IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

Appellant, CASE NUMBER NO. 80,176

vs.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

This appeal is from the orders of the Circuit Court denying without evidentiary hearing four claims raised in appellant's Second Amended Motion to Vacate Judgment and Sentence ("Second Amended Motion"), filed pursuant to Fla. R. Crim. P. 3.850, and denying after evidentiary hearing one claim in that same Motion. The Court has jurisdiction of this appeal pursuant to Art. V, § 3(b)(1) and (9), Fla. Const.

STATEMENT OF THE CASE

Procedural History

Appellant is a prisoner under the sentence of death based upon his convictions for first-degree murders of Eunice Zeigler, his wife, and Charlie Mays, a friend, and under two life sentences for the second degree murders of his in-laws, Perry and Virginia Edwards. As a result of, among other issues, a number of highly irregular events at appellant's trial, he has been before this Court on several occasions since his convictions in 1976. Zeigler v. State, 580 So.2d 127 (Fla.), cert. denied, 112 S. Ct. 390 (1991) (affirming death sentence imposed on

resentencing); Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988) (vacating previous sentence of death and ordering resentencing hearing); State v. Zeigler, 494 So.2d 957 (Fla. 1986) (reversing grant of evidentiary hearing on sentencing claim raised in Rule 3.850 motion); Zeigler v. State, 473 So.2d 203 (Fla. 1985) (affirming denial of relief after evidentiary hearing on claim of judicial bias); Zeigler v. State, 452 So.2d 537 (Fla. 1984) (affirming denial of relief on eighteen claims raised in Rule 3.850 motion and remanding for evidentiary hearing on one claim); Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert. denied, 456 U.S. 1035 (1982) (affirming convictions and sentence on direct appeal). The following is a brief summary of the issues appellant has raised previously (on direct appeal and in Rule 3.850 motions) so that the Court may evaluate the procedural default issues upon which the Circuit Court rested its denial of the Second Amended Motion.

On direct appeal of his convictions, appellant raised several issues concerning the investigation of the murders, the prosecution's conduct in discovery, and the conduct of the trial. Specifically, the issues raised were (stated in the order considered by this Court in its opinion on the appeal): (1) insufficiency of the evidence; (2) prejudicial consolidation of indictments; (3) denial of a much needed continuance of trial; (4) four illegal searches; (5) breach of discovery rules concerning tests performed by Herbert MacDonnell; (6) admission of fingerprint evidence; (7) admission of a bullet allegedly

found in a citrus grove; (8) refusal to admit sodium butathol test of appellant; (9) refusal to admit testimony of appellant's psychiatrist; (10) admission of testimony by Frank Smith concerning alleged telephone conversations with appellant; (11) excusal of Juror Young; (12) propriety of trial court's handling of Juror Brickel's fainting spells and other problems; (13) refusal to allow interview of jurors by appellant; and (14) erroneous judicial override of jury's life recommendation. This Court affirmed appellant's convictions and sentence.

A death warrant was signed on appellant on September 28, 1982, immediately following rejection of his executive clemency application, and his execution was stayed by a federal court twenty days later. Following that court's direction to exhaust state remedies, appellant, through pro bono counsel, filed his first Rule 3.850 motion on January 14, 1983 in the Circuit Court for the Fourth Judicial Circuit, Duval County (the venue in which appellant was convicted after the trial judge moved the trial). As grounds for relief, appellant alleged: (1) that the trial court violated his rights to due process and equal protection when it refused to admit evidence showing the results of a sodium butathol examination conducted on him; (2) that his right to due process was violated when an actually or potentially biased trial judge presided over his trial; (3) that the grand jury indictment was invalid; (4) that the investigating agency and the state attorney exhibited a pattern of obstruction and delay and actual destruction and suppression of evidence; (5)

that his conviction and sentence were obtained by the presentation of evidence seized in violation of his fourth amendment rights; (6) that the prosecutor improperly commented to the jury on evidence; (7) that the jury deliberations were tainted by undue pressure from the trial judge and by the use of intoxicants; (8) that appellant was denied effective assistance of counsel at the guilt and penalty phases of his trial; and ten other claims relating to appellant's death sentence. The Circuit Court denied the motion without any hearing. This Court ruled that all but two of the claims were procedurally barred because they were or should have been raised on direct appeal. This Court rejected the claim of ineffective assistance of counsel on its merits and remanded for an evidentiary hearing on claim 2, the trial court's bias. After taking testimony, the Circuit Court ruled against appellant. This Court affirmed.

Following the proceedings on the First Rule 3.850 motion, appellant's pro bono counsel withdrew. The Office of Capital Collateral Representative (CCR) took over appellant's case. A second death warrant was issued in 1986, setting appellant's execution for May 26, 1986.

On May 18, 1986, CCR filed appellant's Second Rule 3.850 Motion and a Motion for Stay of Execution in the Circuit Court. The Rule 3.850 Motion raised five issues, including a claim that the imposition of the death penalty violated the Eighth Amendment as construed in Lockett v. Ohio, 438 U.S. 586 (1978). The Circuit Court ordered an evidentiary hearing on that

claim, but the state appealed and this Court reversed. State v. Zeigler, 494 So.2d 957 (Fla. 1986). Appellant's current counsel entered the case thereafter.

On November 18, 1987, Mr. Zeigler successfully petitioned this Court for a new sentencing hearing based on Hitchcock v. Dugger, 481 U.S. 393 (1987). This Court vacated the death sentence on April 7, 1988, and remanded the case to the Circuit Court for resentencing. Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988). The Circuit Court held a sentencing hearing on August 14-16, 1989 and resentenced Mr. Zeigler to death. This Court affirmed the sentence. Zeigler v. State, 580 So.2d 127 (Fla.), cert. denied, 112 S. Ct. 390 (1991).

A revised Motion to Vacate Judgment and Sentence concerning guilt-innocence issues was filed in the Circuit Court by appellant's current counsel on September 14, 1988 (R. 331-451). It was held in abeyance while Mr. Zeigler was resentenced and pursued appeal of his new death sentence. Likewise, when an Amended Motion to Vacate Judgment and Sentence was filed on October 20, 1989 (R. 452-603), in response to newly discovered evidence, it was held in abeyance.

On November 7, 1991, three days after the denial of certiorari on the resentencing, the State filed a Motion for Final Disposition of Motion to Vacate Judgment and Sentence and Amended Motion to Vacate Judgment and Sentence. (R. 604-612.) Appellant opposed the motion because he needed an opportunity to develop his claims regarding the resentencing proceedings, which

including locating conflict-free counsel, since current counsel represented appellant in the resentencing hearing, and is not able to adequately represent him in post-conviction proceedings concerning the sentence. (R. 618-622.) After a hearing, the Circuit Court directed that adjudication of guilt-innocence claims proceed immediately and permitted the filing of updated motion papers, and the State agreed that issues related to sentencing could be raised by other counsel at any time prior to the expiration of the two year limitation period for such claims.[1]

The Second Amended Motion was filed on March 5, 1992 (R. 624-687). It expanded upon existing claims by adding information discovered in an inspection of the State Attorney's files in December of 1991 and by stating separately Claim V, for which the facts had previously been pled without additional elaboration. The State did not further respond to the Second Amended Motion.

Court's Order on Second Amended Motion

On March 26, 1992, the Circuit Court rendered its Order partially denying Defendant's Motion to Vacate Judgment and Sentence, Amended Motion to Vacate Judgment and Sentence, and Second Amended Motion to Vacate Judgment and Sentence (R. 703-704). That court concluded, without any evidentiary inquiry,

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[1] Appellant did and does not waive any claims that otherwise would be available to him under Fla. R. Crim. P. 3.850 but have not been asserted because of the Circuit Court's order. In particular, appellant fully reserves all claims concerning his resentencing.

that Claims I, II and IV of the Second Amended Motion were untimely under Rule 3.850 because appellant "failed to demonstrate that the factual basis for these issues could not have been discovered by the Defendant or his counsel by the exercise of due diligence prior to the expiration of the time limit." (R. 703.) The Circuit Court further found that these claims should have been asserted in the Rule 3.850 motion filed on January 14, 1983. (Id.) The Court set Claim III for an evidentiary hearing. (R. 704.) The order did not contain any resolution of Claim V.

Appellant submitted his Motion to Alter or Amend Order Partially Denying Defendant's Motion to Vacate Judgment, Etc., on April 2, 1992. (Missing from record, see R. 786, copy attached as App. A.) This motion called the Court's attention to the omission in the March 26th order. Appellant argued that the basis for ordering the hearing on Claim III applied equally to Claim V.

Although the State submitted no opposition to the motion or any written position concerning Claim V, the Court issued an amended order on April 10, 1992 (R. 736-737), in which a hearing on Claim V was denied on the basis that it "has previously been litigated and rejected on direct appeal and in the Defendant's first Motion for Post Conviction relief." (R. 737.) Further, the Court concluded, "The allegation of 'newly discovered evidence' is not sufficient to warrant the relief requested." (Id.)

Evidentiary Hearing

The Circuit Court held an evidentiary hearing on May 27, 1992, limited to two questions: (i) whether the bullet allegedly retrieved from the citrus grove on January 12, 1976, was in fact fabricated; and (ii) whether this claim was procedurally defaulted. Five witnesses testified.

Three witnesses gave testimony that bore on the merits of the claim. John Bulled and Johnny Beverly were inmate-trustys who participated in the search of a citrus grove in January of 1976. Mr. Bulled, an English citizen, was deported shortly after the search. Although he later returned to Florida, he and Mr. Beverly have not seen or spoken to each other in the time since the 1976 citrus grove search. Nonetheless, they testified quite similarly.

