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IN THE SUPREME COURT OF FLORIDA

THEODORE ROBERT BUNDY,
Appellant

v.

STATE OF FLORIDA,
Appellee

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

FILED

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SID J. WHITE
CLERK SUPREME COURT

By _____
Chief Deputy Clerk

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE FACTS AND CASE

A. Pre-Arrest

THEODORE ROBERT BUNDY was placed in the Tallahassee vicinity on 7 January 1978 (Larry James Wingfield, R 7955). BUNDY was allegedly a student (R 8011-8012) and went by the name of "Chris Hagan" (R 7955). He resided at the Oaks Apartment (R 8410), 409 West College Avenue, Tallahassee (R 8163), several blocks from the scene of the crime(s) for which he was accused.

Testimony was proffered (R 8193-8301) and allowed before the jury that BUNDY was observed on the night of 14 January 1978, the night preceding the offenses, at a local bar, by three co-eds (R 8334-8407) who at trial were permitted to testify to BUNDY'S "unnerving" stare [Carla J. Black, (R 8391)] and that his look "wasn't friendly." One co-ed, Mary Ann Picano, who danced with BUNDY that night, was permitted to testify that he looked "like an ex-con" (R 8404) and that she was scared of him (R 8407).

One of BUNDY'S apartment mates, Henry Edward Polombo, III, and acquaintance, Russell Joseph Gage, testified to their having seen BUNDY on the Sunday morning of the incidents, 15 January 1978, at 4:45 A.M. at the Oaks Apartment (R 8410-ff). The jury was permitted to hear that

later on the same day in the company of the same duo that BUNDY had allegedly commented that the offenses were probably the product of some lunatic (R 8441) who was hiding out and had probably done it before (R 8410). Also allegedly BUNDY had at some disputed proximity in time (R 9240) made the boast that he "could get by with anything he wanted to because he knew his way around the law" (R 8442).

Randal Clayton Ragans lost his vehicle tag on 13 January 1978 (R 7898). On 11 February 1978 Officer Keith Daws observed BUNDY at a vehicle a short distance from the Oaks Apartment (R 7920). Upon investigation BUNDY, wearing new Levis, fled (R 7920). Officer Roy Dickey also alledgedly saw BUNDY in this time interval although he made no report to that effect for more than a year (R 7910). BUNDY apparently was last seen in the Tallahassee area the Monday or Tuesday of the second week of February, 1978 (R 7959).

It was on 15 January 1978 that the offenses in question were committed. The Indictment (R 1-4) alleged Appellant BUNDY to have been the perpetrator of burglary of a dwelling at 661 West Jefferson Street, Tallahassee, Leon County, Florida, the Chi Omega sorority house wherein Margaret Bowman and Lisa Levy were killed and Karen Chandler and Kathy Kleiner were assaulted and battered. On the same night at 431-A Dunwoody, Tallahassee, Leon County, Florida, it was

alleged that BUNDY burglarized the dewlling of and battered the person of Cheryl Thomas. The Indictment, in six counts, averred two capital homicides, two burglaries and three attempted first degree murders.

B. Arrest

On 15 February 1978, one month after the incidents, Officer David G. Lee of the Pensacola Police Department observed an orange colored Volkswagen at 1:30 A.M. on Cervantes Street (R 6787) which aroused his suspicion. Officer Lee made a U-turn (R 6790) and began following the car for a stop. The officer turned on his blue lights and ran a tag check (R 6791). The tag came back stolen (R 6792). Officer Lee ordered BUNDY out of his car and "laid him out" face down on the pavement in order to investigate the VW for additional occupants (R 6793). Back up units were en route (R 6793). The officer had his pistol withdrawn from the holster (R 6793). During the scuffle the officer deliberately fired at BUNDY (R 6794). BUNDY began to run at which time the officer fired a second round (R 6794). When Officer Lee approached, BUNDY began yelling for help (R 6794) and tried to hold the officer's gun (R 6794). BUNDY was cuffed and taken to the patrol car (R 6795). After BUNDY was read his *Miranda* rights (R 6795) he identified himself as Kenneth Miser (R 7978), and the jury heard further testimony over

timely objection (R 7966, 7969) that BUNDY stated he "wished you'd [Officer Lee] killed me. If I run at the jail will you kill me then?" (R 7979). Issue was joined on the admissibility of the statements and flight (R 6781); ruling in the matter was deferred until the jury was selected and sworn (R 6782-6806). The evidence was admitted upon denial of Defendant's Motion *in Limine* as indicated (R 7966-7969).

C. Post-Arrest/Pre-Indictment

Thereafter at 3:00 A.M. on the same morning of 15 February 1978, Officer Norman N. Chapman, Jr. reported for duty at the Pensacola Police Department where he met THEODORE ROBERT BUNDY and took him upstairs to the interview room (R 6810); [he read the *Miranda* warning to BUNDY which was signed at 4:15 A.M.] (R 6820). A tape recording regarding the stolen vehicle and tag was made at 4:25 A.M.

On the afternoon of 15 February 1978, Officer Donald David Patchen, investigator (R 6824) with the Tallahassee Police Department along with Investigator Steven Bodiford of the Leon County Sheriff's Office arrived and met with BUNDY (R 6825).

At 9:00 A.M. on 16 February 1978 first appearance was had at which time BUNDY still maintained his false identity (R 6895). The State Attorney, Curtis Golden was present with news media (R 6975). The Office of the Public Defender

was appointed (R 6895). The State Attorney, Curtis Golden, was present with news media (R 6975). The Office of the Public Defender was appointed (R 6895), and bond was denied (R 6977). Later the same judge (Greenhut) entered a protective order (R 6979) in effect ordering the Office of the Public Defender to be notified of attempted interviews with TED BUNDY. Tallahassee Police Department Officer Don Patchen was present at the hearing (R 6840) as were other law enforcement personnel (R 6912, 6979). A copy of the Order was served on Officer Norman Chapman, Pensacola Police Department, shortly after it was entered (R 6903). Assistant State Attorney, Ron Johnson, Chief Assistant, represented the State at the hearing (R 6977).

BUNDY still known as Miser requested to call Millard Farmer, an attorney in Atlanta (R 6895). Farmer in turn talked to Officer Chapman and asked if BUNDY had admitted to any crimes (R 6895). And Mr. Chapman "told him yes, that he [BUNDY] had admitted to taking the car and credit cards . . ." (R 6895). It was now the afternoon of 16 February 1978 (R 6895). The lawyer arrived from Atlanta at 5:30 P.M. (R 6895).

The Atlanta lawyer with Assistant Public Defenders Michael Koran and Terry Terrell went to the police station where BUNDY was being housed rather than the Escambia County

Jail (R 6980). The conversations were terminated at 9:45 P.M. - 10:00 P.M. (R 6982), leaving Koran with the impression BUNDY had no disposition to talk to law enforcement people (R 6997). Koran advised Attorney Terrell to make a point of getting with BUNDY early the next day (R 6982).

The lawyers and law enforcement agreed BUNDY/MISER could use the telephone for the next two hours to call whomever he wanted (R 6896) including former counsel (R 6961) in return for his true identity which he gave (R 6896). Shortly a Washington [state] newspaper called asking about the "THEODORE BUNDY" who was wanted for murder (R 6897). Coincidentally the FBI was contacted and told "one of their ten most wanted people" was in custody (R 6897), and the ID was confirmed by a Pensacola Police Department ID officer by FBI flyer. The FBI flyer appears (R 6898) to be the same one brought to Officer Chapman "to be signed by Mr. [THEODORE ROBERT] BUNDY for [arresting officer] David Lee." (R 6922) That same night a press conference was set for 9:00 A.M., the next morning, 17 February 1978, by Officer Norman Chapman "By the flagpole in front of the station, weather permitting" (R 6898). Had Officer Chapman expected the turnout he would "probably made the news conference for the auditorium." (R 6898). BUNDY requested a priest (R 6899) who stayed until after midnight (R 6900).

After midnight the priest left, Officer Chapman took BUNDY to the more comfortable captain quarters which was "better situated for things we needed to do." (R 6900); however the "bug" equipment was not yet in place (R 6859, 6915). Notwithstanding, Officers Chapman, Bodiford and Patchen recorded a statement taken from BUNDY (R 6902). The initial session beginning at 1:29 A.M. (R 6855) lasted some two hours (R 6902-6903). The machine was then turned off as being "too formal for the information." (R 6903). Officer Chapman testified at trial from this session that BUNDY liked college campuses where he would blend in with the students (R 8011-8012).

At 7:30 A.M. on 17 February 1978 (R 7006) Assistant Public Defender Terry David Terrell (R 7001) returned to the Pensacola Police Department to be told by Captain Joseph and a Pensacola Police Department sergeant that BUNDY was asleep (R 7006). Meanwhile at approximately 7:50 A.M. Officers Patchen [Tallahassee Police Department] and Bodiford [Leon County Sheriff's Office] again began another taped statement from BUNDY (R 6830) which lasted some two hours.

Mr. Terrell went to court and saw Mr. Koran (R 7007). Mr. Koran, senior attorney and Chief Assistant Public Defender in Escambia County, sent Mr. Terrell back to the Police Station (R 6983). Mr. Terrell with Assistant Public Defender Elizabeth

Nichols (R 7026) returned to the Pensacola Police Department to find the State Attorney Curtis Golden and Pensacola Police officers engaged in the press conference (R 7007). They sought admittance through the back door, the normal entrance for counsel (R 7007), to be told they could not come in as the facility was closed (R 7007). At the front door Assistant State Attorney Ron Johnson met them and in reply to the demands of counsel to see their client said, "you will have to wait until this conference is over." (R 7008). Assistant State Attorney Johnson further advised that "they were in a very important part of the interrogation and that he would not interrupt it to advise Mr. BUNDY . . ." (R 7024) of the presence of counsel (R 7009).

