witherspoon v. Illinois, 391 U.S. 510 (1968), he clearly regarded its blanket rule as inapplicable to the present case. The entire tone and purpose of the Motion spoke to the inapplicability of the full Witherspoon rule. If Appellant thought that Witherspoon governed in his trial, he wouldn't have filed the motion.

The issue is properly preserved for this appeal.

B. The binding sentencing authority of the jury in Witherspoon was a central and dispositive factor distinguishing that case from cases arising

under Florida's non-binding jury recommendation scheme.

Witherspoon was fundamentally and primarily a case which focused on the Illinois jury's final power to sentence the defendant to death. The importance of the jury's sentencing authority, which is referred to throughout the case, is reflected in this passage:

> "It should be understood that much more is involved here than a simple determination of sentence. For the State of Illinois empowered the jury in this case to answer 'yes' or 'no' to the question whether this defendant was fit to live." Witherspoon, at 522 n.20'

No less an authority than the United States Supreme Court itself recognized the primary importance of the Witherspoon jury's sentencing authority when it ruled twelve years later in Adams v. Texas, 100 S.Ct.2521; 448 U.S. 38; 65 L.Ed.2d. 581 (1980) The Court began its analysis of the Texas death penalty statute by stating that:

> "Witherspoon involved a state procedure for selecting jurors in capital cases, where the jury did the sentencing and had complete discretion as to whether the death penalty should be imposed." Adams, at 2525.

It further noted:

> "A juror wholly unable even to consider imposing the death penalty, no matter what the facts of the given case, would clearly be unable to follow the law of Illinois in assessing punishment." Adams at 2526. (emphasis supplied)

Comparing the Illinois law involved in Witherspoon with the Texas statute, the Court found that:

> "(1) The Witherspoon jury assessed punishment at the same time it rendered its verdict..., (2) The Witherspoon jury was given unfettered discretion to impose the death sentence or not..., and (3) The Witherspoon jury directly imposed the death sentence."

and concluded that:

"The jury plays a somewhat more limited role in Texas than it did in Illinois."
Adams at 2526.

The death penalty law at issue in Adams involved a two-phase proceeding. See Tex.Crim. Proc. Code Ann. §§37.071 (Supp. 1980). In the first phase the jury determined guilt or innocence, and if the defendant was found guilty, a second phase was held where evidence pertaining to the sentence was presented. Generally, this is the same procedure as occurs in Florida, but the similarities in the sentencing phase end there. The Texas jury was required to answer three questions during their sentencing deliberations. If the jury found beyond a reasonable doubt the answer to all three questions was yes, the court had to impose the death penalty. A negative answer by the jury to any one of the questions and the defendant received life imprisonment.

The point is that the jury's penalty verdict, under Texas' death penalty statute, was, in its own unique way, binding on the trial court. Even so, the Supreme Court in Adams, in distinguishing the Texas statute from Illinois, found the Texas capital jury's role more limited than the Witherspoon jury's, and reversed the Adams jury's death sentence because of an overbroad rule of exclusion enforced against those opposed to the death penalty. Strictly speaking, Adams was a Witherspoon case and was disposed of as such, because the Adams jury had sentenced the defendant.

It is hard to imagine a capital jury with a more limited role in sentencing than the Appellant's jury and capital juries in Florida generally. Especially when Florida capital juries are compared to the Witherspoon jury's sentencing power along the lines of the Adams comparison. Examining briefly the role that capital juries in Florida play in sentencing, we see that these juries'

sentencing verdicts are not binding; that the Florida jury makes no written or oral findings as to which aggravating and/or mitigating circumstances it found to exist, and upon which it relied; that its sentencing recommendation for death can be reached by a simple majority (as opposed to requirements for unanimous death verdicts in Texas and Illinois); that life recommendations are frequently ignored by the trial judge; and that in over a dozen cases defendants who received jury recommendations for life sentences have had judge imposed death sentences upheld by the Florida Supreme Court.