The search in the citrus grove was conducted using five inmates supervised by deputy sheriffs who were correctional officers. The inmates dug in areas where a metal detector tested positive. The dirt was placed in a sifter to separate any foreign object such as a bullet.

Mr. Bulled testified that he did not observe the discovery of a bullet by either the inmates or Sheriff's deputies -- contrary to the testimony received at Mr. Zeigler's trial. He overheard remarks by law enforcement officers to the effect that a bullet would have to be planted if one could not be found. He also heard a corrections supervisor tell other deputies that what Bulled overheard was not important because he was being deported.

Mr. Beverly witnessed the planting of a bullet in a sifter by a uniformed Sheriff's deputy. He saw the bullet drop from the deputy's hand into the sifter, followed by the deputy's reaching into the sifter and declaring that a bullet had been "found".

Alton Evans was a technical services officer in the Sheriff's Department. He logged in the bullet reportedly found in the citrus grove. He identified the form on which the evidence was logged (Deft. Exh. No. 1), which showed the bullet received on January 15, 1976, although the deputy who allegedly found it reported it found on January 12th. Mr. Evans had no recollection why a three-day gap existed.

The second issue involved testimony from appellant's trial counsel, Ralph Hadley and Vernon Davids. Mr. Hadley testified that despite the requests and diligence of defense counsel, the identity and addresses of the inmate-trustys was not disclosed by the State until a week prior to trial. Mr. Davids testified that he directed an investigation, which was unsuccessful, to locate these potential witnesses. Mr. Davids also testified that Mr. Zeigler lacked the financial resources after conviction to pursue additional investigation of these witnesses and that the focus of the appeals process (which lasted five years) excluded any further efforts.

STATEMENT OF FACTS

The Murders

On December 24, 1975, four persons were killed in the Zeigler family furniture store in Winter Garden. Eunice Zeigler, appellant's wife, and her parents were shot to death, and Mr. Charles Mays was bludgeoned to death and shot. Mr. Zeigler also was shot, nearly fatally, through the abdomen. He telephoned for help and was found by the Police Chiefs of Winter Garden and neighboring Oakland. Mr. Zeigler was arrested for the murders on December 29, 1975, while hospitalized.

The prosecution's theory of the case was that Mr. Zeigler had killed his wife to collect the proceeds of insurance policies on her life, had killed his in-laws because they were inadvertently present, had killed Mays as part of a scheme to make the other murders appear to be the products of a robbery gone haywire, and had then shot himself in a desperate effort to avoid suspicion when his plan to create a false robbery scene went awry. Under the State's theory, Mr. Zeigler murdered his wife and her parents, then drove around with Mays and Felton Thomas, then bludgeoned Mays to death before picking up Edward Williams, although neither Thomas nor Williams ever testified that there was anything unusual about Mr. Zeigler's appearance that night, much less that he was soaked with blood.

The defense theory was that three or four men, probably including Mays, Thomas and Williams, had attempted to rob the furniture store and that the deaths and the wounding of Mr.

Zeigler occurred in the ensuing shoot-out and struggle. Mr. Zeigler was the principal fact witness in his own behalf, flatly denying the crucial testimony of Williams against him and that he was the unnamed white man who had taken Thomas and Mays to an orange grove to fire guns and had then tried to get them to break into the furniture store. Circumstantial evidence corroborating the defense theory included the complete lack of fingerprints on the murder weapons, despite the State's contention that Zeigler had gone to great lengths to have Thomas and Mays handle the weapons; the money in Mays's pockets; a tooth that was not accounted for; and testimony by the F.B.I. expert that the bloody footprint could not be identified as Zeigler's.

Newly Discovered Evidence of State Misconduct (Claims I-IV)[2]

In April 1987, counsel for Mr. Zeigler requested, and was granted, access to the files of this case in the office of the State's Attorney in Orlando, under the Florida Public Records Act, Fla. Stat. §119.01 et seq. This investigation was an exercise undertaken by new counsel to familiarize themselves with the case. Prior counsel had requested access to the records in 1982 and was led to believe that he had seen a complete file. The earlier disclosure, however, was not complete. Further, in December of 1991, following the completion of direct appeal of Mr. Zeigler's resentencing, defense counsel again inspected the files of the State's Attorney. This inspection uncovered

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[2] All references to claim numbers are taken from the Second Amended Motion.

additional materials concerning the investigation of Mr. Zeigler which, on information and belief, was not previously produced for inspection.

Defense counsel found in the 1987 inspection (a) a tape-recorded telephone interview conducted by a state investigator with a hitherto unknown eyewitness to some of the events at the scene of the crime; (b) a previously unproduced report made the night of the crime by the first officer to arrive at the scene; and (c) a previously unproduced investigative report which contained statements by prosecution witnesses which appear to be at odds with some of their testimony. Among the materials discovered in this 1991 inspection were documents indicating that the State's Attorney's Office continued to obstruct justice and tamper with witnesses -- in one case successfully persuading a trial witness to change his testimony in order to harmonize it with inconsistent testimony by another witness.

Jellison Tape (Claim I). Defense counsel found in the 1987 records review a tape-recorded telephone interview of Jon Jellison, a hitherto unknown eyewitness to some of the events at the Zeigler furniture store on the night of the crime. The Jellison tape sets forth facts exculpatory to appellant. Moreover, the interviewer's comments demonstrate the State's active attempt to conform the evidence, including the testimony of witnesses, to its preconceived theory of appellant's guilt.

Impeachment Materials (Claim II). Defense counsel

found in the 1987 records review potential impeachment materials, to-wit: (1) a detailed, 13-page statement of facts written by Oakland Chief of Police Robert Thompson, the first officer to arrive at the crime scene in response to Mr. Zeigler's call for help; (2) an investigation report of Detective Donald Frye that included summaries of information received from Edward Williams and Felton Thomas; (3) a reference (in Frye's report) to a taped interview of Frank Smith that has never been produced. In the 1991 records review, defense counsel found notes showing that some of Herbert MacDonnell's original conclusions concerning blood splatters were different from Frye's and from MacDonnell's testimony at trial and that Frye was then speaking to MacDonnell to conform his testimony to the State's theory.

The failure to disclose these statements is shocking standing alone, but it is more shocking in the light of what was disclosed. The State gave defense counsel a summary report by Chief Thompson that materially differed on a key issue in appellant's defense and witness statements by Williams and Thomas that omitted material contained in Frye's summaries that materially contradicts testimony given at trial. The deception involved in producing one set of reports in lieu of other reports that contained exculpatory information has independent significance.

Citrus Grove Bullet (Claim III). The State concealed the identity of several inmate-trustys who searched a citrus grove in January, 1976, until less than one week before trial.

Despite considerable effort and diligence, defense counsel could not locate any of the inmates for use at trial.

In 1989 John Bulled, an inmate-trusty who searched for the bullet, contacted appellant's former counsel to inform him that the bullet was not found in the grove, as reported. Subsequent investigation turned up a second inmate-trusty, Johnny Beverly, who witnessed the planting of the bullet by a deputy sheriff. The Circuit Court held an evidentiary hearing on this claim.

Newly Discovered Evidence Concerning Jury Verdict (Claim V)

In 1989, an investigation by the reporters for a television program about Mr. Zeigler's case discovered for the first time that one of the jurors (Juror Brickel) received a prescription of Valium during deliberations, at the direction of the trial judge, following her collapse and suggestion to the court that she was experiencing extreme stress from the deliberations. Shortly after receiving this medication, this juror abandoned her holdout position and the jury voted to convict Mr. Zeigler. Defense counsel was not consulted or informed prior to the Court's action and remained unaware of this intervention into the jury's deliberations until 1989. Immediately following the trial and on several occasions thereafter defense counsel sought permission of the court to interview jurors; each such request was refused. As a result, appellant was unaware of these events prior to 1989.

SUMMARY OF ARGUMENT

The Circuit Court erroneously denied Claim V as a successive claim that has been adjudicated previously and for which newly discovered evidence does not warrant relief. Claim V states that appellant's right to an impartial jury was violated when the trial judge ordered a prescription of Valium sent to Juror Brickel during deliberations. She was the sole holdout juror at that point and shortly after receiving the prescription she voted to convict. The facts underlying this claim were unknown to appellant until a television program reported them in 1989 and the facts were not discernible at an earlier date because appellant was barred from interviewing any jurors. Although appellant has litigated claims concerning the jury previously, including ones mentioning alcohol intoxication of certain jurors and mentioning Juror Brickel, appellant has not previously litigated any instance similar to his present claim. The facts developed thus far described both intoxication of a juror and judicial intervention into the jury's deliberations. The newly discovered evidence thus is sufficient to warrant relief because the facts alleged, if proved, would compel a setting aside of appellant's convictions.

The Circuit Court also erroneously denied Claims I-IV as successive claims that were untimely under the limitations period in Rule 3.850 and defaulted when they were not being asserted in appellant's First Rule 3.850 motion in 1983. Appellant demonstrated at the evidentiary hearing on Claim III

that he exercised diligence in attempting to locate the inmate-trusty witnesses at the time of trial and that he lacked the resources to mount an investigation thereafter. Claims, I, II and IV arise from materials found in the files of the State Attorney's Office when they were inspected in 1987 and 1992. Appellant properly pled his diligence regarding these claims in the Second Amended Motion and included an affidavit from prior counsel showing that the State Attorney's files were reviewed in 1982. The material upon which these claims were based were not in the files then, and some of the materials were not even included in 1987. The absence of the materials in 1982 excuses the procedural default. The State's misconduct in withholding the materials estops it from asserting the limitations period as a defense.