The Officers Patchen, Bodiford and Chapman "missed the press conference" (R 6905) as they were still interviewing BUNDY, but were informed by Assistant State Attorney Johnson that the attorneys were outside wanting to talk to Mr. BUNDY (R 6906). Counsel Terrell tried to contact Judge Greenhut (R 7009), who was in court. Mrs. Nichols tried to contact her boss, Public Defender Jack Bahr (R 7010). Assistant State Attorney Johnson came back out again and again to bar counsel access to their client, "at least four times," two times at the front of the jail and then one time in the hallway . . . and then another time some period later, where he came out" . . . (R 7010). The twenty-four hour session (R 6915) ended.

Mr. Koran returned to the police department at approximately 11:00 A.M. after court (R 6984). Mr. Koran then caused an affidavit to be prepared which reflected BUNDY no longer wanted to be questioned (R 6985). Mr. BUNDY then emotionally upset, close to tears, incessantly smoking, mumbling, repeating things over and over again (R 6986) signed (R 6985).

However, on 18 February 1978 at 12:15 A.M. (R 268; 6855) BUNDY was again interviewed by Officer Patchen and Bodiford and taped without counsel and without his knowledge (R 6860). Another session without notice to counsel ensued at 9:00 P.M. on the evening of 18 February 1978 (R 6856) being the last taped session in Pensacola. On 19 February 1978 BUNDY was again interviewed by Tallahassee law enforcement at 12:15 A.M. (R 6856) without counsel and taped without knowledge of the electronic surveillances; and again at 6:00 P.M.; again at 12:47 A.M. on 20 February 1978; at 11:00 P.M. on 20 February 1978; at 12:40 P.M. on 22 February 1978; (R 6857-6858); at 1:00 A.M. on 23 February 1978; at 10:00 A.M. on 3 June 1978 and 11:00 P.M. on July 1978 (R 269), the latter being at the Leon County Jail (R 268-269; R 6858). The State did not seek admission of any statement subsequent to 17 February 1978 [per prosecutor Assistant State Attorney Dan McKeever, (R 6856)]. The trial judge granted the Motion

to Suppress Statements with the exception of the statements as noted above (R 7053).

D. Pre-Indictment Pretrial Proceedings

1. Search & Seizure(s)

The Record on Appeal as further supplemented does not reflect significant activity after arriving in Leon County on 19 February 1978, until the indictment was handed down on 27 July 1978 (SR 1-ff). However, interviews of the Defendant continued as indicated.

Proceedings on 27 April 1978 (R 1690) reflect that Judge John Rudd entered an order on 17 March 1978 compelling the production of handwriting exemplars (R 1692). These proceedings are relative to case no. 78-125, auto theft-burglary, Second Judicial Circuit, Leon County, Florida, (R 135, 1690), not 78-670 the burglary-homicide cases (R 1), of the instant appeal, nevertheless the State requested all defense discovery to be cut off (R 1694) because of Defendant's non-compliance with discovery orders to produce exemplars. The motion was granted (R 162, 1701).

On the same day, 27 April 1978 (SR 81, 1690), a search warrant of a rather unique nature was executed. The warrant was signed on 16 April 1978 (R 5, SR 103) directing the then Sheriff of Leon County, Ken Katsaris and deputy sheriff, Captain Jack Poitinger and all and singular the

deputy sheriffs of Leon County, Florida, to search and seize the mouth of THEODORE ROBERT BUNDY. The search warrant commanded the officers to seize the person of THEODORE ROBERT BUNDY and search his mouth under the supervision of Dr. Richard Souviron and seize from his mouth wax casts and impressions of his upper and lower teeth, geltrate impression of BUNDY'S bite and six close up photographs of the teeth (R 5, SR 102). The written report of findings by Dr. Souviron was ordered to be filed within thirty (30) days from execution of the warrant (R 6, SR 102). The time period was extended by court order (R 7) upon the State's request (R 5-6). The report related to the victim Lisa Levy only (R 8), the victim in count three of the Indictment (R 1). The Report dated 6 June 1978 (R 8-12) speaks for itself, but in pertinent part, found (R 11):

> A. The marks located on the left buttock are human bites.
>
> B. The bites show little vital reactions were made around the time of death or shortly after.
>
> C. The assailant's lower teeth marked closest to ruler. The upper teeth marked farthest (sic) from the ruler.
>
> D. The position of the head of the assailant was therefore toward Ms. Levy's head with her face lying down.
>
> E. There are two distinct marks from the lower teeth.

F. There are three indistinct marks from the upper teeth.

G. The same person made both bite marks.

Dr. Souviron concluded, "It is my conclusion, therefore, that both bites made on the left buttock of Ms. Levy, *within reasonable dental certainty*, were made by Mr. THEODORE BUNDY." (emphasis added) (R 12).

2. Grand Jury

The issue concerning pre-indictment right to counsel (R 2642) was initially set into motion by Assistant Public Defender Joe Nursey (R 2644, SR 266), who on or about 18 July 1978 (R 147) prepared and filed certain motions prior to Defendant's indictment on the present charges (R 1644). Mr. Nursey had been appointed to represent BUNDY on auto burglary and auto theft charges earlier and had been involved in BUNDY'S representation since 19 February 1978 (R 1648, 2653). BUNDY *pro se* filed a motion for pre-indictment appointment of counsel (R 1645, 2652). The State responded (R 2667) that the Defendant had no pre-indictment right to counsel and the Public Defender had no authority to appear (R 148) prior to appointment. The motions came on for hearing on 21 July 1978 (R 2665), SR 266-ff). The presiding Judge John A. Rudd denied the request for public defender assistance (R 715, 2037), on grounds of no statutory authority (SR 276). He denied the challenge to the grand jury on timeliness (SR 276). Judge Rudd

then on the same date, 21 July 1978, called assistant Attorney General George R. Georgieff and discussed the question of the right to counsel prior to indictment and timeliness of motions filed in connection with grand jury proceedings (R 720) by the Office of the Public Defender. The particular motions (R 705-714; R 1079-1088) were entitled "Motion to Inform Defendant of Grand Jury Proceedings" (R 705, 1079); "Motion for Temporary Restraining Order and Preliminary Injunction Restraining Grand Juries from Returning Indictment Against the Defendant" (R 707, 1081); "Motion for Voir Dire Grand Jury" (R 709, 1083); "Challenge to the Grand Jury" (R 711, 1085).

The trial judge, Honorable John A. Rudd, then reversed himself, on the ruling that "Mr. BUNDY had no right to appointed counsel to present these motions" (R 2644, 2665) by entering a written order dated 24 July 1978 (R 715, 1089), and having a hearing on 24 July 1978 (R 2034, SR 280-285). Defense counsel was contacted in the morning by the judge (R 2645) to be informed a hearing was to be held later the same date, with the motions being denied as untimely (R 716-717, 1090-1091) 1 August 1978 *nunc pro tunc* 25 July 1978 (R 151, 717, 1091). The *nunc pro tunc* Order is styled "IN RE" GRAND JURY INVESTIGATION July 25-27, 1978" (R 250, 716, 1090) which is interesting since the Indictment was presented (R 4)

and filed (R 1) on 27 July 1978. The hearing of 25 July 1978 may be found in the Supplemental Record (SR 285-289).

In renewed form Defendant's counsel moved to quash indictment (R 701-744) on grounds relative to the grand jury. The motion came on for hearing before trial Judge Cowart on 16 May 1979 (R 2640-2676) and was again denied (R 2675).

E. Post-Indictment Pre-Trial Proceedings

1. Publicity

The issue of pre-trial publicity is a joint issue with publicity at trial (R 2315). From the taking of depositions (R 2303) to location of the media in the courtroom (R 2437, 3791), from venue change (R 3923) through the jury selection process (R 4035-5518), the publicity attendant to the case was in every way extraordinary. The media which so closely scrutinized the proceedings prompted defense motions to seal certain motions and close pre-trial hearings (R 256), Motion to Seal Transcripts of Depositions taken by the Defendant (R 257), Motion for Protective Order to Close the taking of Depositions and to Seal the Transcripts of the Testimony of Witnesses including Exhibits (R 454-461), Motion to Prohibit Photography of Defendant in Restraints (R 507-510), Motion to Strike Portions of the Response filed by the Florida Publishing Company to Defendant's Motions (R 599-602),

Motion to Exclude Electronic Media Coverage (R 652-663), Amended Motion to Exclude Electronic Media Devices from Courtroom (R 665-667), Motion for *In Camera* Hearing on Motion *In Limine* Regarding the Admissibility of Evidence Purporting to Show Other Crimes (R 686-690), Motion for *In Camera* Hearing on Motions *In Limine* Regarding the Admissibility of Statements (R 691-694), Motion for Change of Venue (R 748-1072), Motion for *In Camera* Hearing on Motion to Exclude Testimony of Nita Neary (R 1167-1172), Motion for *In Camera* Hearing on Motion to Suppress Tangible Evidence seized in Utah (R 1180-1183), Motion to Seal Depositions and to Designate Persons to be present at Depositions (R 1185-1191), Supplemental Motion for Continuance (R 1350-1354), Motion to Prohibit Further Prejudicial Extrajudicial Statements by Leon County Sheriff Ken Katsaris (R 1390-1398), Motion to Sequester Witnesses (R 1399-1407), Motion to Dismiss Jury Venire or, In the Alternative; to Sequester the Jury Venire Until a Jury is picked (R 1413-1420), Motion for Change of Venue or, in the Alternative, to Abate the Prosecution to Blunt the Effects of Pervasive Prejudicial Pre-trial Publicity (R 1425-1428), Motion to Exclude Electronic Media Devices from the Courtroom (R 1437-1440). It is Appellant's position that the pervasive uncontrolled invasion of the media into the judicial arena violated his right to a fair trial.