Compared to the Witherspoon jury, Florida capital juries' power to sentence is limited to the point of non-existence. The Florida jury penalty recommendation provides little basis for meaningful appellate review, as required by Profitt v. Florida, 428 U.S. 242 (1976), and if, in fact, Florida juries' death recommendations were binding, under current jury sentencing procedures, they would almost certainly run afoul of Furman v. Georgia, 408 U. S. 238 (1972), and its progeny, by creating a substantial risk that death sentences might be imposed in a capricious and arbitrary manner.

Witherspoon does not apply to jury selection in Florida because Florida capital juries do not sentence, and because the remedy for a Witherspoon violation is re-sentencing by a properly selected jury, a remedy which serves no useful purpose in Florida when it was the trial judge who imposed the original sentence and would impose the second sentence.

C. Appellant relies upon case law embodying the Sixth Amendment right to a jury representing a fair-cross-section of the community which has developed in the fifteen years since Witherspoon and which was not properly before the Witherspoon Court.

It is true that in 1968, the Supreme Court of the United States did not accept the Witherspoon defendant's argument that a jury excluding persons

opposed to the death penalty "must necessarily be biased in favor of conviction", and rejected his "competent scientific evidence that death-qualified jurors are partial to the prosecution on the issue of guilt or innocence". (See Witherspoon at 516-517). However, this result does not affect the Appellant's Sixth Amendment fair-cross-section claim in the present case for the following reasons:

1. To begin with, Witherspoon was not technically a Sixth Amendment case. Although the Court mentioned the Sixth Amendment, and its reference to the jury's role of "expressing the conscience of the community" in assessing punishment suggests that it was applying the cross-section requirement (Witherspoon at 518-519), it could not have been a Sixth Amendment case as the trial in Witherspoon occured before the Sixth Amendment was held applicable to the states in Duncan v. Louisiana, 391 U.S. 145 (1968). The Court, two weeks after Witherspoon was decided, declined to give Duncan retroactive effect. DeStefans v. Woods, 392 U.S. 631 (1968). The Witherspoon Court used the language of due process cases, and thus may be viewed as applying the constitutional principles "of due process as seen through the filter of Sixth Amendment values". Hovey v. Superior Court, 616 P.2d. 1301, 1304 n.17 (1980).

The requirements of the Sixth Amendment, considerably different from the due process right to an impartial jury involved in Witherspoon, pose a separate constitutional basis to challenge the systematic exclusion of persons opposed to the death penalty.

2. Appellant does in fact rely on a separate constitutional basis for relief as it has been set forth in the line of cases repre-

sented by Duncan v. Louisiana, supra; Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 (1979), and which has developed and been applied to the states since Witherspoon.

3. Appellant does not attempt to prove, as did the petitioners in Witherspoon and Spinkellink v. Wainwright, 578 F.2d 582 (1978) (a case which will be examined extensively below), that capital juries from which persons opposed to the death penalty have been excluded are biased in favor of conviction, or are somehow prosecution-prone. Appellant is not required to present such proof because in Sixth Amendment cross-section cases, "systematic disproportion itself demonstrates an infringement of the defendant's interests in a jury chosen from a fair community cross-section. There is no need to show particularized bias against the defendant. The only remaining question is whether there is adequate justification for this infringement." Duren at 368 n.26.

4. Instead, Appellant argues the state bears the burden of justifying the under-representative result "by showing attainment of a fair-cross-section to be incompatible with a significant state interest". Duren at 368-369. Moreover, the significant state interest asserted must be "manifestly and primarily advanced by those aspects of the jury selection process...that result in the disproportionate exclusion of a distinctive group". Duren at 367-368.

No such significant state interest exists which justifies the exclusion for cause of the five veniremen in question in this case.

D. The Spinkellink case should not be followed in the present case, because:

1. The petitioner in Spinkellink v. Wainwright, 578 F.2d 582 (1978), complained that the trial judge in his Florida murder case had improperly excluded for cause two venirepersons who testified they would impartially decide guilt or innocence, but would not vote to recommend the death penalty. There is, then, factual similarity between Spinkellink and the present case on this issue.