The Circuit Court additionally erred by denying Claim III on the merits. The evidentiary hearing (and discovery in preparation for it) was wrongly limited in scope such that the Court could not properly evaluate the testimony before it. Moreover, the Court discredited the testimony of the two key witnesses for appellant, contrary to the great weight of the nontestimonial evidence and without evaluating the credibility of the witness whose written testimony was offered in opposition. These errors are compounded by several evidentiary rulings by the Circuit Court that erroneously excluded admissible, probative, relevant evidence.

ARGUMENT

I.

THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT CLAIM V HAD BEEN PREVIOUSLY ADJUDICATED

Claim V states that the trial judge had Valium sent to a known hold-out juror and that shortly thereafter she voted to convict Mr. Zeigler. The facts underlying this claim were never brought to light prior to a 1989 television program about appellant's case. Appellant could not learn of the facts because he has been enjoined from interviewing jurors since the trial in 1976. The State has not replied to the allegations of the claim, not even to state a position concerning procedural default.

The Circuit Court concluded that Claim V was procedurally barred because it had been litigated and rejected on direct appeal in the first 3.850 motion. (The Court did not explain this conclusion nor did it append to its order any part of the files and records to show this to be the case.) The Court also found that the "newly discovered evidence" was not sufficient to warrant relief. Both of these conclusions are in error.

The basis stated for relief asserted in Claim V has not been litigated at any time prior to the Second Amended Motion. In the direct appeal of appellant's convictions, an issue was raised concerning the intoxication of jurors, but that claim concerned a bailiff's observation of the ingestion of alcoholic beverages by members of the jury. (A copy of the relevant pages

from appellant's brief on direct appeal is attached as App. B.) The direct appeal also raised an issue concerning Juror Brickel but that claim concerned her assertion that other jurors asserted undue pressure on her to convict; there was not any allegation concerning the delivery to her, or the ingestion by her, of Valium. The Rule 3.850 motion in 1983 repeated these two issues and the factual support for them did not mention any allegation that Juror Brickel had received or taken Valium.[3] (A copy of the relevant pages from appellant's Rule 3.850 motion is attached as App. C.)

This Court's ruling in State v. Sireci, 502 So.2d 1221 (Fla. 1987), demonstrates why Claim V is not barred by the earlier litigation of similar sounding claims based on different evidence. The defendant there asserted new evidence regarding his psychiatric competence although the issue had been thoroughly litigated on direct appeal. Because this new evidence was previously unavailable despite defendant's diligence, the Court permitted the claim. Id. at 1224. Likewise, it is properly alleged (and undisputed) here that appellant previously did not and could not know of the basis for Claim V.

Since the allegations of Claim V are new and different grounds for relief and the judge did not (because he could not) find that failure to assert these grounds in a prior motion constituted abuse, the claim must be evaluated under the

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[3] Although the court below did not mention the 1986 Rule 3.850 motion, appellant notes that the allegations relating to Juror Brickel in that motion do not mention Valium.

standards that govern a timely, nonsuccessive motion. Under Rule 3.850, appellant is entitled to evidentiary hearing on Claim V unless the motion and the files and records of the case conclusively show that he is not entitled to relief. Appellant did not receive such an evidentiary hearing. Neither the motion nor the files and records conclusively show that appellant would not be entitled to relief if it is true that Juror Brickel was intoxicated on Valium ordered by the trial judge. The allegations must be accepted at face value, Lightbourne v. Dugger, 549 So.2d 1364, 1365 (Fla. 1989), and, when they are, they satisfy the legal standard for relief.

The standard for setting aside a conviction or sentence because of newly discovered evidence has two elements. See Scott v. Dugger, 604 So.2d 465, 468 (Fla. 1992). The first requirement, appellant's ignorance of the asserted facts at the time of trial and subsequent diligence, is not in dispute. The second requirement is that the newly discovered evidence must be of such a nature that it would void the conviction. See id. Appellant also succeeds in satisfying this requirement.

As a matter of law, appellant is presumptively entitled to the relief requested if he proves the allegations of Claim V. The ingestion of Valium is a form of intoxication. A juror who is intoxicated deprives a defendant of an impartial and competent jury. See Gamble v. State, 44 Fla. 429, 33 So. 471 (1902); Langston v. State, 212 So.2d 51 (Fla. 1st DCA 1968). Once evidence of intoxication is presented, the burden shifts to the

State to demonstrate that no relief is necessary. "If intoxicants be shown to have been used by the jury, the presumption arises in favor of the convicted defendant that it resulted injuriously to him, and the burden is on the state to show affirmatively, to the entire satisfaction of the court, that its use was to such a limited and moderate extent as to completely and satisfactorily negative any harm to the defendant from its use by the jury, or any member of it." Gamble, 44 Fla. at 435, 33 So. at 473.[4]

The State, not having responded to the allegations, obviously has failed to rebut the presumption. Moreover, any response would necessarily involve factual assertions that could be resolved only at an evidentiary hearing. Since the allegations, if proven, would void appellant's convictions and entitle him to a new trial, the trial court erred in denying the

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[4] Relief also is justified under a theory that the trial judge's intervention into Juror Brickel's predicament was tantamount to judicial coercion to reach a particular verdict. Sending Valium to her was the equivalent of the judge reading an improper "dynamite charge" to Juror Brickel alone. E.g., Lincoln v. State, 364 So.2d 117 (Fla. 1st DCA 1978) (judge telling jury "to get back there and arrive at verdict" deprived defendant of right to hung jury), approved, Kelly v. State, 486 So.2d 578, 584 (Fla. 1986); Webb v. State, 519 So.2d 748 (Fla. 4th DCA 1988) (violation of Florida Constitution to tell jury to return verdict that night); Lee v. State, 239 So.2d 136, 139 (Fla. 1st DCA) ("Nothing should be said by the trial court to the jury that would or could likely influence the decision of a single juror to abandon his conscientious belief as to the correctness of his position."), cert. denied, 240 So.2d 642 (Fla. 1970). The circumstances suggest this conduct was particularly egregious because a verdict had not been reached and Juror Brickel clearly indicated her conscientious opposition to the verdict advocated by other jurors. Cf. Scruggs v. Williams, 903 F.2d 1430, 1435 (11th Cir. 1990).

claim without an evidentiary hearing. This Court should reverse and remand with instructions to hold such a hearing. The instructions should include a direction to dissolve the current bar on interviews of the jurors so that appellant may conduct discovery.

II.

THE CIRCUIT COURT ERRED AS A MATTER OF LAW AND OF FACT IN FINDING APPELLANT'S OTHER CLAIMS UNTIMELY AND/OR PROCEDURALLY BARRED

The Circuit Court ruled that four of appellant's claims are untimely and procedurally barred. The timeliness ruling holds that appellant should have discovered and asserted Claims I, II, III and IV prior to January 1, 1987, the deadline established in Rule 3.850 for a conviction and sentence that became final on or before January 1, 1985. The procedural bar ruling states that the claims should have been asserted even earlier, at the time of appellant's First Rule 3.850 motion, filed on January 14, 1983.

The Circuit Court's ruling is clear error as a matter of law and of fact. Appellant diligently pursued, within those means available to him, all available avenues of investigation of his case but, through no fault of his own, was not able to discover the facts that form the bases for his claims. Appellant properly pled his inability to assert the claims prior to this Rule 3.850 motion, see Lightbourne, 549 So.2d at 1365, and therefore the Circuit Court should not have summarily denied

Claims I, II and IV. To the extent that appellant's excuse from untimeliness and successiveness rested on facts that required proof beyond that submitted or that the State controverted, an evidentiary hearing on procedural default should have been held. Appellant also demonstrated his inability to discover the facts underlying Claim III at any earlier date.

The four claims in the Second Amended Motion at issue fall roughly into three groups for purposes of examining the issue of procedural default. Claim III (the citrus grove bullet) involves matters that did not come to appellant's attention until a third party to the proceedings brought the facts underlying the claim to light. Claims I (the Jellison tape) and II (the impeachment materials for Thompson, Thomas, Williams, Jones and MacDonnell) are based on materials discovered during examinations of the State Attorney's files both in 1987 and in 1991 that were not present when the files were purportedly fully disclosed in 1982. Claim IV (the pattern of misconduct) addresses the impact of the new evidence, taken as a whole, on appellant's previously asserted claims of prosecutorial and police misconduct.

A. Appellant Was Unable to Discover the Facts Underlying Claim III Until Revealed to Him by a Third Party

It is undisputed that appellant was actually unaware of the facts underlying Claim III until his counsel learned those facts from a third party in 1989. The facts were exclusively within the knowledge of the persons who were present at the search of the citrus grove. Appellant could not learn of this

claim until one of those persons volunteered the information. Accordingly, his time to assert the claim could not run until this happened. See Lightbourne, 549 So.2d at 1365 (even though other claims barred by time, Brady allegations arising from information alleged to have been learned for first time in 1989 satisfies exception to time limit in Rule 3.850); see also Smith v. Dugger, 565 So.2d 1293, 1295 (Fla. 1990) (affidavit of key eyewitness recanting trial testimony warranted evidentiary hearing); Cammarano v. State, 602 So.2d 1369, 1371 (Fla. 5th DCA 1992) (until recanting witness decides to recant, any prior interviews would have been futile).

The Circuit Court ruled that Claim III is barred because appellant could have worked harder to seek out and hopefully persuade an inmate-trusty to tell the story. The Court appeared to endorse appellant's diligence in seeking the inmate-trustys from the time he learned of their existence through the time of trial, but held that the facts could have been learned at an earlier date if appellant had exercised greater diligence after the trial to locate the inmate-trusty witnesses who testified at the evidentiary hearing. The Court concluded that Mr. Bulled could have been found and would have been willing to testify because Mr. Bulled was present in the State of Florida from 1979 to 1991 and because Mr. Bulled professed that during his periods of incarceration he sometimes assisted other prisoners who were unjustly convicted. The Court concluded that Mr. Beverly could have been found and would have been willing to

testify because Mr. Beverly has been present in Florida since 1976 and because he testified at the evidentiary hearing.