2. Right to Counsel

The Indictment was returned 27 July 1978 (R 1-4) and the Record on Appeal for most material purposes commences at that point. However on 25 July 1978 (R 725-744, SR 280-284) Mr. Millard Farmer, Esq. of Atlanta, Georgia, sought leave of court to appear *pro hac vice*. Pleadings to that effect were filed on 28 July 1978 (R 16-17), 31 July 1978 (R 24) and 2 August 1978 (R 31-32). Arraignment was 31 July 1978 (R 1704) at which time ruling on the motion(s) was deferred until 2 August 1978 (R 1705).

At the hearing TED BUNDY was present in proper person without formal counsel appointed (R 1712). The State was allowed by the trial judge (Rudd) to proceed on a motion to extend speedy trial over objection of Defendant (R 1717) after the court deferred hearing and ruling on the motion(s) to appear *pro hac vice* (R 1713). The motions regarding the appearance of foreign counsel were filed jointly by Appellant BUNDY and Mr. Farmer (R 16, 24) and by Public Defender Michael Minerva (R 31). By written order of 3 August 1978 *nunc pro tunc* 2 August 1978, Circuit Judge Rudd denied the motions without disposing of the issue sought to be reached herein, namely Defendant's right to appointment of counsel *pro hac vice*.

Defendant *pro se* renewed and reiterated this po-

sition requesting out-of-state counsel (R 279-280) subsequent to the designation of the ultimate trial judge Hon. Edward D. Cowart (R 281). Judge Cowart entered his order Denying Admission *Pro Hac Vice* (R 438-442) on 21 February 1979 addressing both the rights of out-of-state counsel and the Sixth Amendment rights of Defendant BUNDY (R 439). The transcript of the hearing on the renewed motion before Judge Cowart is found in Volume 22 (R 2022-2156).

3. Discovery

Arraignment was held on 31 July 1978 (R 1706); on 14 August 1978 (R 18-23) the state's motion to continue was granted (R 1784) on grounds of complexity. Each party filed motions to compel discovery (R 74, 77) which were heard on 25 September 1978; in substantial portion each party received relief (R 1788-ff).

On 2 October 1978 at the pretrial conference the Defendant moved to continue on grounds that lab reports and discovery disclosures were late in forthcoming making it impossible to prepare for the trial scheduled on 3 October 1978 (R 1813-ff). The motion to continue was granted (R 1851) in open court and in the presence of prospective jurors in Tallahassee, Leon County, Florida.

The record reflects continued updating of discovery (R 84, 106, 107, 121, 132, 241, 277). Additional

matters in regard to the disqualification of the trial judge (R 133-226, 229-232) Motion to Dismiss and Motion for Contempt [Souviron] (R 116-120, 126-128, 129-131), further motions to continue (R 234-238, 242-247) Motion to Suppress Evidence (R 248-255) were filed and heard but are of no direct consequence at this point to the appeal.

On 9 January 1979 (R 281) Hon. Edward D. Cowart was appointed by this Court to preside over trial proceedings. Many of the issues previously raised were renewed, Defendant moved for appointment of out-of-state counsel (R 279-280). An additional motion to compel discovery was filed (R 283-286) as were motions for extension to file motion to dismiss indictment (R 289-290) and additional discovery (R 412, 419). Defendant was being represented by the Office of the Public Defender Second Judicial Circuit (R 2037).

4. Pre-Trial Evidential Issues

With the first trial commencing 12 June 1979 (R 3791) and concluding that same day (R 3923) upon the granting of a change of venue from Tallahassee to Miami, Florida, the intervening weeks and fifteen volumes of the record on appeal will be capsulized into issues regarding evidence which for various reasons to be respectively discussed hereafter take on significance in this appeal.

One of the pertinent issues is the motion to sever

filed 12 February 1979 (R 429-430). The record reflects almost daily efforts made to control the pervasive pre-trial publicity in the case as itemized above.

On 26 April 1979 Defendant filed separate motions to suppress the testimony of witnesses Picano, Hastings, and Nita Neary (R 670-675); Nita Neary being the purported eyewitness in the case. On 2 May 1979 Defendant filed separate motions *in limine* to exclude statements and to suppress statements (R 695-699). Defendant's first motion for change of venue was filed on 9 May 1979 (R 748-1072). The disposition of which was previously noted. On 9 May 1979 Defendant filed a motion *in limine* to suppress testimony pertaining to the bite mark identification (R 1122-1124) and motion to strike testimony of state's expert and forensic odontologist (R 1140-1144). On the same day motion to suppress tangible evidence seized as a result of unlawful search in Granger, Utah was filed (R 1173-1174) together with Defendant's motion to quash search warrant (bite mark) (R 1175-1179). Volume 27 of the record on appeal (R 2432-ff) begins the hearing on these issues of critical concern.

As to the issue of publicity, the Court found that there was a presumption toward dissemination (R 2518) unless clear and present danger was present and no remedy through channels (a) *voir dire* (b) additional peremptory

challenges, or (c) no other order would accomplish the purpose. In an ensuing *in camera* inspection (R 2526) the Court decided to keep certain matters closed to the public until the jury was sequestered (R 2539) and deferred rulings (R 2546) on certain motions. Other motions were called up for hearing; the motion to dismiss was denied (R 2675); the motion to suppress Nita Neary testimony was continued until after the jury selection (R 2749); the ruling on the bite mark search warrant was also deferred (R 2751); the motion to close the hearing was denied as to bite mark testimony from Dr. Souviron (R 2810).

Testimony was taken as to the *admissibility* of the bite mark evidence. After extensive testimony from Dr. Souviron and Dr. Lowell J. Levine (R 2930) motion to close the hearing was renewed (R 2972) ruling upon which was deferred (R 2987). Then after adjourning *in camera* (R 2992) the Court found no clear and present danger and continued the hearing (R 2765-3314) which concluded with the testimony of Dr. Dwayne DeVore, Chairman of the committee working on standards of bite mark in comparison (R 3260). The competing position of the witnesses for the State, Dr. Souviron, Dr. Levine, and Dr. DeVore for the defense was that within a reasonable dental certainty, taking the evidence most favorable to the prosecution, the bite marks were those of BUNDY

(R 3114). Dr. Souviron (R 2873), Dr. Levine (R 3049) and Dr. DeVore (R 3202) did agree that no standards exist for bite mark analysis. Dr. DeVore went so far as to say that the situation presented was so incongruous that something was wrong; that if the tissues were correct the photos were wrong, and if the photos were correct the tissue sample was wrong (R 3219). Espousing doubts as to the impartiality of Dr. Souviron, the court deferred ruling on motion until the taking of testimony at trial (R 3357).

On 31 May 1979 (R 3470) situational developments between counsel and Defendant precipated with the defendant requesting replacement of counsel (R 1262-1266). The motion was predicated upon the choice of counsel to move for a competency hearing of Defendant (R 1280) over the objection of the defendant. The matter came on for hearing (R 3580) initially on efforts to close the hearing (R 1281-1283). Attorney Brian Hayes (R 3600) was appointed to represent the Defendant and appeared at the actual hearing held 11 June 1979 (R 3615); the hearing concluded with the finding of competency (R 3650). The Defendant moved to discharge the Office of Public Defender without waiving his right to counsel (R 1262-1266) which led to the only counsel, court appointed, with any previous capital case experience, Michael Minerva, to withdraw (R 3677; 1519-1520).

F. Trial Proceedings in Tallahassee

The motion to continue on grounds involving venue was under advisement (R 3762) when initial trial proceedings began 12 June 1979 in Tallahassee (R 3791). Individual *voir dire* (R 3764, 3812) commenced with the defense being granted twenty-five (25) peremptory challenges (R 3810). After a series of jurors were excused for cause, the change of venue was granted (R 3923). The order changing venue was filed the same day, 12 June 1979 (R 1347). Trial was reset for 25 June 1979 (R 3923) in Miami.

G. Trial Proceedings in Miami

During the interval between trials, little additional legal positioning is evident from the record. On the day the trial commenced, 25 June 1979, a number of motions were filed including Motion to Improve Conditions of Confinement, (R 1372-1377), Motion to Continue (R 1378-1380), Motion to Compel Discovery (R 1384-1389), Motion to Prohibit Further Prejudicial Extrajudicial Statements by Leon County Sheriff (R 1390-1398), Motion to Sequester Witnesses (R 1399-1407), the state's motion for competency hearing (R 1412), motion to prevent disqualification of jurors because of views on capital punishment (R 1421-1423). Several other additional motions were filed including a request for additional preemptory challenges (R 3951); however, the foregoing reflect the most pertinent issues at this junction.

1. Jury Selection

Jury selection continued through 30 June 1979 ending with the selection of alternates (R 5552). Several jurors were excused because of scruples concerning the death penalty (R 4205, 4274, 4627, 5386, 5492). With camera aimed at defense table (R 3969) and parabolic mike on ready, the trial began (R 4949). Individual *voir dire* revealed grounds for challenge for cause time and time again. The primary grounds for cause was predisposition aroused by the pervasive publicity surrounding the case (R 4036-4201) as the initial half dozen jurors called were so infected. A juror noted one would "have to be in Siberia" (R 5466) to have avoided the publicity about the case. In fact all prospective jurors had indeed heard about the case save one (R 5086).

During the examination of one juror, it was discovered that in the jury pool room prospective jurors were talking (R 5149) that they were afraid Defendant BUNDY would have friends on the outside that would get them (R 5147). The juror testified that the conversation affected people there (R 5149) precipatating a motion to strike those prospective jurors sequestered on the fourth floor (R 5115). The Court caused and expedited *voir dire* (R 5149) regarding that issue and denied the motion to strike the mini-panel (R 5161). Motion was later renewed and denied regarding the fourth floor mini-panel (R 5342).

Approximately twenty-four (24) jurors were excused due to their knowledge of the case gained through pretrial publicity (R 4080-4103, 4144, 4201, 4255, 4313, 4314, 4408, 4506, 4594, 4629, 4630, 4704, 4759, 4900, 4930, 4965, 4968, 4981, 5080, 5161). Defendant's request for additional peremptory challenges was denied (R 5230).