However, in Spinkellink, the petitioner did not argue that Witherspoon was not entirely applicable because his Florida capital jury did not sentence him, as does Appellant here. Hence, the Fifth Circuit, apparently unaware of the significance of lack of Florida capital juries' sentencing authority, ruled that Witherspoon applied and that the two venirepersons in question were properly excluded. Spinkellink at 592-593.

Appellant argues, therefore, that Spinkellink can be distinguished, in part, from the present case because neither the petitioner, nor the Fifth Circuit recognized or addressed the importance of the jurys' sentencing role or rather its lack thereof.

2. Unlike Spinkelllink, Appellant does not argue that his jury was prosecution-prone.

As mentioned earlier, a major contention of the Spinkellink petitioner was that his jury was prosecution-prone. Spinkellink at 593-595. The Fifth Circuit rejected this argument, but that rejection does not relate to and must be distinguished from the present case where Appellant does not seek to prove prosecution-proneness. Indeed, Appellant claims, as he outlined above, that his Sixth

Amendment fair-cross-section right, based upon Duren and related cases, does not require a showing of actual bias.

3. The Spinkellink court's ruling on the fair-cross-section issue is bad law, based as it is on the falacious and prejudicial preseumption that an entire class of venirepersons does not tell the truth during voir dire.

The Court, in Spinkellink, concluded that the two prospective jurors, who testified under oath that they would impartially determine guilt or innocence, were properly excluded because:

> "Florida apparently has concluded that, if for whatever noble reasons, lll a veniremen clings so steadfastly to the belief that capital punishment is wrong that he would never under any circumstances agree to recommend the sentence of death, it is entirely possible - perhaps even probable - that such veniremen could not fairly judge a defendant's guilt or innocence when a capital felony is charged." Spinkellink at 595.

The Court, in Spinkellink, reasoned that "the State has decided that...the State's interest in the just and even-handed application of its ...death penalty statute [is] too fundamental to risk a defendant-prone jury from the inclusion of such veniremen". Spinkellink at 596 (emphasis supplied).

The Fifth Circuit applied its totally unsupported, defendant-prone reasoning to the question of a defendant's Sixth Amendment right to a representative-cross-section in this way: First, it cited Taylor to the effect that when a class of venirepersons is excluded from jury service, then the state must show "weightier reasons" than "merely rational grounds" for such an exclusion. Spinkellink at 597. What "weightier reasons" did the Fifth Circuit find that tipped the balance in favor of the state's interest in excluding venirepersons who

would be impartial as to guilt or innocence, but who would not impose the death penalty? It used its earlier unfounded presumption that this class of persons would lie during voir dire, that they would not be impartial on guilt or innocence, that they would, in effect, nullify Florida's death penalty statute by causing hung juries, and that juries on which they served would be defendant-prone. Spinkellink at 597.

The defendant-proneness analysis concocted by the Court in Spinkellink, though it certainly may reflect the motivating force behind Florida's exclusionary policy, must be completely rejected. There was no evidence before the Fifth Circuit that the two jurors in question lied when they testified they would be impartial as to guilt or innocence, or that such jurors as a group do not tell the truth during voir dire on this matter.

The defendant-proneness suspicion places in question the fundamental reliability and veracity of the jury selection process in all criminal cases. For the Fifth Circuit to be guided by such a suspicion absent any evidence is alone sufficient to discredit its holding that Florida's state interest outweighed petitioner's right to a jury representing a fair-cross-section.