Appellant established his diligence in trying to ascertain the identity and location of the inmate-trustys. According to Ralph Hadley, one of appellant's trial counsel, appellant unsuccessfully sought discovery even before indictment. (R. 149-51.) When the State produced its witness lists, the inmates were not mentioned. (R. 156-57, 164-65; D. Exh. Nos. 3, 6.) When an officer involved in the citrus grove search first mentioned the existence of the inmates, he promised to supply names and addresses (R. 204; Deposition of H.D. Martin taken April 29, 1976, at 48), but it was not until nearly a month later, after an additional deposition, that the information was turned over by the State. (R. 174, 219-23.) The testimony of Vernon Davids, another of appellant's trial counsel, revealed that appellant's counsel attempted to locate the inmate-trustys, including Bulled and Beverly, in late May and June 1976 without success. (R. 225-29, 235-37.) Given that they could not be located only a few months after their release from the Orange County jail, no facts suggest that they could be found many years later with only the same information from which to work.

After appellant was convicted, he was indigent and he was embroiled in his appeal for the next five years. (R. 203.) His counsel conceded that they could not devote any time to efforts to locate the inmates during the pendency of the appeal because they were preoccupied by the other aspects. (R. 243-44.)

This is not surprising. Counsel could deploy only limited resources. One of the issues on appeal dealt with exclusion of the bullet as evidence. Under the circumstances, counsel's diligence is not called into question. Cf. Harich v. State, 542 So.2d 980, 981 (Fla. 1989) (procedural bar waived because of unusual factual allegations).

Thus, the Circuit Court effectively announced a new rule (unknown in 1976, 1987, or 1992) that convicted persons or their counsel must exercise extraordinary efforts, without regard for their resources, to track every potential lead in a case or it will be forfeited. In fact, under the Circuit Court's standard, a defense lawyer is duty bound to doubt the authentication of every piece of evidence and doubt the veracity of every law enforcement officer. Moreover, this standard encourages concealment by the State, since successful concealment for two years will bar any post-conviction claim.

Public policy considerations argue strongly against this rule. Pro bono counsel already face an enormous task in assembling and following up on those claims that are readily apparent on the face of a record. If the burden includes intense investigation of those leads which were investigated at trial and did not pan out, the task will become unmanageable.[5] Indeed,

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[5] Presumably the State would be obligated to bear the cost of an investigator to assist counsel if this is the standard. In other words, every indigent convicted person who asserts his or her innocence would be entitled to a state-appointed investigation of the integrity of the evidence. This absurd result illustrates the absurdity of the standard.

the Circuit Court's declaration implies that appellant's various counsel were ineffective per se for not following up the inmate-trusty possibility before the first Rule 3.850 motion. If that is the case, counsel's incompetence should excuse appellant from the procedural bar. See Agan v. Singletary, Case No. 87-489-Civ-J-16, slip. op. at 17 (M.D. Fla. March 17, 1992) (Moore, J.); see also Kimmelman v. Morrison, 477 U.S. 365, 386-87 (1986) (failure to demand discovery in mistaken belief it would be turned over by the State is ineffective insistance of counsel); Code v. Montgomery, 799 F.2d 1481, 1483-84 (11th Cir. 1986) (failure to contact alibi witnesses); cf. Breedlove v. Singletary, 595 So.2d 8, 11 (Fla. 1992).

On the facts the Circuit Court was wrong. Its findings are sheer speculation. The evidence does not support them. More specifically, with regard to Mr. Bulled, Davids testified that he believed, on the basis of an investigator's report, that Bulled had been deported to England. (R. 228.) (This was in fact the case. R. 181.) Neither he nor any successor counsel could have supposed that Bulled would return to the United States. Even if Bulled had been found, it is sheer speculation to conclude that he would testify as a fact witness in a major murder prosecution.

With regard to Mr. Beverly, the Court made no finding that he might have cooperated if he had been contacted earlier. To the contrary, the record shows that when Beverly was first contacted by appellant's counsel he stated that he was unwilling to testify because he feared retaliation from the State. (R. 90-

91.) Beverly testified that he was unwilling to testify until his mother died because she had always told him to "leave it alone." (R. 88, 96.)

Beverly further testified that his mother was so vehemently opposed to his involvement in the Zeigler case that she said that on one occasion that she had turned away someone looking for him. (R. 88-89, 103.) The Court twice struck Beverly's testimony on the matter as hearsay, once when appellant's counsel elicited the statement (R. 89) and once when the Court had elicited the statement (R. 104). This hearsay ruling is erroneous. The mother's statement was relevant and probative without regard for the truth of the whether someone came out to Beverly's house. The statement showed his mother's state of mind to protect her son from inquiry on the matter by outsiders. This rebuts any speculation that Beverly could readily have been found after 1976.

B. Appellant Was Unable to Discover the Facts Underlying Claims I and II Due to the Misconduct of the State

Claims I and II indisputably arise out of counsel's review of the State Attorney's files in 1987 and in 1991. As to whether this motion is successive, the Circuit Court found that the materials should have been discovered in time to assert the issues in appellant's First Rule 3.850 motion in 1983. This finding is erroneous because it contradicts undisputed facts. William Duane, appellant's counsel at the time of the 1983 motion, submitted an affidavit stating that he inspected the

State Attorney's files in 1982 and did not find any of the materials that form the basis of Claims I and II. (R. 680-81.) Mr. Duane's sworn statement -- which is not controverted by the State -- demonstrates appellant exercised diligence in investigating his potential claims. Appellant did not discover the facts underlying Claims I and II prior to filing his 1983 motion because the materials were withheld from the files inspected by Mr. Duane. Under the express terms of Rule 3.850, this excuses the failure to assert the claims at that time. Since the State has not proffered any opposition to Mr. Duane's sworn statement, this Court should reverse the Circuit Court outright and hold that Claims I and II are not procedurally defaulted.

As to the timeliness of Claims I and II, the Circuit Court concluded that the facts could have been discovered prior to January 1, 1987.[6] Presumably the basis for the conclusion

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[6] The text of the Court's order below refers to the two-year limitation. This is technically inaccurate. Appellant would be barred for timeliness, if at all, under the limitation applied to a conviction and sentence that is final on or before January 1, 1985.

Appellant's arguments here assume that Rule 3.850's January 1, 1987 deadline applies to appellant because his conviction became final in 1982. This is not a foregone conclusion. Rule 3.850 speaks in expres terms of the finality of "conviction and sentence" (emphasis supplied) and this Court may opt to interpret the Rule by its plain language. Appellant is, after all, attacking both his convictions and his sentence; if he succeeds on the present claims, his sentence must be vacated with his convictions. Since his sentence was not final until November 4, 1991, all of the present claims are timely.

Two cases that have enforced the January 1, 1987 deadline, Demps v. Dugger, 515 So. 2d 196 (Fla. 1987), and Agan v. State, 560 So. 2d 222 (Fla. 1990), are easily distinguished on this point, since in those cases both the conviction and sentence

is the Court's assumption that appellant could have inspected the files prior to January 1, 1987. This of course ignores the fact that appellant did inspect the files, but he is not barred for at least two reasons.

First, the State must be equitably estopped from asserting the limitation period because of its affirmative misconduct in withholding the materials and in showing Mr. Duane what was represented to be a complete file in 1982.[7] Appellant was entitled to materials when they were requested in 1976; his constitutional rights were abridged by the withholding, the offense was compounded by the misdirection perpetrated on Mr. Duane, and the State should not profit from the (repeated) misconduct of its agents. Affirmative misconduct generally estops reliance on a limitation period. See Glantzis v. State Auto. Mutual Ins. Co., 573 So.2d 1049, 1051 (Fla. 4th DCA 1991) (equitable estoppel applied to statute of limitation where party's representations deterred other party from taking action).

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were final prior to January 1, 1985. See Demps, 515 So.2d at 197 (court notes both sentence and conviction were final prior to January 1, 1985); Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied, 469 U.S. 873 (1984) (conviction and sentence were final on denial of certiorari in 1984). In a recent case where the sentence was not final but the conviction was, Foster v. State, 17 FLW S 658 (Fla. Oct. 22, 1992), this Court held claims on the conviction to be barred on the basis of successiveness. The Court also stated in a footnote that the claims were untimely. Foster is not yet final and the reference there should be deleted so the issue can be fully litigated in this case.

[7] Alternatively, counsel's belief in the integrity of the production by the State Attorney's Office may be viewed as naivety that constitutes ineffective assistance of counsel. See Kimmelman, 477 U.S. at 386-87.

The State is not exempt from this rule. The Florida Cos. v. Orange County, 411 So.2d 1008 (Fla. 5th DCA 1982) (equitable estoppel may be invoked against government body as if it were an individual). This Court has equitably extended the time period under Rule 3.850 in response to State misconduct, e.g., Mendyk v. State, 592 So.2d 1076, 1081-82 (Fla. 1992), and waived it for "unusual factual allegations," Harich, 542 So.2d at 981. This remedy is appropriate on these facts.