2. Counsel at Trial

The issue of effectiveness of counsel has been previously raised by Appellant in a separately filed pleading. As mentioned, no court appointed counsel had capital case experience (R 9822) and the trial judge denied the defendant's request for an evidentiary hearing on the issue of effectiveness of counsel (R 10,079). While the trial judge desired the issue to be raised on appeal and not ten years down the road (R 9045), it is impossible to brief the issue meaningfully without a full record regarding the points raised by Appellant's Motion for *De Novo* Hearing on Effectiveness of Counsel.

Appearances on behalf of the Defendant included Mr. Edward Harvey, Ms. Margaret Good and, Ms. Lynn Alan Thompson Assistant Public Defenders, and Mr. Robert M. Haggard, volunteer private counsel; on behalf of the state, Hon. Harry Morrison, State Attorney; Mr. Larry Simpson, Mr. Dan McKeever, and Ms. Lyndia Kent, Assistant State Attorneys (R 4190).

As to effectiveness of counsel, the issue will be broken down into (1) failure to appoint supervisory counsel with experience in capital cases, (2) the trial court denial of an evidentiary hearing on the effectiveness of counsel, (R 10,079, 10,130) and (3) evidence of counsel ineffectiveness.

3. Evidential Issues at Trial

Defendant's Motion to Compel Discovery (R 1384-1389) was filed on 25 June 1979 and was taken under advisement until the jury was selected (R 3962). The Motion sought a "letter written by one Howard Anderson, now deceased, who took his own life after admitting to perpetrating the crimes with which the defendant is charged" (R 1384); "The letter wrapped in tin foil received by Sheriff Katsaris from Atlanta which contained admissions and several details of the crime which had not yet been published in the newspaper." (1984); "The substance of the confession written on the wall of the Rose Printing Company, Tallahassee, as well as the identity of the author and any statements given by him to any police officer." (R 1384-1385); "the transcripts or substance of any statements made by any of these named suspects and the identity of the person to whom such statements were made;" (R 1386). The state at hearings on 2 July 1979 did not oppose the letters being disclosed (R 5663) as well as the Rose confession (R 5665).

The court then considered matters of daily transcripts and grand jury testimony, before going into evidential issues of Defendant's Motion to Suppress Testimony of Nita Neary (R 670-672; 5691). Defense counsel sought to waive Defendant's presence at the hearing during the testimony of the witness, Nita Neary. The request was denied (R 5692).

By stipulation the state proceeded to put on evidence first regarding identification (R 5691). Ms. Nancy Dowdy testified that Nita Neary told her of seeing a male in light pants and a jacket with a ski cap and something in his hand leave by way of the front door shortly before the facts of the incident on the night in question were known (R 5702-5703); the male being somewhat bigger or taller than the Chi Omega houseman, Ronnie Eng (R 5706-5707).

Ms. Dowdy was followed on the stand by TPD Officer Oscar Brannon who testified to receiving the initial description of a "white male, young, approximately five feet eight inches tall, approximately a 160 pounds, slender build, clean shaven, had a large distinguished nose, protruding nose, a dark complexion, smooth; last seen wearing a dark tobaggan type cap, a waist length dark jacket, light colored pants, and carrying a large stick" (R 5800). Officer Brannon dispatched the description to other field units (R 5798). On cross examination the Officer recited to arriving at the Chi Omega house at 3:23 A.M.

Investigator Stephanie Wright of the Leon County Sheriff's Office was next called (R 5851) and testified to her interview of Ms. Neary had on 15 January 1978 sometime between 5:00 A.M. and 7:30 A.M. (R 5853). Officer Linda Presnell, FSUPD, testified she arrived at the Chi Omega house at 4:00 A.M. on 15 January 1978 (R 5882) and related her interview of Ms. Neary (R 5883-5887). Later on that evening Ms. Prescott went back over to the sorority house with an artist named Kenniston who drew sketches of Ms. Neary's description (R 5888). The six sketches were introduced at the hearing (R 5888-5889). Ms. Prescott was followed by Captain Jack Poitinger, Commander of the CID unit of the Leon County Sheriff's Office (R 5931).

Captain Poitinger was later made case agent or officer in charge of the case (R 5932). Captain Poitinger related the substance of the hypnosis session conducted on 23 January 1978 on the witness Ms. Neary (R 5934). Tapes of the session were marked and introduced into evidence (R 5936-5937).

Captain Poitinger on 6 April 1978 went to Muncie, Indiana, to conduct a photographic line-up with Ms. Neary (R 5944). The actual photo spread was shown Ms. Neary on 7 April 1978 consisting of ten (10) separate pictures (R 5946) of different persons. Defendant BUNDY'S picture was in position four (R 5947), Defendant having been taken into custody on 15 February 1978. The session was also tape recorded (R 5948).

Ms. Neary had seen photographs of BUNDY in the media (R 5949). Ms. Neary picked out number four stating "I don't know; pretty definite resemblance". (R 5951). As to the hypnosis session, Captain Poitinger admitted from it the investigators "were able to obtain the color of the hair". (R 5956). The tapes and the photo line up are a part of the exhibits and record (R 5936, 5952) and need to be examined (Exhibits 9, 10, 12, 13; R 1534, R 6433).

The witness Nita Neary was called (R 6023). She testified having arrived from a fraternity party at about 3:00 A.M. (R 6025) and having had "a few beers" (R 6026). She entered through the back door combination lock (R 6026) walked through the recreation room into the living room where she heard a loud thump (R 6027). Thinking her date might have fallen down (R 6027) she walked out toward the stairs to look out. Going back through the recreation room, she heard someone running upstairs (R 6028). Upon getting closer to the stairs in the foyer, she heard somebody running down the stairs, and at the front foyer she saw a man at the door (R 6028), with his left hand on the doorknob in a stooping posture (R 6031). She saw only a profile (R 6032). The man was carrying a club with a dark sock around the middle (R 6032). She recalled a dark complexioned, slightly built, clear complected man, around five feet eight inches (5'8") in height, one hundred

sixty-five (165) pounds with a prominent pointed nose wearing a dark jacket and light pants (R 6033), and a stocking cap, pulled down to his eyebrows, was over his hair and ears (R 6034). She saw him in motion for a matter of maybe three seconds (R 6034); she maintained a still conception from seeing him stop for a fraction of a second at the door (R 6032). Her first thought was "What was Ronnie Eng [the houseboy] doing in the house?" (R 6035). The victims were then found and police called (R 6037-6040).

As to the photo array, Ms. Neary said she initially picked out two photographs before eliminating one (R 6047). She further testified of having had occasion to see the Defendant BUNDY at the Tallahassee trial in October (R 6050).

Upon request by the state, the court ordered everybody in the courtroom stand and turn a right profile to the witness (R 6051) including the Defendant who was at counsel table (R 6053). The witness then identified Defendant THEODORE ROBERT BUNDY (R 6056). Ms. Neary also acknowledged seeing the series of newspaper photographs of BUNDY published after his arrest (R 6137; Exhibits A-1, A-2, and A-3, R 1534).

Officer George C. Brand of the Leon County Sheriff's Department was called by the defense and testified that on 23 January 1978, prior to the hypnosis session Ms. Neary described to Mr. Brand the person she saw at the State Attorney's Office

in Tallahassee (R 6271). Ms. Neary on that occasion described a *light* complexioned male about five feet ten inches to five feet eleven inches (5'10" - 5'11") in height (R 6274). Officer Raymond Crew was called and testified to his initial BOLO (R 6347). The artist next testified that Ms. Neary told him she might be able to recognize the man she saw (R 6398).

Detective (sic) James Steven Bodiford, of the Leon County Sheriff's Office played a taped telephone conversation with Nita Neary's mother which appears in the Record (R 6403-6409). The conversation was 14 March 1978 (R 6402). Mrs. Neary stated that Nita Neary had seen BUNDY'S photos in the newspaper and wanted to see a profile (R 6407). Mr. Bodiford advised Mrs. Neary to keep Nita Neary from seeing more pictures because "that is what is called a tainted line-up" (R 6408). Mr. Bodiford next played a tape of a telephone conversation between himself and Nita Neary (R 6411-6414). Ms. Neary couldn't guarantee, but . . . could say he resembles him" (R 6411). Ronald Eng, the houseboy, was called for comparison (R 6424).

An expert in hypnosis, Dr. David S. Kuypers, was called and qualified (R 6427) and finally tendered as an expert in the field of clinical psychology and hypnosis (R 6432). The witness having previously examined reports, interviews, tapes and photos (R 6433-6436) used the state's hypnosis session to cite examples of inappropriate suggestions (R 6443,

6445, 6447, 6448, 6452, 6454, 6463, 6465, 6469, 6472, 6482, 6485). In Ms. Neary's subsequent conversation on tape with the Sheriff of Leon County, the witness identified responses to post hypnotic suggestion (R 6489, 6491). The witness indicated that Ms. Neary "produced items or altered details" (R 6493) as a result of positive hallucination (R 6455, 6459) and hypnotic suggestion, leaving the greater probability of certain production responses rather than actual recall (R 6506) resulting in contamination (R 6504). The court deferred ruling until after the hearing on the motion to supres Utah evidence (R 6511).

The trial proceedings, jury absent, next went into the search and seizure relative to THEODORE ROBERT BUNDY (R 6511) in Granger, Utah. The Utah motion is actually titled *in limine* (R 681-685). The evidence the state sought to use stemmed from a stop, search and seizure *two and one-half (2½)* years earlier in Granger, Utah (R 682) on 16 August 1975. A small crowbar, a ski mask, and pantyhose were seized from the car that BUNDY was driving (R 6518-6519). The trial judge finding *res judicata* as to the legality of the search and seizure by virtue of the Supreme Court of Utah having ruled in the area (R 6690) found the evidence inadmissible (R 7832) and went on to rule on the admissibility of the Nita Neary testimony (R 6691-6697) in denying the motion to suppress.