Venirepersons, who state under oath that they will impartially determine guilt or innocence in a capital case, are entitled to be believed, as they are in all other criminal cases, and not automatically excluded for cause due to some groundless prejudice of the state relating to venirepersons'attitudes toward sentencing. It should be noted that in non-capital criminal cases, prospective jurors are not systematically queried about their attitudes toward a particular legal

punishment, and then excluded, as a matter of law, depending upon how they answer. Would the Spinkellink court approve, for example, of prospective jurors in a robbery case being questioned about possible sentences? Would it permit such jurors to be excluded for cause because they opposed the statutory sentencing scheme in some way? It is unlikely. Why, then, should a similar tactic be allowed on capital cases where the jury doesn't sentence?

The only justification for allowing voir dire in capital cases about possible sentences is when the jury has binding sentencing authority.

The State of Florida's fear of defendant-proneness of persons who testify they will impartially decide guilt or innocence should not have outweighed the petitioner's right in Spinkellink to a representative jury and does not outweigh Appellant's right to one here.

E. An issue of first impression: One observation made by the State in its Answer Brief is undeniably accurate; the manner in which the issue of a capital jury's role in sentencing is linked in this appeal to exclusions for cause during voir dire is a novel one. No other case in Florida, to Appellant's knowledge, has dealt with the significance of this relationship.

If juries in capital cases in Florida are to be selected as if they have the power to finally sentence guilty defendants, then these juries must actaully be given that power, as they have been in virtually all other states (See Appellant's Main Brief, Appendix A). If their sentence recommendations are not to be binding and they are not now, then Florida's capital juries should be selected like any other criminal jury, without regard to possible sentence. The State of Florida has had it both ways with its post-Furman death statute when it comes to excluding for cause persons opposed to the death penalty. It is time for this practice to cease and for Florida

to make a choice. This is the underlying message of Appellant's argument on this issue.

Accordingly, the five venirepersons in question in the present case, who testified they could impartially decide guilt or innocence, and who were excluded for cause, were excluded in violation of Appellant's Sixth Amendment to the United States Constitution rights and his conviction must be reversed.

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

Despite the simple answer of the State to this issue, Appellant believes this to be a struggle of fundamental concepts for which there is no adequate answer currently available. The Appellant reaffirms those arguments made in the Main Brief and contends that the State's superficial answer does not contain a legally substantive rebuttal to those arguments.

The State cites Murphy v. Florida, 421 U.S. 794 (1975) as comparison to the instant case. The "comparison" fails when you compare the two men. "Murph the Surf", as Murphy was known, was something of a folk hero, referred to by the State as "flamboyant". Bundy is not a folk hero and the mere mention of his name to some people conjures up revulsion, fear and hatred. Thus, it was no prejudice to Murphy that people had heard of him, because there was a good chance that those who knew of him regarded him in a positive manner. For Bundy, only those who had not heard of him did not have negative feelings about him. Any knowledge about Bundy was certain to be unfavorable to him, and certain to infect a potential juror's opinion as to Bundy's guilt or innocence.

The State is apparently bewildered as to the argument advanced in the Defense's Main Brief. The Court should recognize that the cornerstone to this entire dilemma is the conflict between the First Amendment and the Fifth, Sixth and Fourteenth Amendments. As the State concedes in its Answer, "Where could the trial have been transferred", and "How long would an abatement of prosecution have to last", are valid questions. Without being glib, the answer to the first question is apparently, "Anywhere but Columbia, Suwannee, Orange, Leon or Dade Counties". That still leaves a

substantial number of locations to choose from. The answer to the second question is more a rhetorical question: "How long does a constitutional right retain validity?" That is how long an abatement should last if faced continually with the situation of the instant case and if a defendant's rights have any meaning and are to be protected. As long as the pervasive news media coverage persists, the abatement must continue.

Therefore, for the reasons contained herein and in the Main Brief, the conviction of the Appellant must be reversed and the case remanded for new trial, with instructions to preserve the Appellant's right to a fair trial and an impartial jury at all costs; even if that means numerous venue changes or a lengthy abatement. It is not too onerous a burden to place upon the shoulders of justice.

The judgment and sentence below should be vacated and a new trial granted.