Second, appellant may be excused from having made an earlier request on the basis of futility. The public records law contained exceptions that allowed the withholding of disclosures during active criminal investigations and until the conclusion of litigation. Several state's attorneys offices, including Orange County, had asserted that the pendency of a Rule 3.850 motion allowed them to invoke these exceptions. See, e.g., Provenzano v. Dugger, 561 So.2d 541, 546-57 (Fla. 1990); State v. Kobal, 562 So.2d 324 (Fla. 1990); Tribune Co. v. Public Records, 493 So.2d 480 (Fla. 2d DCA 1986), rev. denied, 503 So.2d 327 (Fla. 1987). Thus, a request prior to early 1987 would have been futile because the first case holding in favor of compelled disclosure, Tribune Co., was not decided until July 9, 1986, and was not final until review was denied on February 5, 1987. In response to such withholding, this Court has equitably extended time to file a Rule 3.850 motion. See, e.g., Jennings v. State, 583 So.2d 316, 319 (Fla. 1991) (giving 60 days from disclosure to file new claims); Provenzano, 561 So.2d at 549 (same). The Court

may do so now to recognize the futility present prior to 1987.

The Circuit Court also erred because it overlooked the claim based on materials discovered in 1991 that were not present in the file in 1987. Under this state of affairs, the claims are plainly not time barred. If the materials were not produced in April of 1987, there is no reason to suppose they could have been discovered earlier. The fact that an omission from the file still occurred in 1987, moreover, further supports the foregoing arguments regarding estoppel and futility.

C. Appellant Was Unable to Discover the Pattern of Misconduct Alleged in Claim IV For the Reasons Stated in Claims I, II and III

The timeliness and procedural propriety of the pattern of misconduct allegation -- Claim IV -- is derivative of other claims inasmuch as it combines the new information uncovered with information previously known to open a fresh perspective on the State's actions in 1975 and 1976. It must be recognized that the significance placed on facts previously urged as a basis for relief is altered by the discovery of materials that provide a basis to infer intent or scienter not previously apparent.[8]

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[8] An analogy is the continuing violation doctrine in the law of employment discrimination. When acts that were outside a limitations period are joined with acts within the period by a common thread, all of the acts are subject to adjudication. See, e.g., Roberts v. Gadsden Mem. Hosp., 835 F.2d 793, 800 (11th Cir. 1988). Moreover, acts outside of a limitations period are sometimes relevant to determining the meaning of acts within the period even when some dissimilarity is present. See, e.g., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1494-95 (M.D. Fla. 1991) (Melton, J.). This analogy explains why otherwise barred claims provide a basis for relief when a related claim is not barred.

Accordingly, if any of the other claims are not defaulted and untimely, Claim IV should be heard and all of the State's misconduct and neglect should be examined.

III.

THE CIRCUIT COURT'S DENIAL OF A NEW TRIAL IS CLEARLY ERRONEOUS AND CONTRARY TO THE WEIGHT OF THE EVIDENCE

The Circuit Court's judgment cannot stand because the evidentiary hearing was too narrow in scope, because the Court erroneously excluded relevant evidence, and because the credibility determinations defy the great weight of the evidence.

A. Appellant was Denied a Full and Fair Opportunity to Litigate the State's Misconduct

The allegation of the fabrication of evidence in appellant's case cannot be viewed in isolation from the rest of appellant's allegations of prosecutorial and investigatory misconduct. Standing alone, there is a powerful presumption of the integrity of law enforcement personnel; however, when appellant's proof of the single episode in the citrus grove is placed among additional proof showing repeated acts of misconduct by State actors, the presumption becomes inapplicable and the allegation has much greater plausibility. The Circuit Court's narrow focus, then, prejudiced appellant's presentation of his claim.

The Circuit Court wrongly limited the litigation of Claim III in two ways. First, discovery was truncated such that

appellant could not adequately uncover the deceit that gives force to his claim. Second, Claim III was heard without the context of the wrongdoing set forth in Claims I, II and IV. This left the trial judge with the mistaken impression that the allegation was a lone accusation, rather than part of a pattern of misconduct.

Discovery was limited by the Court's grant of the State's motion for a protective order. Appellant sought to uncover and present evidence that concerns two aspects of the case inextricably intertwined with the actual discovery of the bullet: pressure to obtain a conviction against appellant (since this demonstrates a motive to fabricate evidence) and evidence that Felton Thomas, the witness who testified to the shooting of guns in the grove, was never present in the grove (since the bullet was necessarily fabricated if Thomas never visited the grove). The Circuit Court ordered that discovery would be "strictly limited to the facts surrounding the bullet, the recovery of the bullet in the orange grove itself. . . . General impeachment questions of the witness will not be allowed." (R. 317.) The Court clarified its ruling to exclude any inquiry into circumstantial proof that the bullet could not have been fired into the grove as Felton Thomas testified. (R. 318.)

The foregoing limitation on the development of Claim III severely prejudiced appellant. No proof could be adduced that law enforcement officers were pressured to develop

incriminating evidence against appellant without regard to the legality of their methods. As a consequence, the trial judge may have wrongly assumed that he could rely on the integrity of the police. Further, appellant could not develop those additional bases upon which he could raise an inference of fabrication. Appellant did not seek to relitigate the entire trial, as the Circuit Court thought; rather appellant sought to show that the events of the night of the crimes did not support the State's theory about a bullet having been fired in the grove, and supported the defense theory that the bullet was planted.

Compounding the foregoing prejudice is the Circuit Court's adjudication of Claim III standing alone. The facts underlying Claims I, II and IV show that the State pressured witnesses to change testimony, concealed exculpatory evidence, and engaged in other misconduct to secure appellant's conviction. This far reaching pattern of abuse is vital to understanding the piece represented by the citrus grove bullet evidence. See, e.g., 2 Wigmore on Evidence § 278(2) (Chadbourne rev. 1979) (fabrication or suppression of evidence indicates consciousness of a weak or unfounded cause, which in turn creates an inference that the whole mass of alleged facts constituting cause are untrue or lack merit). By slicing off the one piece for adjudication the Court missed the bigger picture. This deprived appellant of a full and fair opportunity to litigate the claim.

B. The Circuit Court's Credibility Determination is Contrary to the Great Weight of the Evidence

The Circuit Court rejected appellant's claim on the

ground that "no credible evidence" supported the proposition that the Sheriff's Office, the State's Attorney Office, or any other State agency fabricated the bullet reportedly recovered in a citrus grove in January 1976. (R. 768.) The court specifically declared that Bulled and Beverly were not credible. The judge orally explained that he disbelieved Bulled because he "clearly has a bias against the Orange County Sheriff's Office" and "[h]is testimony was not significant." (R. 265.) The judge orally explained that he disbelieved Beverly because he "clearly has poor recollection as to what occurred" and "clearly . . . he was easily led in his testimony." (R. 266.)

Contrary to the trial court's finding, Bulled did not state a bias against Orange County. He named a specific law enforcement officer from Orange County who he learned from news accounts was corrupt and stated that he believed that two convictions he suffered at that officer's hand were unjust. (R. 61-62.) When asked about his view about the Orange County Sheriff's Office and the Orange County State Attorney's Office, Bulled stated that he distinguished between those persons who had wronged him and everyone else. (R. 75-76.)

Further, the trial court's view of Mr. Beverly is contrary to the evidence. While the witness's recollection reflected the passage of sixteen years since the events, it was sharp and precise with regard to the details that form appellant's claim. To say that he was led to this testimony is simply wrong; appellant's counsel did not use leading questions

to elicit the important testimony. (In fact, when a leading question was used, e.g., R. 84, ll. 15-17, the witness corrected an inaccuracy in its assumption.) Beverly did in one instance show an inability to comprehend a particular word used in a question (R. 89-91), but this flaw in his vocabulary does not indict his credibility.

The strongest rebuttal to the Circuit Court's credibility determination is the consistency between Bulled's testimony and Beverly's testimony. Both men described the routine aspects of the event, such as how the search was conducted and how the Sheriff's deputies were deployed, in like terms. (R. 35-36, 82-88.) Both men described a man in a suit who was associating with the Sheriff's deputies. (R. 34-35, 85.) Beverly described conversations among the law enforcement officers to the effect that since the search was not bearing fruit, something would have to be done. (R. 86-87.) Bulled also would have testified to such conversations (see D. Exh. ID A, which proffers Bulled's testimony) except the judge erroneously excluded the testimony as hearsay. (R. 35-37.)

The hearsay ruling on Bulled's testimony was a significant error. The Court demanded that Bulled identify the speaker of the words as a State agent. (R. 37.) This he could not do because the person was in plainclothes. (R. 35.) The demand, however, was unreasonable. Bulled was a prisoner involved in the search of an alleged crime scene; he was not introduced to each of the law enforcement officers. (R. 36.) It

is reasonable to assume that the State did not open the scene to persons who were not State agents. (Appellant's counsel, for instance, was not invited.) There was no evidence to show the presence of anyone but inmates and State agents, and Bulled's description excluded by its terms an inmate as the speaker. This means the speaker was, as best one might determine after sixteen years, a State agent. (Notably, Jack Bachman, an investigator for the State Attorney's office, frequently worked in plainclothes. R. 234.) The speaker's words are still admissible, moreover, as an admission because the fabrication of evidence was a common plan or scheme of which the speaker, whether a state agent or not, was a joint actor with the Sheriff's deputies present. See, e.g., State v. Brea, 530 So.2d 924, 925 (Fla. 1988); State v. Escobar, 570 So.2d 1343, 1344-45 (Fla. 3d DCA 1990), app. dismissed, 581 So.2d 1307 (Fla. 1991).

The only explanation for the consistency in the witnesses' stories is that they were telling the truth. Beverly and Bulled were not acquainted and had no discussions over the last sixteen years. (R. 88.) Neither man spoke with the Zeiglers. (R. 43, 96-97.) Bulled did not speak to anyone about his observations until he contacted appellant's former counsel in 1989. (R. 41, 61-62.) Beverly did not speak to anyone until appellant's current counsel contacted him. (R. 95-97.) The consistency of their testimony bespeaks truth.