Hearings continued as to collateral crimes wherein it was established that Randall Raggins had lost a tag on or about 13 January 1978 (R 6697) and Officer Ray Dickey, TPD had seen BUNDY (Brief of Appellant p.2). The hearings on the admissibility of statements of the Defendant in Pensacola as previously noted followed (BOA 5). The statements and tapes were ordered suppressed (R 7053). The Motion to Sever came on to be heard (R 7059) on evidence proffered by counsel, rather than the taking of testimony (R 7060-7067) and was denied (R 7079). The trial judge heard argument on the previously deferred motions to quash bite mark search warrant and motion to suppress evidence of the bite mark identification (R 7079) and denied the motions (R 7099).

4. Opening Argument

After opening argument by the state (R 7106-7127), the defense (R 7127-7145) presentation was somewhat feeble by virtue of approximately fifteen (15) objections being *sustained*. Counsel's comments [Haggard] were not the proper object of opening argument (R 7128, 7133, 7134, 7135, 7136, 7137, 7138, 7139, 7141, 7142, 7143, 7144, 7145). The defense presented was that BUNDY was not the person who commited the crimes alleged (R 7127).

5. Trial Testimony

The first major witness, Ms. Nancy Dowd, took the stand (R 7135) and testified in substance as earlier outlined. Oscar Brannon next testified as to the Nita Neary description (R 7189) and finding moss and bark. Henry Newick (R 7218) found victim Margaret Bowman (R 7223) with fractured skull and bark on the bed. Raymond Crew (R 7238) found victim Lisa Levy. The trial was briefly recessed for the deposition of victim Cheryl Thomas of the Dunwoody incident who was not previously deposed due to media attention (R 7272). Two girls from the sorority were called who basically testified they had seen the deceased victims alive earlier that evening (R 7279, 7289).

The emergency medical technicians told of the condition of victim Lisa Levy (R 7300). Victim Karen Chandler (R 7320) and Kathy Kleiner [DeShields] (R 7327) each related being battered and having no idea of the identity of the assailant or assailants.

Ms. Debra Ciccarecci (R 7329) of the Dunwoody address (R 7330) testified to having heard thumping noises below her upstairs apartment (R 7333) prompting her to call the police (R 7334). Apartment mate, Ms. Nancy Young, heard someone exit through the Dunwoody address kitchen (R 7353). Officer Wilton Dozier of the Tallahassee Police Department testified the Dunwoody address to be about two miles from the Chi Omega

address (R 7360) and to finding pantyhose at Cheryl Thomas' apartment at Dunwoody Street (R 7369). Deputy Mary Ann Kirkham was dispatched to the Dunwoody Street apartment where she took pictures (R 7143). The pantyhose became characterized as a "mask" (R 7420, 7423, 7441). Officer Bruce Johnson collected the evidence at the Dunwoody apartment (R 7443). Victim Cheryl Thomas testified that late 14 January 1978 or early 15 January 1978 she went to sleep (R 7459) only to wake up in the hospital. She testified she had had no sexual relations that night (R 7474).

Officer Howard Winkler (R 7476) was dispatched to the Chi Omega house (R 7477) and took pictures of the house and crime scene (R 7481-ff) including pantyhose around the neck of victim Margaret Bowman (Exhibit 33). Hanes pantyhose were also seized from the room of Lisa Levy together with a hairspray bottle nine (9) days later (R 7689; Exhibits 56 and 57).

Dr. Thomas Purcer Wood, the pathologist was called out of turn (R 7694) in order to establish the necessary predicate for FDLE forensic serologist, Richard L. Stephens (R 7690) who had examined swabs and blood samples (Exhibits 58, 59, 60, 61 and 62) taken from the respective victims. His findings:

1. Karen Chandler (R 7702-ff)

   a. "A" Blood group A
   b. "BA" Erythrocyte Acid Phosphatase
   c. "1" Estrase D type
   d. "2-1" Phosphoglucoutase type
   e. "1" Adenylate Kinase

2. Kathy Kleiner (R 7704)

   a. "A" Blood group
   b. "BA" Erythrocyte Acid Phosphatase
   c. "1" Estrase D type
   d. "2-1" Phosphoglucoutase type
   e. "1" Adenylate Kinase

3. Margaret Bowman (R 7705)

   a. "O" Blood group
   b. "BA" Edythrocyte Acid Phosphatase
   c. "1" Estrase D type
   d. "1" Phosphoglucoutase type
   e. "1" Adenylate Kinase

4. Lisa Levy (R 7705)

   a. "O" Blood group
   b. "BA" Erythrocyte Acid Phosphatase
   c. "1" Estrase D type
   d. "2-1" Phosphoglucoutase type
   e. "1" Adenylate Kinase

5. Cheryl Thomas (R 7706)

   a. "O" Blood group
   b. "BA" Erythrocyte Acid Phosphatase
   c. "1" Estrase D type
   d. "2-1" Phosphoglucoutase type
   e. "1" Adenylate Kinase

Ms. Laura Evans Nixon established the identity of both of the deceased (R 7779); Dr. Thomas Purcer Wood, the pathologist, (R 7782) testified to the autopsy results of the victims. Lisa Levy was knocked unconscious, bitten on the

breast and buttock, sexually molested vaginally and anally, and strangled (R 7796). Margaret Bowman was strangled to death (R 7802) showing no anal or vaginal trauma (R 7805).

Testimony was elicited as to hair samples seized and analyzed (R 8025). Ms. Patricia Ann Latsko, microanalyst with FDLE compared the Defendant's hair with hair in the pantyhose found at Dunwoody Street (R 8077). The comparison results were not an absolute identification (R 8084), but the sample from the Dunwoody pantyhose microscopically "could have come from the same source as the standard of THEODORE BUNDY" (R 8074). No ABO blood grouping tests were run on the hair (R 8159), no scale count, no scale index test (R 8159), no refraction index test, and no electron scan text were performed (R 8160).

Deputy William P. Gunter, sergeant with the Leon County Sheriff's Office (R 8162) processed room 12, 409 West College Avenue, Tallahassee, on 16 February 1978 (R 8164) which is the address previously attributed to TED BUNDY. He testified to obtaining lifts from outside the apartment but no latent lifts of evidential value from inside, appearing to him as if the room had been wiped (R 8167) or cleaned. Mr. Daniel G. Hasty, FDLE latent print analyst (R 8171) matched the latents from the outside door panel of the Oaks Apartment, 409 West College, with the Defendant (R 8174). No lifts from the crime scenes compared to BUNDY.

The trial in the absence of the jury (R 8193) proceeded into attempted suppression of the Hastings-Picano-Black testimony (BOA 1), and concluded with the judge allowing the testimony (R 8301). That testimony before the jury was next presented (R 8334-8407), and was followed by the residents of the Oaks Apartments, also earlier connoted (BOA 1-2). The chain of custody as to the sketches of the person allegedly seen by the witness Nita Neary was established (R 8460) setting the stage for her trial testimony of Ms. Neary (R 8469), which was similar to her earlier testimony (R 8469-8575).

Ms. Neary was followed by the "bite mark" testimony and witnesses Souviron, Campbell and Levine. The basic conclusion was that within a reasonable medical certainty, the teeth of TED BUNDY made the bite marks on the victim Lisa Levy, as reproduced through photography techniques (R 8649-9001). No state witness testified to or used actual tissue samples for comparison analysis.

The state shortly thereafter rested its case. Motion for judgment of acquittal was made and denied (R 9023). Defense counsel announced ready for trial with exhibits (R 9024). The defense began with another rift between counsel and the Defendant (R 9036). It became obvious the defense was not ready as a motion was made to reopen the case for the

defense after resting (R 9624). The defense had evidence from blow-ups of the Defendant taken when he was arrested in Pensacola which showed no chip on one of the teeth, a critical point of comparison (R 9978-9984). The Defendant and another witness testified that the chip in the tooth was made in jail in Pensacola after the crimes were committed (R 9590). The trial judge found the defense had adequate time to develope the photo (R 9830), and related testimony, and if the evidence had been timely prepared and presented, the court would have admitted it (R 9990). The failure to procure the evidence was attributed to counsel (R 9998).

At this point, the record reflects one court appointed counsel seeking to withdraw (R 9287) without prior notice to the Defendant (R 9293). Another motion to mentally examine the Defendant (R 9283) was made. As noted by BUNDY he had "no responsibility for, but [bore] complete consequences for . . ." the acts and/or omissions of counsel, (R 9038). Attorney Bob Haggard was excused from the case (R 9294).

The defense tactic was primarily an attack on the credibility or strength of the state's case. Ms. Nancy Dowdy was recalled as to Nita Neary's initial description. Doctor John Mitchell and Dr. Duane DeVore testified relative to the strength or weakness of the bite mark identification (R 9061-9217). Officers Wayne Hicks, George Brand and Benjamin

Masterson were called relative to state's witnesses' earlier inconsistent accounts (R 9217-9265). Ronnie Eng was called for physical identification demonstration purposes (R 9329). The Nita Neary tapes of her hypnosis session and telephone conversations with law enforcement were introduced (R 9348-9372). Witnesses testified TED BUNDY was an O type secreter (R 9415-9440); which closed the evidence at trial.

6. Jury Instructions - Charge Conference

Defendant requested through counsel special instructions on bite mark (R 1526-1527) and hair analysis (R 1521) which were denied (R 9523). Defense counsel requested an alternative jury instruction to the new standard on reasonable doubt (R 1532-1533) which was denied (R 9472). Defense counsel also requested an alternative instruction to the standard (R 1522) as to the Defendant not testifying, Fla.Std. Jury Instr. (Crim.) 2.13(h), arguing that the language in the standard "failure to testify" amounted to a comment on the Defendant exercising his right to remain silent (R 9476). The standard jury instruction was given (R 9749) and reflected the standard language that "a defendant's *failure* to take the witness stand must not be considered in any manner as an admission of guilt, nor should his *failure* to take the witness stand influence your verdict in any manner whatsoever." (R 9749). Timely objection to the jury instruction on "flight" was also lodged (R 9512, 9515).