IV. THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN NOT CONDUCTING, ON ITS OWN MOTION, A "FRYE TEST" CONCERNING THE FIBER AND SHOE TRACT EVIDENCE.

The Defense reaffirms the arguments made in its Main Brief, and expressly contends that the State has not presented any legally substantive rebuttal to those arguments.

The State apparently agrees with the Defense that a review by an Appellate Court, of an issue, absent an objection in the lower court, is possible only when the error is fundamental error. The Defense argues that that is the case here. The failure of the court, when confronted by a novel, unproven theory of evidence, to conduct a "Frye Test" to determine whether the evidence adduced is legally reliable, was fundamental error. Absent this evidence, Bundy would not have been convicted. That is fundamental.

The trial judge is not an extension of the prosecutor. He is there to ensure that the rights of all parties, including the defendant, are properly and adequately protected. He is impartial and when a situation develops that may adversely and unfairly affect a party, it is his duty to analyze that situation and take the necessasry steps to prevent that adversity from occuring unfairly. This duty is not contingent upon an objection by the defense. It is not variable. It is mandatory.

In the instant case, fiber evidence was presented that purported to show that victim and appellant were in close proximity in time and space at a certain point. Fiber evidence is novel. The fiber analyst had not previously been declared an expert before she handled the evidence. The evidence was highly prejudicial to the Appellant, consisting only of the speculative opinions of Ms. Henson as to the degrees of probabilities as to whether Bundy, the van and the Leach girl had come into contact with one another.

The fiber evidence was also potentially unreliable, being a novel pseudo-science. The potential for unreliability, coupled with the extremely prejudicial nature of the evidence, should have triggered the duty of the court to satisfy its own mind that the evidence was reliable, relevant and admissible.

Fiber evidence is so new that the State cannot show any case law to support its opinion that fiber evidence is reliable.

Appellant assumes that the State is not attempting to mislead the Court deliberately, but that is the effect of its argument. The State contends that fiber evidence is reliable because hair analysis evidence is reliable. The cases cited, Jent v. State, 408 So.2d 1024 (Fla. 1981) and Peek v. State, 395 So.2d 492 (1980), are hair analysis cases and do not speak to fiber analysis. Despite what the State believes, "hair sample" evidence is not of the same type as shoe track and fiber evidence.

Because the State cannot rebut the argument that fiber evidence is potentially unreliable, Appellant deems that admitted by the State. The State cannot argue, therefore, that the trial court did not commit fundamental error when it failed to conduct a "Frye Test" inquiry to determine whether the fiber evidence was admissible.

As a final note on the "Frye Test", in view of the discussion of Frye in the section on hypnosis, Appellant is unsure whether Florida has adopted the Frye standard. Since this issue of fundamental error depends upon Florida invoking and accepting the Frye standard, Appellant urges the Court to definitively accept the Frye standard as the standard for "scientific" evidence in Florida. However, if this Court opts to follow the "relevancy approach" as discussed in Brown, supra, then the trial court should have placed the burden upon the State to establish the admissibility of such fiber evidence by clear and convincing evidence.

Accordingly, if the Court accepts the Frye standard, or the "relevancy approach", the Appellant's conviction must be reversed and remanded with instructions to the trial court to conduct its own inquiry to determine the reliability of the fiber evidence.

V. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A VIEW

Every defendant in a criminal case, especially one on trial for his life, should be given every opportunity to present evidence in his defense in the manner he deems most effective. In denying a view, the trial court prevented the defense from being able to demonstrate to the jury, in an effective manner, its contention that C. L. Anderson could not possibly have seen what he said he saw from where he said he saw it.

There is no doubt that a view would have been inconvenient, but mere inconvenience should not have precluded the defense from effectively presenting a vital part of its case. C. L. Anderson was the linch-pin of the State's case against Bundy. As stated before, without his testimony, all the other evidence was virtually meaningless.