C. The Circuit Court's Ultimate Conclusion Conflicts with the Great Weight of the Evidence

The Court's findings lack competent substantial evidence to support them. See Phillips v. State, 17 FLW S 595 (Fla. Sept. 24, 1992). Two witnesses, whose only prior association was in 1976 when they were present at the events that gave rise to appellant's claim, testified consistently and independently to a shocking case of the fabrication of evidence. They overheard agents of the State plot to plant evidence and Beverly observed the actual act of a bullet being placed in the sifter to fabricate evidence against appellant.

The witnesses' testimony explains why the State actively concealed the identity of the inmate trustys until the last possible moment when defense counsel would be too busy to investigate as throughly. The effort to conceal the identity of witnesses gives rise to an inference that those witnesses would have exposed facts unfavorable to the State. See, e.g., 2 Wigmore on Evidence § 285(1). If there was no impropriety in the search, why were these potential witnesses not disclosed with every other state witness? The State cannot explain this discrepancy.

Moreover, the Sheriff's Department's own documents cast a suspicious pale over the "discovery" of the bullet. Although the officer who led the search detail reported the bullet found on January 12, 1976, it was not logged in with the evidence custodians until three days later. Alton Evans, a technical

services officer, testified at appellant's trial that he received the bullet on January 15, 1976. (T.T. at 1341.) He confirmed at the hearing that the official property receipt (D. Exh. No. 1) shows that he received the bullet from the intake officer on that date. (R. 143.) Although the State sought to create an explanation to account for the lost three days, Mr. Evans admitted that he has no recollection of having received the bullet prior to the time and date logged on the form. (R. 139-40, 143-44.) The State cannot explain this discrepancy.

In essence the Circuit Court concluded that the testimony of Bulled and Beverly did not raise even a prima facie case that evidence had been fabricated. This is absurd. Although the judge identified (incorrectly) a motive for Mr. Bulled to lie, no such motive existed for Mr. Beverly. Because the testimony of the two men is consistent in significant respects and because other circumstantial evidence supports an inference that the bullet was not handled in a routine fashion, the State bore at the very least a minimal burden to dispel the inference of misconduct. No one testified on the State's behalf to rebut or deny the charges made by Bulled and Beverly. The State rested solely on the sixteen year old trial testimony of an officer (T.T. at 1317-25) whose veracity was called into question by the testimony at the hearing. That officer's testimony was inconsistent with certain other evidence and testimony, such that preferring it over Bulled's and Beverly's testimony is simply to refuse to face reality. That officer's testimony was never

subjected to the cross-examination that would have been conducted if the State had not concealed the identity and addresses of the inmate-trustys until a week before trial. That officer, in fact, participated in the concealment of this information, a fact which suggests a culpable state of mind on his part. Cf. Barr v. State, 507 So.2d 175 (Fla. 3d DCA 1987). The trier of fact never evaluated the officer's demeanor or otherwise observed him for purposes of determining his credibility.[9] Since the consistent, unrebutted testimony of two witnesses creates the inference of perjury by the officer upon whom the State relied, it was error for the judge to prefer his account of the events without hearing live testimony and observing him under cross-examination.

At the very least, the Circuit Court erred in entering a judgment on the record before it. As noted in Point A, supra, additional evidence should have been heard from appellant. The Court also should have compelled the State to produce the officer for examination by the Court and counsel or face an adverse inference concerning his absence. The order denying Claim III on the merits should be vacated and this case remanded with instructions to rehear the evidence in the context of all of the evidence of State misconduct.

CONCLUSION

For the reasons stated in Points I and II, the Circuit Court's orders denying Claims I-V of the Second Amended Motion on

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[9] The judge who presided over the evidentiary hearing is not the same judge who presided over appellant's trial in 1976.

procedural grounds should be reversed. For the reasons stated in Point III, the Circuit Court's order denying relief on Claim III on the merits should be reversed and this case remanded for further evidentiary development on that claim. Additionally, this case should be remanded for an evidentiary hearing on Claims I, II, IV and V. If this Court finds some, but not all, of the claims to be procedurally defaulted, then the Circuit Court's orders should be reversed in part and this case remanded with directions to hold an evidentiary hearing on those claims that are preserved.

Dated: November 9, 1992

Respectfully submitted,

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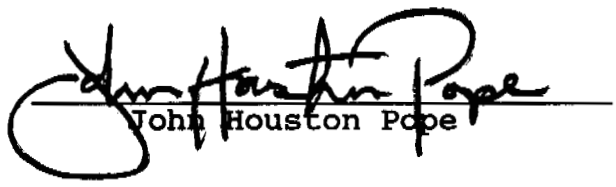
Attorneys for the Defendant.

BY _____
John Houston Pope

I certify that a copy hereof has been furnished to Margene A. Roper, Assistant Attorney General, Attorney General's Office, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 this 9th day of November 1992.



John Houston Pope

Appendix A

CIRCUIT COURT, NINTH JUDICIAL CIRCUIT, CRIMINAL DIVISION, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NOS. CR88-5355
CR88-5356

STATE OF FLORIDA,

vs.

WILLIAM THOMAS ZEIGLER, JR.,

Defendant.

_____/

MOTION TO ALTER OR AMEND ORDER PARTIALLY DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT, ETC.

Defendant, William Thomas Zeigler, Jr., by and through his undersigned attorneys, hereby moves this honorable Court for an order altering or amending its Order Partially Denying Defendant's Motion to Vacate Judgment and Sentence, Amended Motion to Vacate Judgment and Sentence and Second Amended Motion to Vacate Judgment and Sentence to set Claim V of the Second Amended Motion for an evidentiary hearing. In support of this motion, defendant states:

1. On February 27, 1992, defendant lodged with the Court his response to the State's Motion for Final Disposition of Motion to Vacate Judgment and Sentence and Amended Motion to Vacate Judgment and Sentence. Simultaneously, defendant lodged his Second Amended Motion.

2. The Second Amended Motion contains a Ground V relating to the valium intoxication of Juror Brickel. The facts

underlying this claim were stated in the Amended Motion, at the first instance in which they became known to defendant, and the Second Amended Motion set forth such ground as a legal basis for relief.

3. The Court's order denied defendant's request for an evidentiary hearing on Grounds I, II, and IV of the Second Amended Motion and set Ground III for an evidentiary hearing on May 27, 1992. There is no mention of Ground V in the order.

4. Ground V cannot be resolved without an evidentiary hearing. Ground V is virtually identical to Ground III in terms of the manner and timing under which it became available to defendant. Defendant made note of the similarity, see Second Amended Motion at 52, n.16, and has received no papers from the state responding to defendant's statements concerning the need for and appropriateness of an evidentiary hearing.

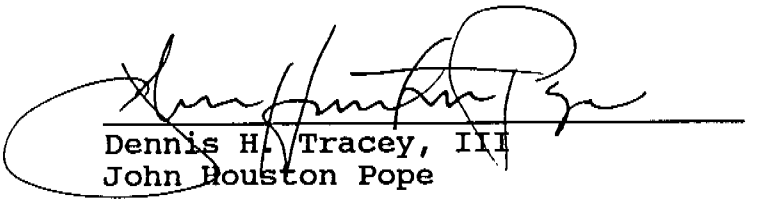
5. In light of the circumstances under which Ground V became available to defendant and in light of the state's lack of opposition to defendant's request for an evidentiary hearing, one should be scheduled and the bar against interviews of the jurors should be lifted.

WHEREFORE, defendant respectfully requests the entry of an order altering or amending the Court's prior order to provide for the inclusion of Ground V in the evidentiary hearing scheduled for May 27, 1992, for such time at the hearing as is

necessary to adjudicate both claims, and for the lifting of the bar against interviews of the jurors.

New York, New York
April 1, 1992

Respectfully submitted,



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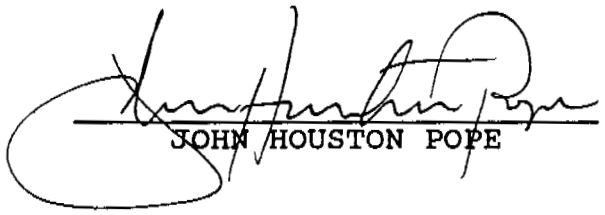
Attorneys for the Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing DEFENDANT'S MOTION TO ALTER OR AMEND ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT, ETC. has been served by UNITED STATES MAIL to Jeffrey Ashton, Esq., Assistant State Attorney, 250 North Orange Avenue, Orlando, Florida 32801, on this 1st day of April, 1992.



JOHN HOUSTON POPE

Appendix B

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 50,355

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NOS. 76-1076 CF
76-1082 CF

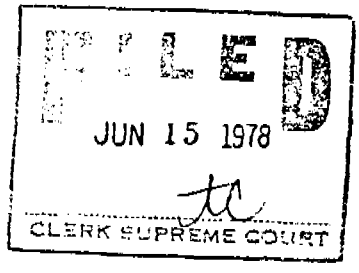
WILLIAM THOMAS ZEIGLER, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.



MAIN BRIEF OF APPELLANT

Direct Appeal from Circuit Court and
Imposition of Death Penalties

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WILLIAM THOMAS ZEIGLER, JR.
Appellant

prior to the completion of Appellee's evidence and before any defense testimony or evidence was submitted. The court's failure to delve into this aspect when presented with the opportunity and its refusal to allow Appellant's counsel to question the jurors was prejudicial to Appellant. Most significant, however, is the failure of the court to inquire into the cause of Mrs. Brickle's loss of consciousness, twice, on the day the verdict was returned. The court blatantly interrupted when she tried to answer questions and otherwise failed to make a diligent inquiry into the circumstances surrounding this situation, all to the substantial prejudice of Appellant (T2838-2844).