7. Closing Argument

Argument of counsel proceeded with the state laying emphasis on flight from the tag incident (R 9645), resisting arrest (R 9647) and fleeing in Pensacola (R 9647). Defense closing was a general argument to the sufficiency.

The verdicts were, guilty to all counts (R 1586-1591; SR 590).

8. Post-Guilt Phase

The defense moved for the imposition of life sentences (R 1605-1606) on the basis of the aborted plea agreement. The defense theory was that the Defendant by not pleading guilty and insisting on a trial by jury was being punished for the exercise of his constitutional right to a trial by jury. The motion was denied (R 9805).

Defendant also filed a motion for statement of Particulars (R 1603-1604) and specially requested a jury instruction on "heinousness" (R 1608-1621) which were denied (R 9816).

9. Penalty Phase

The defense stipulated to the existence of an aggravating circumstance on violence (R 9868) as an essential element of the prior kidnapping conviction in Utah (R 9867). It was also stipulated that the Defendant was under sentence (R 9863) and had not been pardoned or paroled at the time of the Tallahassee assaults (R 9878).

The mitigating issues were actually stimulated in part by the court, particularly the issue of mental impairment (R 9977). The judge found reduction of mental faculties (R 10,024) as a mitigating factor.

The trial court further found the capital felonies to have been committed while the Defendant was engaged in the crime of burglary (R 10,101), and that the capital crimes were especially heinous, atrocious or cruel, and followed the jury advisory sentence of death (R 1626-1627), and in written form (R 1629) memoralized the findings.

The Motion for New Trial preserves the pertinent issues (R 1650-1658) including the post-trial denial of motion for Judgment of Acquittal (R 10,128).

The instant appeal ensued on timely notice (R 1665).

A.

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

The instant issue is not "prior restraint," but "public access." *Ocala Star Banner Corp. v. Strugis*, 388 So.2d 1367 (Fla. 5th DCA 1980). In that context a defendant's right to a fair trial may compete with the public's right to information. *Miami Herald Pub. Co. v. Chappell*, 403 So.2d 1343 (Fla. 3d DCA 1981). Citing, *State ex rel. Miami Herald Pub. Co. v. McIntosh*, 340 So.2d 904 (Fla. 1977).

It is the duty of the trial judge to protect a defendant from inherently prejudicial publicity which will saturate the community. *Sheppard v. Maxwell*, 384 U.S. 333,363; 86 S.Ct. 1507, 1522 (1966). The venue change in the instant case was not sufficient to protect the defendant's rights. *Miami Herald Pub. Co. v. Lewis*, 383 So.2d 236 (Fla. 4th DCA 1980), at 240. Rather than the implicit constitutional right of the public to attend criminal trials, *Richmond Newspapers, Inc. v. Virginia*, 100 S.Ct. 2814 (1980), the concern is with the particularly acute danger of publicity concerning pretrial suppression issues. *Gannett Co. Inc. v. Depasquale*, 433 U.S. 368, 99 S.Ct. 2898, 2905; 61 L.Ed.2d 608 (1979).

The *Gannett* court noted the precise problem confronting Appellant, the effects of pretrial disclosure on the

fairness of the trial.

> "Closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun. *Cf. Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663." *Gannett supra*, 99 S.Ct. 2905.

While *Richmond Newspapers* recognizes a constitutional right of the public to attend criminal trials, *Gannett* expressly rejects the concept of a constitutional right in strangers to attend a *pretrial* proceedings, *Gannett, supra*, 99 S.Ct. 2911.

> [I]f the examination must necessarily. be public, the conseqnence may be that the testimony upon the merely preliminary examination will be spread before the community, and a state of opinion created, which, in cases of great public interest, will render it difficult to obtain an unprejudiced jury. The interests of justice require that the case of the defendant should not be prejudiced, if it can be avoided; and no one can justly complain, that until he is put upon his trial, the dangers of this prejudgment are obviated." Commissioners of Practice and Pleadings, Code of Criminal Procedure, Final Rep. §202 (1850). *Garnett, supra*, 99 S.Ct. 2911.

Miami Herald Pub. Co. v. Lewis, 383 So.2d 236 (Fla. 4th DCA 1980), at 238, addressed the same issues and reached the same conclusion. The Fourth District recited a three pronged analysis on the sealing of a suppression hearing:

1. Is necessary to prevent a serious and imminent threat to the administration of justice.

2. Can be established that no less restrictive alternative measures are available.

3. Will in fact achieve the Court's pose.

In finding the danger in *Gannett* was effectively avoided in *Lewis*, the district court found the admissibility of the evidence vitiated the potential hazard of unreasonably exposing jurors to inculpatory information. In caveat the court stated, *Miami Herald Pub. Co. v. Lewis, supra*, 383 So.2d 240:

> We do not foreclose the possibility that there will be cases of such notoriety that a change of venue will not suffice. Thus our conclusion here is expressly limited to the circumstances of this case.

It is submitted the THEODORE ROBERT BUNDY case is of such notoriety.

> "When the conduct restrained involves the exercise of a constitutionally protected right or freedom, as of speech, press, or religion, then a different test may reasonably be applied or a more stringent necessity required before such restraint or uncontrol is warranted. But it does not follow that a court is governed by the same rules in restricting *access* to its own proceedings (or penalizing a direct violation of such restrictions) as in restraining or penalizing independent conduct of third parties. The safeguard against an abusive judicial "censorship" of its proceedings by such means is the same as that which controls all judicial action in this direction: the requirement that such measures must appear to be necessary to a fair trial." *Brumfield v. State*, 108 So.2d 33 (Fla. 1958) at 36.

It is a generally recognized rule that criminal trial judge may exclude all or any portion of the public from a trial, depending upon the necessities of the situation, in order to prevent disorders and distrubances of any nature which could interfere with the orderly course of the proceedings. It, is not error to refuse to news gathering forces the right to obtain or release the name of a rape prosecutrix, or to keep certain portions of judicial records confidential. The purpose of such restrictions is not confined to prevention of physical distrubance, for the power to limit public information or excluce spectators includes the power to limit the vicarious audience by prohibiting photography. *Brumfield, supra,* 108 So.2d at 36.

No Florida Supreme Court case holds that the "clear and present danger" rule governs a court's power to restrict, upon occasion, the public character of judicial proceedings or to regulate or place certain limitations on public *access* to persons in custody. "The requirement has been simply that such limitations must appear to be reasonably required for the orderly administration of justice." *Brumfield, supra,* 108 So.2d at 37. The duty of the court in this respect is not confined to preserving order or decorum in the courtroom itself, but relates to the entire process from the inception, in the case of criminal proceedings, of official custody of the accused.

"It is generally conceded that under

> certain circumstances the public and press alike might be denied permission to interview or otherwise make personal contact with a prisoner awaiting trial. [R 127] Certainly he might be brought to the courtroom, for arraignment, by a route other than the public corridor if physical facilities were available. [R 5331] If constitutional inhibitions do not prevent that procedure, can they operate to prevent a court's accomplishing the same end by injunctive order if circumstances dictate such precautions? We think not." *Brumfield, supra,* 1-8 So.2d at 37.

The primary issue at this point is preserved by Defendant's Motion for *In Camera* hearing on Motion *In Limine* on the admissibility of the bite mark evidence (R 686-690, 2467). The Court utilized the "clear and present danger" test (R 2518) and the three pronged analysis. The hearing on the bite mark was open to the public (R 2810) over protestations of the defendant (R 2748). Defendant further moved to continue the hearing until after the selection of the jury (R 2749) which was ultimately denied (R 2994) as the court found no "clear and present danger." The standard by the court is to restrictive and by applying the incorrect standard, error was committed.

In access cases the three pronged analysis of "clear and present danger" is not applicable. *Sentinel Star Co. v. Edwards,* 387 So.2d 367 (Fla. 5th DCA 1980)[cited for that proposition in *Miami Herald Pub. Co. v. Chappell,* 403 So.2d 1342 (Fla. 3d DCA 1981) at 1345]. The correct test is under the inherent powers of the court.

By virtue of its inherent power to control the conduct of its own proceedings, there is little doubt that under certain circumstances the courts may exclude the public and the press from its proceedings, but such authority must be cautiously exercised. *State ex rel. Gore Newspapers Company v. Tyson*, 313 So.2d 777 (Fla. 4th DCA 1975). Generally, in criminal cases the sealing of court records or proceedings is done with a view toward protecting the rights of the defendant to a fair trial. *News-Press Pub Co. Inc. v. State*, 345 So.2d 865 (Fla. 2d DCA 1977).

Judicial powers possessed by a trial court are classified either as inherent powers, stemming from its existence as a court, or as powers which depend upon constitutional or statutory authorization for their exercise. Every court has the inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. These powers, however, must be invoked in the exercise of sound judicial discretion. *Miami Herald Pub. Co. v. Collazo*, 329 So.2d 333 (Fla. 3d DCA 1976).

Rather than "clear and present danger" the test is simply that limitations are "reasonably required for the orderly administration of justice." *Brumfield, supra*, 108 So. 2d 37. The duty of the court relates to the entire criminal justice process from its inception with official custody of the accused. Just as no constitutional imperative prohibits

alternate or private routes to and from the courtroom (R 507-510) no constitutional proscription prohibits a court from accomplishing the same end by injunctive orders, particularly in an "access" case. *Brumfield, supra,* 108 So.2d 37. Traditionally access in criminal cases is based upon fundamental government interests and protection of other rights which override the concerns of the public. *U.S. v. Gurney,* 558 F.2d 1202 (5th Cir. 1977).