The State contends that because the road in front of the school and upon which Anderson was stopped, was widened since February 8, 1978, the value of a view was diminished. The type of view which the defense wanted to conduct would not have been affected by the widening of the road. The defense wanted the jury to see where the Leach girl left her homeroom class, walked to the auditorium, see where she would have been visible from the road and see the distances involved for themselves. The widening of the road would not have had any effect on this.

The view was logically and legally relevant to the Defendant's case. If there were any minor differences in the setting, the State could argue to they jury that the view lacked credibility. It's the same argument, in reverse, upon which the hypnosis issue was resolved below.

The Motion for a View should have been granted and its denial was highly prejudicial to the Defendant's case. Bundy's conviction should be reversed and a new trial granted.

VI. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE, TO EXCLUDE EVIDENCE OF FLIGHT, AND THE SUBSEQUENT JURY INSTRUCTION ON FLIGHT BASED UPON THAT EVIDENCE.

A. The Evidence of Flight

The Defense reaffirms the argument made in the Defense' Main Brief and expressly states that the State has offered no legally substantive rebuttal to that argument. The Defense answers the bare statements made by the State only to prevent the State from misleading this Court as to the nature of the argument.

In Defense' Main Brief, it was argued that the State misinterpreted the opinions in Hargrett v. State, 255 So.2d 298 (Fla. 3d DCA, 1971), and Batey v. State, 355 So.2d 1271 (Fla. 1st DCA, 1978). The State, lacking any substantive argument to oppose the Defense' Motion in Limine to exclude Evidence of Flight and the subsequent jury instruction on flight based upon that evidence, resorted to an attempt to mislead the trial court by boldly asserting that they had case law to support their argument. The Batey and Hargrett cases, cited by the State to support their contention that the evidence of flight should be admitted, never speak to the question of admissibility. The trial court, successfully misled by the State, misapplied those cases and ruled in favor of the State. This ruling was in error.

The general rule in Florida is that relevancy is the test of admissibility. The Defense reaffirms its argument that the evidence was irrelevant, more prejudicial than probative, and therefore, inadmissible under the rules of evidence in this jurisdiction.

The State admits that flight is not probative of any particular crime, particularly the crime charged. There can be thousands of factors that may

combine to produce the reaction of flight to a given instance. To say that flight may be used to infer guilt is to reduce the entire spectrum of human emotions and reactions down to one explanation. This is an oversimplification of the human experience.

The State argues, condescendingly, that the idea that a defendant may be protected by multiplicitous crimes is absurd, and if that were true we would agree. However, the State misses the point. The State may not attempt to prove by inference, innuendo and aspersion what it cannot prove by substantive, relevant evidence. The evidence of flight was not competent evidence to prove that Bundy had guilty knowledge of the crimes charged. Because it was not probative of the crimes charged, but rather tended to paint Bundy as a desperate character in the eyes of the jury, it was too prejudicial to have even remote evidentiary value in this case.

As stated in the Defense' Main Brief, it is unfair and an unconstitutional denial of due process to require that Bundy, when faced with this situation, must prove his innocence. Further, to require that this proof be given in the face of incompetent evidence based upon mere speculation, conjuration, and innuendo is contrary to every tenet of American Jurisprudence. This Court must hold that the "Motion in Limine" was improperly denied.

B. The Instruction of Flight

The Defense reaffirms the argument made in its Main Brief and expressly states that the State has offered no substantive legal rebuttal to that argument. The State misses the point of the Defense argument once again. The State argues that because inference of flight was admitted into evidence by the trial court, an instruction was proper. As far as this tunnel-vision argument goes, it is correct; but the point is that the evidence of flight should never have been admitted. Because it was error to admit the evidence

of flight into the record, it was compound error to give the instruction on the evidence of flight.

Because the State chooses not to rebut the argument contained in the Defense' Main Brief, it is assumed that the State agrees with the contentions made. Accordingly, the Defense again argues that the evidence of flight was irrelevant and, therefore, improperly admitted. The instruction on flight was compound error because it was given as a result of improperly admitted evidence.