POINT X

THE COURT ERRED IN REFUSING TO PERMIT COUNSEL FOR APPELLANT TO QUESTION JURORS AS TO ALLEGED MISCONDUCT DURING THE COURSE OF THE TRIAL AND DELIBERATIONS.

Appellant filed three separate Notices of Intention to Interview Jurors plus supplementary allegations and affidavits (R372-373,403-404,410-412,427-441). Appellee filed objections to the Notice of Intention to Interview Jurors and the trial court permanently enjoined Appellant from interviewing the jurors (R444-445). This was error.

Appellant incorporates and adopts by reference as argument on this point the argument appearing in the record beginning at R427 and concluding at R431. This portion of the record is also reproduced in the appendix at A32-36, as a convenience to the reader. It should be read in order to understand fully the continuation of the argument here.

Not only should the jurors have been interviewed based on the foregoing, but by the affidavit of one of the court's own bailiffs it was shown that jurors, during their deliberations, used intoxicants.

The burden, at that point, shifted to Appellee " . . . to show affirmatively, to the entire satisfaction of the court, that its use was to such a limited and moderate extent as to completely and satisfactorily negative any harm to the defendant from its use by the jury, or any member of it." Gamble v. State, 44 Fla. 429, 33 So. 471 (1902). Appellee abdicated its responsibility by objecting to an inquiry into the use of intoxicants even though the use was reported by one of Appellee's employees, a bailiff (R439-440). This bailiff also states in his affidavit that he saw Juror Dollinger, during the course of the trial, purchase a newspaper and talk to a member of the press whom he believed to be Diane Seldich of the Orlando Sentinel Star.

The "known facts" necessary to support a notice of inquiry were abundantly laid out before the court. They were in the form of affidavits of actual knowledge of use of alcoholic beverages or of third person conversations with members of the jury. There was no speculation about the "known facts". They were not vague. The items cited in the affidavits, if shown to be true in an interview with the jurors, would have constituted substantial prejudice to Appellant and warranted the granting of a new trial. Appellant was denied due process and a fair trial and this cause should be remanded.

POINT XI

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

Appellant's counsel, at the close of Appellee's case, moved for a judgment of acquittal and in support thereof presented argument citing authority which appears in the transcript beginning at T1810 and concluding at T1822. This argument is adopted and incorporated by reference as a portion of Appellant's argument on this point. For the

Appendix C

FILED
1/14/83

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

-vs-

WILLIAM TOMMY ZEIGLER,

Defendant.

CRIMINAL DIVISION

CASE NO. 76-1076-CF
76-1082-CF

MOTION TO VACATE, SET ASIDE, OR CORRECT CONVICTION AND SENTENCE

The citizen, WILLIAM TOMMY ZEIGLER, by and through his undersigned counsel, and pursuant to Fla. R. Crim. P. 3.850, moves to vacate and set aside the judgment of conviction and the sentence of death in this case. The grounds for this Motion, described in detail below, are that the judgment was entered and the sentence imposed in violation of the Constitution of the United States and the laws and Constitution of the State of Florida.

In support of this Motion, Defendant states the following:

ISSUE VII

THE CITIZEN'S RIGHT TO A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO DUE PROCESS AND EQUAL PROTECTION WAS VIOLATED WHEN:

1. THE TRIAL JUDGE UNDULY PRESSURED A HUNG JURY INTO REACHING UNANIMITY.

2. THE TRIAL JUDGE PERSONALLY INITIATED THE SEPARATION OF ONE OF THE JURORS FROM THE OTHER MEMBERS AFTER DELIBERATION HAD BEGUN AND

   (a) THE DEFENDANT WAS SPECIFICALLY EXCLUDED BY THE TRIAL JUDGE FROM THESE PROCEEDINGS.

3. THE JURY DELIBERATIONS WERE TAINTED BY THE USE OF INTOXICANTS AND THE VERDICT CARRIED A VERY STRONG AND OBVIOUS POSSIBILITY THAT IT WAS THE DIRECT RESULT OF A COMPROMISE.

4. THE TRIAL JUDGE REFUSED TO ALLOW MR. ZEIGLER TO MAKE INQUIRY INTO ANY OF THESE POSSIBILITIES BY ISSUING A PERMANENT INJUNCTION AGAINST HIM INTERVIEWING ANY MEMBERS OF THE JURY.

FACTS IN SUPPORT OF CLAIM

1. Juror Brickle informed the Court directly and candidly that she was pressured into her verdict and that she felt Mr. Zeigler was, in fact, innocent.

Juror Brickle:

> "...I still feel he is innocent." (TT 2838)
>
> "I feel I couldn't take any more." (TT 2838)
>
> "Well at the end I was pressured into it and I just couldn't take any more." (TT 2839)

"No, I still don't feel like he's guilty." (TT 2841)

2. The Trial Court personally initiated the separation of Juror Brickle after deliberations had begun. (TT 2713)

(a) Mr. Zeigler was specifically excluded from these proceedings by the Trial Court. (TT 2711)

3. The Court's own Bailiff submitted an Affidavit that jurors, during deliberations, used intoxicants. (R 439-440)

4. The facts of this case firmly support a finding that the verdict was a result of compromise.

(a) The jury deliberated three (3) days on the question of guilt.

(b) The jury deliberated only twenty-five (25) minutes on the issue of punishment. They returned with a recommendation of life.

5. The Court refused to permit Mr. Zeigler, who was not present during the events concerning Juror Brickle, to make any inquiry into these issues and permanently enjoined him from doing so.

6. The minimal requirements of a fair trial, due process and equal protection, were violated.

LEGAL BASIS IN SUPPORT OF CLAIM

By way of background, the Bailiff had advised the

Court that he had had contact and a conversation with one of the jurors. Neither the Court, the attorneys nor the citizen were present at this communication by the Bailiff to the juror. (TT 2707)

Thereafter followed a conference during which notes were sent to a juror and responses received. (RIV 39) During this whole proceeding, Mr. Zeigler was not present. The citizen's counsel said, "Well, I wonder, should we have Tommy Zeigler here now?", and the Court's response was, "No". (TT 2711)

At the suggestion of the Court, the juror who complained was segregated ". . . in a little office under the pretext of being examined medically, ..." (TT 2713) This juror was separated from the other jurors several times, which was error. (TT 2707-2758)

> "When the jury is allowed to separate after the case has been submitted to them, the defendant is entitled to the presumption that such separation has been prejudicial to him, and that burden is on the prosecution to show that no injury could have resulted therefrom to the defendant." Wilcox v. State, 99 P.2d 531 (1940)

The entire proceedings were conducted in areas other than open Court. It was expressly done in this manner to avoid being in open Court.

> It might not be anything, you know, but it might be something. That is why I wanted to just sit down and talk to you a minute. I don't want the press. That is why we

came back here. I don't want anything out in that press about this. (TT 2709)

The Court said, "We don't want anyone to know what is going on here but these lawyers, okay?" The citizen was not present. (TT 2714)

The Court sent back communications by the Bailiff to the other separated eleven (11) jurors, under the Court's following instructions:

> Just let the rest of the Jury know that we are asking her out to have her checked over by the nurse so they won't think there is anything wrong. (TT 2714-2715)

The Bailiff, at the same time, sent a note to the segregated juror. (RIV 39) A second note was sent to the segregated juror after the response came back and was discussed again without Mr. Zeigler being present. (RIV 39) (TT 2721) (TT 2727)

The Court caused a third message to be sent to the separated juror. (TT 2729) Counsel objected to this note because ". . . this statement implies that another Juror in our view has not done something wrong". (TT 2730) The note was sent over counsel's objection. (TT 2730-2731) Mr. Zeigler was not present.

During this same session, a report was made by counsel that one of the members of the jury had taken a newspaper into the jury room at some time during the trial. (TT 2731-2732) The in-chambers session ended at or about 10:05 A.M. and the

jury was brought back in for open Court instructions at 10:15 A.M. (TT 2737) The jury retired to continue deliberations of their verdict at 10:17 A.M. (TT 2738)

At 1:50 P.M. of that same day, proceedings were again had in chambers, without the citizen being present. (TT 2738)

The Court, at that time, reported as follows:

> "We had to go to the cafeteria -- Sergeant Fuqua did. Mrs. Brickle passed out dead on the floor -- not dead dead, but passed out. So they got her and said she was all right, and in a minute she did it again. She is cold and clammy, and so they brought her back. She has been sitting in an office up there by herself. The rest of the jurors were put somewhere else and they don't know. The just know we told them we needed the Courtroom for a minute, and we put them somewhere where everyone won't get panicked. But she is up there and has passed out twice on us in an hour. She is tight as a tick."