In determining the restrictions to be placed upon access to judicial proceedings, the court must balance the rights and interests of the parties to the litigation with those of the public and press. *State ex re. Gore Newspaper Co. v. Tyson,* 313 So.2d 777 (Fla. 4th DCA 1975).

In a criminal proceeding, it is not the province of the court to control publicity as such, but only to control publicity such as will deny a defendant his right to a fair trial. Therefore, if denial of access is proper, there must be some selectivity. *Ocala Star Banner Corp. v. Sturgis,* 388 So.2d 1367 (Fla. 5th DCA 1980).

The record is preserved as to requested closure and requested continuance. *Cf. Smith v. State,* 376 So.2d 455 (Fla. 1st DCA 1979). But to show prejudice in a specific case something more than general juror awareness is required, *Chandler v. Florida,* 101 S.Ct. 802 (1981) at 813, citing *Murphy v. Florida,* 421 U.S. 794, 800; 95 S.Ct. 2031, 1036; 44 L.Ed.2d 589 (1975). *Accord, State v. Green,* 395 So.2d

532 (Fla. 1981); *King v. State*, 390 So.2d 315 (Fla. 1980); *Clark v. State*, 379 So.2d 372 (Fla. 1st DCA 1979).

Prejudice may be presumed in circumstances where the trial atmosphere has been corrupted by press coverage. *Irwin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). But the Record before the Court reflects four of the actual jurors, including one alternate, were more than aware of the bite mark evidence issue (R 4109, 4522, 5477, 5604). *Irwin v. Dowd, supra*, 331 U.S. 726-727, 81 S.Ct. 1645. The statements of jurors that they would not be influenced by the news accounts is not dispositive. *Sheppard v. Maxwell, supra*, 384 U.S. 351, 86 S.Ct. 1516. *Accord, Irwin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). It was the trial judge's responsibility to protect the accused from inherently prejudicial publicity. The bite mark evidence can only be construed as positive identification, conclusive guilt. The preliminary reports were that the bite marks were inflicted by the accused. (R 8-12). Knowledge of such evidence through news channels could only leave the jury panel with guilt-prone tendencies. The most prejudicial bite mark accounts were fed to the public by the star witness for prior to hearing; *Sheppard v. Maxwell, supra*, however substantial publicity regarding the bite mark analysis attended the

hearing (R 1046, 1317, 1320, 1321).

The jurors who were familiar with the bite mark analysis were more infected than the juror facing a simple eyewitness identification. The bite mark identification has the infallability of the neutral detached uninterested expert witness. The eyewitness is usually in an emotionally stressed situation, often the victim, therefore interested. Everyone in ordinary life has second guessed themselves by blowing their horn at a friend, who turned out to be a stranger. Eyewitnesses therefore lack the cloak of infallibility perceived by lay persons as shrouding the expert.

It is submitted that the bite mark publicity impermissibly reached the trial jury, and violated the defendant's right to a fair trial.

B.

THE FAILURE OF THE COURT TO CONTROL THE PERVASIVE PREJUDICIAL PUBLICITY DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO BE TRIED IN THE COUNTY WHERE THE OFFENSE WAS COMMITTED, Art I, §16, Fla.Const. (1968)

Since 1885, the Florida Constitution has guaranteed to persons accused of a crime "a speedy and public trial by impartial jury in the county where the crime was committed." Art. I, §16, Fla.Const. (1968); §11, Declaration of Rights, Fla.Const. (1885). That guaranty is a legacy of the jurors' seventeenth century role, as witnesses to the disputed facts. 1 Holdsworth, History of English Law 156 (1908). Pluckett, T.F.T.; *A Concise History of the Common Law*, 5th ed. (Little, Brown & Co., Boston, MA. 1956), pp. 127-128.

Parliament's enactment of laws authorizing trial for treason in any county in England, which British authorities threatened to employ against recalcitrant colonists, "was one of the grievances which led to separation of the American colonies from the British empire," *Swart v. Kimball*, 43 Mich. 443, 449, 5 N.W. 635, 638 (1880). Explicit guaranties of trial by a jury of the county or vicinage were therefore written into original constitutions of Maryland, Massachusetts, New Hampshire, Virginia, Pennslyvania and Georgia. *Murphy v. Supreme Court*, 294 N.Y. 440, 455, 63 N.E.2d 49,55, 161 A.L.R. 937, 946 (1945). The local constituency of the jury was thought to be so fundamental that it was held to be implied in the right of jury trial itself. *Swart v. Kimball*,

supra, at 637.

The Florida Supreme Court's first interpretation of the guarantee of the 1885 Constitution was entirely consistent with the deep concern displayed by the colonists, *Hewitt v. State*, 43 Fla. 194, 30 So. 795 (Fla. 1901). In *Hewitt*, the trial judge exhausted a venire of 125 persons without obtaining a qualified jury. The Court in *O'Berry v. State*, 47 Fla. 75, 36 So. 440 (1904) reversed a trial court determination that it was impracticable to obtain a qualified jury in Osceola County. Defendant *O'Berry* had allegedly committed cattle theft. Because his quilt or innocence had been widely debated during his candidacy for the legislature and had been the subject of public comment and litigation in a replevin action concerning the cattle, O'Berry's trial for larceny of another animal had been generally discussed. All those facts, the Supreme Court held, did not demonstrate that a qualified jury could not be obtained from the more than 600 citizens of Osceola County who were eligible for jury duty:

> "The fact that it might have been difficult or would have consumed considerable time to have procured a qualified jury to have tried the defendant is not sufficient to warrant a change of venue, against the consent of defendant." *O'Berry v. State*, *supra*, 47 Fla. 86, 36 So. 443; see also *Ward v. State*, 328 So.2d 260 (Fla. 1st DCA 1976).

Did trial court try to get a jury first?

In *Ashley v. State*, 72 Fla. 137, 72 So. 647 (1916), the Court again reversed a trial court's order transferring

a cause on grounds of the impracticability of obtaining a qualified jury and held:

> ". . . the matter should be tested in some way so as to make it clearly appear that it is practically impossible to obtain an impartial jury to try the accused in that county. "*Ashley, supra*, 72 Fla. 140-141; 72 So. 648. See also *Higginbotham v. State*, 88 Fla. 26, 101 So. 233 (Fla. 1924).

The means by which the impossibility of securing an impartial jury is to be determined, is implied from the very word "impossible," which here means "practically impossible" or "impossible as a practical matter." The term does not mean absolutely impossible, as would be implied by examining every resident of the county for jury service, only to find that six impartial persons cannot be found; but neither does the term "impossible" simply mean difficult, problematic, inconvenient, laborious, or frustrating. What is required is a showing that a jury cannot be secured by an exhaustive or perserving judicial effort. The way for the trial judge to determine that possibility or impossibility is to summon a venire, swear them, join with counsel in asking them questions bearing on their qualifications, and excuse both the impartial jurors and the evasive ones by execising that skill of judgment which Justice Alderman described in *Manning v. State*, 378 So.2d 274, 279 (Fla. 1979) (dissenting opinion). *Beckwith v. State*, 386 So.2d 836 (Fla. 1st DCA 1980), *pet. for rev. den.* 392 So.2d 1379.

Strong as the evidence was of the difficulty of the

task, the impossibility of obtaining an impartial jury was not demonstrated by an exhaustive effort to select such a jury from among the citizens of Leon County. The court examined only 5 veniremen in open court, who were excused for cause suggesting partiality.

It is somewhat incongruous that a defendant argue a change of venue prejudiced his rights. But a defendant has not a constitutional right to a change of venue, rather a fair trial by impartial jury in the county where the crime, was committed. *North v. State*, 65 So.2d 77 (Fla. 1952), aff'd 341 U.S. 932. *Ward v. State*, 328 So.2d 280 (Fla. 1st DCA 1976). Again the Court is confronted with the impacting of First Amendment rights with Sixth Amendment rights. Twenty-six per cent (26%) of the pretrial proceedings totalling one thousand five hundred thirty-three (1533) pages of the record on appeal are devoted to pretrial publicity alone. News reports "Bundy's Teeth Match Bite on Girls' Body Expert Says (R 333), "Bundy provides Dental samples" (R 1042), "Experts Argue Bite Mark Merits" (R 1046), "Expert casts Doubt on Bite Mark Evidence" (R 1317), Bitemark Evidence Ruling Postponed (R 1320), Bundy Challenges Evidence from Bitemark Comparisons (R 1321), together with more than one hundred seventy-one (171) local pretrial news accounts (R 1069-1070), [not counting the final month] dictated a change of venue. BUNDY was literally driven out of town,

not by a disruptive citizenry, but an uncontrolled media. At some point the public curiosity, as opposed to the public's right to know, must be reconciled against the right of the defendant and the overriding interest in administration of justice. The media in the BUNDY case controlled the docket, not the trial judge. The media changed the venue, not the defendant. The expense has prompted new bills in the legislature, but cannot amend or revise the prejudice to Defendant. The defense was severely prejudiced by the distance between the trial and critical bitemark photographs and witnesses (R 9590, 9830, 9990) which were not timely produced (R 9590) and which would have been admitted if timely presented (R 9990-9998). The prejudice is real and actual, and the case should be reversed for a new trial in Leon County.

C.

THE USE OF HYPNOTICALLY REFRESHED EYE-WITNESS TESTIMONY VIOLATED DEFENDANT'S RIGHT TO A CONSTITUTIONALLY FAIR TRIAL

On 23 January 1978, police hypnotist Dr. Julian Arroyo and Leon County Sheriff Ken Katsaris conducted a hypnotic session with state's witness Nita Neary. (R 6435). During that session Ms. Neary provided several details that her previous interviews with police officers did not reveal. Particularly, she described eyebrows and the hair color of the man she saw at the Chi Omega house on the night of the crimes. (R 6033-6034, 6452-6455). The characteristics of hypnosis in general and of Ms. Neary's hypnotic session in particular render her hypnotically refreshed testimony so unreliable and tainted with suggestion as to be inadmissible to establish the identity of the assailant.