The Defendant demands that he be given a new trial exclusive of any purported evidence of "flight" and absent any instruction on flight.

VII. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH.

A. The trial court did not establish that the crime was expecially heinous, atrocious and cruel.

The Appellant reaffirms the arguments made in the Main Brief and expressly contends that the State has offered no legally substantive rebuttal to those arguments.

The State apparently follows the old maxim: When the law is against you, argue the facts and when the facts are against you, argue the law. Apparently, when both are against you, argue speculation. The State's answer to the arguments in Appellant's Main Brief, VII, §A & B, is to speculate on what might have been, because there is no proof, no evidence, to support the sentence of death.

The State speculates that the victim struggled to escape (R. 3955). They base that speculation upon the fact that a van was alleged to have contained Theodore Bundy and the victim when it crossed the center line once or twice as it travelled down the highway. How tenuous can an argument be?

First of all, the testimony of Jacqueline D. Moore was incredible, if not incredulous. When she first reported the incident to Investigator Daugherty on March 3, 1978 (R.4266), she did not relate having "a mental picture in her mind" of the expression on the face of the man driving the van. She further testified that she had seen Bundy's picture on television and in newspapers numerous times (R. 4279), but never drew any connection to this "mental picture" until she saw a picture of Bundy in the newspaper and on television on January 18, 1980 (R. 4280), in which she saw the same "expression" (R.4280).

Based upon this extremely tenuous and doubtful identification, the State

speculates that Mrs. Moore's account that the van crossed the center line is evidence that the Leach girl must have been struggling.

The State also speculates that the victim was sexually assaulted prior to death and that she suffered because of that fact. Without engaging in a thorough discussion of the psychological aberration known as necrophelia, it is entirely possible that any sexual assault which may have occurred only occurred after death. As such, no suffering on the part of the victim would have taken place. Absent any evidence to show, beyond a reasonable doubt that the alleged assault took place prior to death, it is error to speculate that the victim suffered in such a manner.

The State speculates that Ms. Leach feared bodily harm and death during the course of the abduction. Again, the State has no way of proving that argument. Ms. Leach may have been unconscious or dead within moments of her alleged abduction; she may have accepted as the premise for her leaving the school some reason that does not inspire fear; or she may have been unable to comprehend the apparent situation in which she found herself. The possibilities are endless and it cannot be shown beyond a reasonable doubt that she lived her last moments in the grip of fear and apprehension.

The State argues that these bald assertions are enough to support the finding that the death was "heinous, atrocious and cruel". If this hypothetical the State constructed is true, then the death penalty might be warranted. However, this hypothesis bears no relation to the facts adduced at trial, which were limited to speculation by the State's forensic pathologist that Ms. Leach died as a result of "homicidal violence to the neck region, type undetermined" (R. 4481). This speculation was sufficiently rebutted by Dr. Joseph Burton, a medical examiner from Atlanta, Georgia, and an expert in forensic pathology (R. 6029-6055). Dr. Burton concluded that there was no

way to determine any actual cause of death because of the condition of the body (R. 6045).

B. The Trial Court erred in finding that death occurred as a result of homicidal injury to the neck region of the victim.

Dr. Burton's testimony was that there was no way to conclude, as the State's pathologist had done, that the alleged wound to the neck was the cause of death. The trauma could just as easily and likely have occurred as a result of insect and small animal scavenging (R. 6045-6046). Finally, any injury done to the neck could have occurred just as likely after death (R. 6048).

This was more than enough rebuttal to raise a reasonable doubt in the mind of the average reasonable trial judge. The court clearly erred in finding that, as a matter of fact and law, the death was as a result of the alleged wound to the neck region.

What the State is left with is exactly what they started with; the fact that the death occurred. That is the only fact provable beyond a reasonable doubt. The State cannot argue that because a death occurs it is necessarily heinous, atrocious, and cruel unless it can be proven otherwise. This argument defies logic.