The citizen was not present at the proceedings which began in chambers at 1:50 P.M. (TT 2742) Thereafter followed the discussion of the female juror's physical condition and the Court decided to communicate further with the juror. (TT 2745-2756) The court reporter was excluded by the Court. (TT 2744) After the conference with the juror, the court reporter was again allowed in - the citizen was again absent - and a recitation of what was done placed on the record. (TT 2746-2748) The inquiry was apparently made through a nurse. There is no record of what the nurse said to the juror or what the juror said to the nurse because the court reporter was excluded. Ostensibly, there was

a communication to the nurse or some discussion about a vote of the jury which appears as part of counsel's Motion for Mistrial as follows: "There is no indication even that a vote has ever been taken other than what this nurse has told us, and, therefore, I would object." (TT 2755)

Thereafter followed a Motion for Mistrial. (TT 2748) The Motion was denied. (TT 2756)

While the Motion for Mistrial was being heard, the clerk came in and interrupted the proceedings in chambers and said that he had had a communication with one of the jurors. (TT 2755-2756). After a discussion of this communication, the clerk was sent back by the Court with a message to "Just tell them they can continue their deliberations, if everyone is agreed to it." (TT 2758) There is no record of what the clerk said to the jurors. These in-chambers proceedings ended at 2:50 P.M. (TT 2758) At 5:00 P.M., that same day, the jury returned a verdict of guilty. (TT 2759-2761) On July 16, 1976, after the jury had returned a recommendation of life imprisonment, another hearing was held in chambers at which Mr. Zeiger again was not present. (TT 2823-2828) The Court questioned certain members of the jury concerning a Motion to Interview filed by Mr. Zeigler's counsel. During all of these interviews Mr. Zeigler was not present. His counsel requested the right to interview the jurors as they appeared before the

Court, but was refused that right. (TT 2847-2848, 2854-2855)

EXCLUSION. In Ivory v. State, 351 So.2d 26 (Fla. 1977), this Court held that a defendant in a criminal case is denied a fair trial and due process of law when a Trial Judge responds to a request from a juror, during the period of its deliberations, without affording the prosecutor, the defendant, and defendant's counsel an opportunity to be present and object or request alternative courses of action.

This Court, in Ivory, said:

> "We now hold it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request." (Emphasis added.) 351 So.2d at 28

Mr. Zeigler was not present as required by Ivory. Prejudice is presumed because it is a denial of fundamental rights, a fair trial and due process of law. The refusal of the Trial Court to allow the defendant to be present during these proceedings was prejudicial error. (TT 2711)

"No one is permitted to communicate with the jurors without permission from the Court given in open Court in the presence of the defendant or his counsel. Section 918.07, Florida Statutes." Caldwell v. State, 340 So.2d 490, 491 (Fla. 2d DCA 1976) (emphasis added) A communication with a juror was by permission of the Court, but it was not done in "open

Court". The very purpose of not conducting it in open Court was, as the Trial Judge said, to avoid an open and public hearing before the press. (TT 2709) It was also done in a manner to avoid having the citizen present. The Trial Court also erred in allowing the nurse to go in and communicate with a juror off the record. Randolph v. State, 336 So.2d 673 (Fla.2d DCA 1976)

A defendant must be present at every essential part of the trial unless he has, by his own actions, waived the right. See, Florida Rules of Criminal Procedure 3.180; State v. Melendez, 244 So.2d 137 (Fla. 1971). There was no understanding and knowledgeable, freely given ratification of counsel's actions taken during his absence as required in Melendez, supra.

This Court held in Shoultz v. State, 106 So.2d 424 (Fla. 1958):

> "This Court is of the opinion that a defendant in a felony prosecution has the right to an open, public trial and to be present at every stage of the proceeding as provided in §914.01, Florida Statutes Annotated. It is an invasion of these rights and reversible error for a trial judge to examine and pass upon the qualifications of a sworn juror when such is done outside the courtroom and not in the presence of the defendant." 106 So.2d at 426

The Trial Court in the instant case was, in effect, passing upon the qualifications of a sworn juror, Irma Brickle, when

there was a determination made about her mental ability to continue deliberations in the case, all outside the presence of the citizen. This was a denial of his fundamental rights to due process and a fair trial. This Court, in Shoultz, at 426, continued to say that, "[A] holding to the contrary would tend to raise doubt and suspicion in other minds to the prejudice of public confidence in the fair and open administration of justice". The proceedings were held in chambers with the express purpose of excluding the press, the public and the defendant.

Counsel did not place an objection on the record as to the absence of Mr. Zeigler from the foregoing proceedings because the Trial Court had said "no" to an inquiry about him being present. (TT 2711) The exclusion of Mr. Zeigler, even if "innocently intended", violated his fundamental rights. Slinsky v. State, 232 So.2d 451, 453 (Fla. 4th DCA 1970)

MISTRIAL DENIAL. The citizen's fundamental Constitutional rights were violated by not granting Mr. Zeigler's Motion for Mistrial. (TT 2748-2756) The jury deliberated three (3) days. During the last two (2) days, Mrs. Brickle, a juror, had problems. The second morning, her physician was called. And on the third day, at lunch, she passed out once and when revived, passed out again. The notes back and forth indicated that it was pressure within the jury room that was causing her

the problem. It was pointed out to the Court by Mr. Zeigler's counsel:

> ". . . that there is every reason to believe that the lady is of such a state of mind that she disagrees with the other members of the Jury and that her change in mind, if any might occur in this case, would be solely as a result of the emotional trauma being inflicted upon her and, therefore, would not be a proper basis for a verdict." (TT 2750)

The Trial Court, after being fully aware that a member of the jury was in such a mental state that she had passed out twice that very day, refused to grant a mistrial. A guilty verdict was returned that same day. Mr. Zeigler was denied his Constitutional right to a fair trial and due process. This Court, in Adjmi v. State, 154 So.2d 812 (Fla. 1963) at 819 said: "Every defendant in a criminal case is guaranteed by Section 11, Declaration of Rights of the FSA - Constitution a fair and impartial trial". A conviction by a jury where one of the members of the jury is under such stress that she asks for help from the Court and then passes out twice immediately preceding a verdict of guilty surely is not a fair trial.

INTERVIEW OF JURORS BY COURT. This error was seriously compounded in refusing to allow Mr. Zeigler's counsel to question jurors as to alleged misconduct and pressure during the Court's interrogation of jurors. The citizen's rights were further gravely affected when the Court refused to ask questions about

juror misconduct, as requested by Mr. Zeigler's counsel. A lawyer's prior unrestricted right to interview jurors after a trial was curtailed under Canon EC 7-29 of the Code of Professional Responsibility for Lawyers. But, that Canon still provided, "Subject to any limitations imposed by law, it is a lawyer's right after the jury has been discharged, to interview the jurors . . ." (Emphasis added.) Counsel filed notice that they intended to interview jurors, pursuant to the above-quoted Canon. (R 372-373) The Trial Court, instead of allowing his counsel to interview the jurors, conducted an interview itself. (TT 2829-2859) The Trial Court refused to allow his counsel to question the jurors in any manner whatsoever. (TT 2844, 2847-2848) There was adequate reason to believe that grounds for challenge of the jury existed. But, counsel was precluded by the Trial Court from questioning the jurors about this particular cause. In his Notice of Intention to Interview Jurors, served July 3, 1976 and filed July 16, 1976, it was alleged in paragraph 3 that, " . . . members of the jury may have improperly formed and expressed opinions as to the guilt of the accused prior to the case being submitted to the jury." (R372-373) The Trial Court did not inquire into that area. Subsequently, as was stated in his Notice of Intention to Interview Jurors filed August 4, 1976 (R 410-412), his counsel was advised that the Foreman of the jury had stated that he had made up his mind two (2) weeks

prior to the time the case was submitted to the jury (R 410) which, if true, meant that a member of the jury had formed a closed opinion of guilt prior to the completion of the evidence and before any defense testimony or evidence was submitted. The Court's failure to delve into this aspect, when presented with the opportunity, and its refusal to allow counsel to question the jurors was prejudicial to him. Most significant, however, is the failure of the Court to inquire into the cause of Mrs. Brickle's loss of consciousness, twice, on the day the verdict was returned. The Court blatantly interrupted when she tried to answer questions and otherwise failed to make a diligent inquiry into the circumstances surrounding this situation, all to the substantial prejudice of Mr. Zeigler. (TT 2838-2844)

Counsel filed three (3) separate Notices of Intention to Interview Jurors, plus supplementary allegations and affidavits. (R 372-373, 403-404, 410-412, 427-441) He filed objections to the Notice of Intention to Interview Jurors and the Trial Court permanently enjoined Mr. Zeigler from interviewing the jurors. (R 444-445) This was error.

Not only should the jurors have been interviewed based on the foregoing, but, by the affidavit of one of the Court's own Bailiffs, it was shown that jurors, during their deliberations, used intoxicants. The burden, at that point, shifted to the State " . . . to show affirmatively, to the entire satisfaction of the Court, that its use was to such a limited and

moderate extent as to completely and satisfactorily negate any harm to the defendant from its use by the jury, or any member of it." Gamble v. State, 44 Fla. 429, 33 So. 471 (1902). The State abdicated its responsibility by objecting to an inquiry into the use of intoxicants, even though the use was reported by one of the State's employees, a Baliff. (R 439-440) This Bailiff also states in his affidavit that he saw Juror Dollinger, during the course of the trial, purchase a newspaper and talk to a member of the press whom he believed to be Diane Seldich of the Orlando Sentinel Star.

The "known facts" necessary to support a notice of inquiry were abundantly laid out before the Court. They were in the form of affidavits of actual knowledge of use of alcoholic beverages or of third person conversations with members of the jury. There was no speculation about the "known facts". They were not vague. The items cited in the affidavits, if shown to be true in an interview with the jurors, would have constituted substantial prejudice to the citizen.

The Trial Judge should not hold private conversations with any juror at any stage of the proceeding. All communications should be in open Court and before ALL the jurors. United States v. Agueci, 310 F.2d 817 cert. denied 372 U.S. 959, 10 L.Ed.2d 11 83 S.Ct. 1013 (1975)

Further, Rule 43 of the Federal Rules of Criminal

Procedure guarantees to a defendant the right to be present at every stage of the proceedings, including the deliberations and verdict. A juror's communication with the Court should be in open Court and the defendant should be given an opportunity to respond before the Trial Court responds. Rogers v. U.S., 422 U.S. 35, 45 L.Ed.2d 1 99 S.Ct. 2091 (1975)