The State does manage to cite one case in support of its argument; Hallman v. State, 305 So.2d 180 (Fla., 1974). This case is of precious little value to this argument, however, because it is so factually dissimilar. The facts of Hallman show that the perpetrator cut the throat of the victim numerous times with a broken piece of glass. The facts of the instant case show that a victim died; nothing more. Hallman is inapplicable to the instant case.

Because the death and its attendant circumstances were not proved

beyond a reasonable doubt, the trial court could not conclude that death occurred as a result of any specific injury and then use that conclusion as an aggravating factor in the penalty and sentencing phases of this trial.

Accordingly, because this fact was not proven beyond a reasonable doubt, the jury and the judge, by the court's own instructions, were precluded from considering this fact as an aggravating factor in support of a death sentence for Bundy (RP 135 & 195).

Therefore, the sentence must be vacated and the case remanded for resentencing with instructions to enter a sentence of life imprisonment.

C. The first two findings of aggravating circumstances in the trial court's sentence involved the same convicted act and this constituted an impermissible doubling of aggravating circumstances.

The State argues that Provence v. State, 337 So.2d 783 (Fla. 1976) does not apply to the instant case. It is interesting to note that the State's argument is based solely upon a perceived distinction between Provence and the instant case, and the State has produced no case law to support this argument. Accordingly, the Appellant reaffirms the argument contained in the Main Brief, and expressly contends that the State has offered no legally substantive rebuttal to that argument.

The State asserts a tangential relationship between multiple punishments for the same crime and compounding aggravating factors in sentencing a capital felon. Citing Blockburger v. United States, 284 U.S. 299 (1932), as expressed by Whalen v. United States, 445 U.S. 684 (1979), the State seeks to persuade the court that the Blockburger test, which provides that two separate offenses may be punished with consecutive sentences, should be used to allow the doubling of aggravating factors which occurred in the instant case.

However, even assuming that aggravating factors and consecutive sentences are analogous, a proposition with which Appellant disagrees, an analysis of the Whalen case shows that Blockburger would not apply here. (Whalen, at 693-694)

The State's final contention, that Section 921.141(5)(a) Florida Statutes, provides the death penalty for those to whom the rehabilitative process is an "obvious waste of time", is outrageous and extreme in its conclusion and unsupported by facts. The Appellant may be the perfect candidate for serious rehabilitation. Until some quantitative measure of that capacity is determined, the State must not be allowed to arbitrarily decide who may be rehabilitated and who may not.

The trial court erred in doubling an aggravating factor while determining the sentence for the Appellant. Accordingly, the Appellant's sentence must be vacated and the case remanded for resentencing.

D. The trial court erred in admitting the testimony of Michael James Fisher to prove an aggravating factor in the penalty phase.

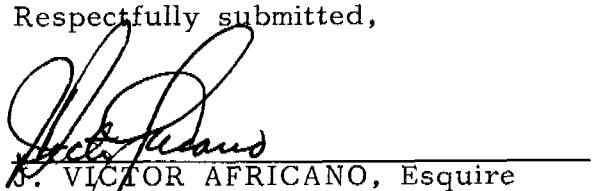
E. The trial court erred in denying the defendant's Motion to Enter Life Sentence on verdict and to prohibit penalty phase of trial.

The State has chosen not to respond in anylegally substantive manner to the Appellant's arguments under these sections. The Appellant therefore, reaffirms the arguments made in the Main Brief and demands the relief prayed for at the end of both sections.

CONCLUSION

For the reasons set forth in the foregoing arguments and citations of authority, it is respectfully submitted that the conviction, judgment and sentence of THEODORE ROBERT BUNDY for the kidnapping and murder of Kimberly Diane Leach should be vacated and set aside and the cause remanded for a new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished to the Attorney General of the State of Florida, The Capitol, Tallahassee, Florida, by hand delivery on this 21st day of March, 1983.

J. VICTOR AFRICANO

xc: Theodore Robert Bundy