The only Florida case involving a witness's hypnotically *refreshed* testimony, *Clark v. State*, 379 So.2d 372 (Fla. 1st DCA 1979), takes a very uncritical view of the dangers inherent in the technique. The majority regarded hypnosis as merely an unconventional form of the "past recollection refreshed" exception to the hearsay rule, relegating to the issue of weight, rather than admissibility, the question of whether the hypnosis procedure used in the case was reliable, *Clark v. State, supra*, 379 So.2d at 375. The view has found acceptance in several states, *Harding v. State*, 246 A.2d 302 (C. Spec. App., Md. 1968); *State v. Jorgenson*, 492

P.2d 312 (Oreg. 1st Ct.App. 1971); *State v. McQueen*, 244 S.E.2d 414 (N.C. 1978) and in the 9th Cir., *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974); *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975); *U.S. v. Adams*, 581 F.2d 193 (9th Cir. 1978); *U.S. v. Awkard*, 597 F. 2d 667 (9th Cir. 1979). It is of note, however, that of these case decisions only *Harding v. Maryland*, 246 A.2d at 311-312, discussed the *reliability* of hypnosis as a means of refreshing a witness' memory. "Science has not recognized the possibility that memory of painful events can sometime be restored by hypnosis." It cautions however, that "some authorities warn that fancy can be mingled with fact in these cases." *Harding v. Maryland, supra*, 246 A.2d 311-312.

The *Clark* decision did not discuss the threshold issue, raised in *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968), that scientific evidence must be recognized and accepted in the scientific community before it is admissible in court. *See also; Frye v. U.S.*, 293 F.1013 (D.C.Cir. 1924); *Kaminski v. State*, 63 So.2d 339 (Fla. 1953). *Roariguez v. State*, 337 So.2d 903 (Fla. 3d DCA 1976), cited *Coppolino* to justify the exclusion of defendant's hypnotically *induced* statement from evidence *Rodriguez* held hypnotically induced statements inadmissible because of their unreliability. The *Clark* decision involved hypnotically "refreshed," as opposed to hypnotically "induced" testimony.

Crawford v. State, 329 So.2d 554 (Fla. 4th DCA 1975) involved a police officer testifying before a jury that a witness had taken a polygraph examination. In reversing the lower court's decision, the Second District Court of Appeals held that "neither the result of a polygraph examination *nor any allusion to such an examination to infer a certain result is admissible.*" (emphasis supplied). *Crawford v. State, supra*, 321 So.2d at 561. The *Crawford* court thus recognized the inherent prejudicial impact that mere mention of an ostensibly scientific procedure in connection with testimony can have on the trier of fact's estimation of that testimony.

The courts which have discussed its character and function, have held hypnosis and its fruit inadmissible for purposes of identification in criminal trials when the hypnosis procedure itself is unduly suggestive. *People v. Smrekar*, 385 N.E.2d 8218 (Ill.App. 1929). *See also, U.S. v. Adams*, 581 F.2d 193 at 198 (9th Cir. 1978); *Merrifield v. State*, 400 N.E.2d 146 (Ind. 1980); *State v. Mack*, 292 N.W. 2d 764 (Minn. 1980); *Commonwealth of Pennsylvania v. Nazarovitch*, 436 A.2d 170 (Penn. 1981); *State v. Hurd*, 432 A.2d 86 (N.J. 1981); *State v. Mena*, 624 P.2d 1274 (Ariz. 1981). The increased legal awareness of the limitations of hypnotically refreshed testimony is based on several factors.

1.

Central to the unreliability of hypnotically refreshed testimony is the phenomenon of confabulation. The term "confabulation" denotes the tendency of a hypnotized person to fill gaps in memory with fantasies and suggestions implanted by the hypnotist, creating memory where there was none. *Commonwealth v. Nazarovitch, supra,* 436 A.2d 170 at 174; *State v. Hurd, supra,* 432 A.2d 86 at 92; *State v. Mack, supra,* 292 N.W.2d 764 at 769; Neil J. Dilloff 83; "The admissibility of Hypnotically Influenced Testimony," 4 Ohio N.E. L.Rev. 1 at 4-5 (1977); Kevin L. Pelanda "The Probative Value of Testimony from Hypnotically Refreshed Recollection" 14 Akron L.Rev. 609 at 619 (1981). Several characteristics of the hypnotic state explain this phenomenon. Hypnosis severly diminishes the subject's critical faculties and increases his or her tolerance for persistent reality distribution. *State v. Hurd, supra,* 432 A.2d at 90-93. At the same time, hypnosis instills in the subject a desire to conform to the hypnotist's expectations. Pelanda, *supra,* at 620. Robert S. Spector and Terle E. Foster, "Admissibility of Hypnotic Statements; is the Law of Evidence Susceptible." 38 Ohio State L.J. 567 at 578, 591-2 (1977); *State v. Hurd, supra,* 432 A.2d at 93; *Commonwealth v. Nazarovitch, supra,* 436 S.2d at 174; *State v. Mena, supra,* 624 P.2d at 1277; *State v. Mack, supra,* 292 N.W.2d at 770. As a result, the

subject will alter or fabricate memories in a subconscious attempt to respond to the hypnotist's requests for specific information, which stems from the tendency of hypnotic subjects to take instruction literally. Spector and Foster, *supra*, at 572.

Bernard L. Diamond, Professor of Law at University of California, Berkeley, and Clinical Professor of Psychiatry at University of California, San Francisco, provides a vivid illustration of the subject's literal response. Hypnotic subjects were instructed to imagine themselves ten years in the future and asked to describe their surroundings. The subjects related what they imagined they saw in minute detail even though they had never actually experienced these perceptions, Bernard L. Diamond "Inherent Problems on the Use of Pretrial Hypnosis on Prospective Witness,: 68 Cal.L. Rev. 313 at 337-8 (1980). The obvious danger of fantasy and fact intermingling thus casts serious doubt on the reliability of hypnotically refreshed testimony.

In the case at bar, the danger is significantly enhanced by the circumstances of Nita Neary's hypnosis. As has been discussed, the hypnotic subject is both extremely suggestive and desirous to conform to the hypnotists' expectations, which increased the probability that the subject, in her eagerness to fulfill the role expected of her, subconsciously created details where none were remembered.

Judges and legal scholars have emphasized the need for neutrality in the hypnotic setting and have proposed procedural guidelines which would help assure it. *State v. Hurd, supra,* 432 A.2d at 96-97; *State v. Mack, supra,* 292 N.W.2d at 770; Pelanda, *supra,* at 623, 627, 628; Diloff, *supra,* at 8; Spector and Foster, *supra,* at 592. Unfortunately, Dr. Arroyo failed to follow a number of these guidelines.

The holding of the hypnotic session in the state attorney's office compromised the neutrality of the procedure. Many authorities have held location of hypnosis to be one factor in determining whether the methods used were unduly suggestive. *State v. Mack, supra,* 292 N.W.2d at 770; Pelanda *supra,* at 627; Spector and Foster, *supra,* at 594. The presence of law enforcement personnel has also been held prejudicial to the procurement of reliable results from a hypnotic session. *State v. Hurd, supra,* 432 A.2d at 96-97; *State v. Mack, supra,* 292 N.W.2d at 772; Pelanda, *supra,* at 623, 627. Nevertheless, Leon County Sheriff Ken Katsaris *was in the room* with Dr. Arroyo during Ms. Neary's hypnosis session (R 9351). Finally, judges and legal experts who have proposed procedural safeguards for hypnosis sessions suggest that the hypnotist himself be, independent and unbiased. During hypnosis, Dr. Arroyo introduced himself to Ms. Neary as "Special Deputy Sheriff, Hillsborough County" (R 6448). *Id.* Dilloff, *supra,* at 8. The concern over the hypnotist's affiliation

stems not only from the cues, conscious or unconscious, which the hypnotist may give the subject, but also from the tendency of the subject to adopt a role and carry on the sophisticated psychological activities associated with that role. Diamond, *supra*, at 316. In the instant case, the character of the session cast Ms. Neary in the role of a police witness, whose function was not to describe what she remembered, but to fashion a description of the suspect. (*See*, R 6469-70). The testimony of Dr. Kuypers regarding the hypnotic session illustrates the point. Dr. Arroyo made a number of inappropriate suggestions that he, not she, was in command of her actions (R 6444-6445, 6447, 6450, 6463, 6469-6470, 6485). He used a postural sway test to implant the suggestion that he could make her perform an act no matter how hard she resisted. With the establishment of this master-servant relationship within the hypnotic setting (R 6444), Dr. Arroyo then contradicted Ms. Neary's own assertion that she was confused (R 6460-61). He commanded her to produce an image of eyebrows, telling her to "never mind what [you] remember" (R 6462). He further declared that Ms. Neary would "make a good composite" and that she would never forget "the fact she was commanded to remember" (R 6469-70). Given the hypnotic subject's desire to please the hypnotist and conform to his expectations, Dr. Arroyo's repeated suggestions that Ms. Neary produce a desired response exacerbated the risk that she would experience positive hallu-

cination in an effort to perform as expected. *State v. Mack, supra,* 242 N.W.2d at 768; Dilloff, *supra,* at 8; Spector and Foster, *supra,* at 592. Dr. Arroyo repeatedly made clear suggestions that Ms. Neary describe hair, when there is evidence to indicate that Ms. Neary never actually saw any (R 6469-70), eyebrows, shoes, and facial features. (R 6454, 6460, 6462, 6463, 6492).

The combined effect of Dr. Arroyo's suggestions, the inherently suggestive hypnotic setting and the heightened suggestibility of the hypnotized subject caused such confabulation and positive hallucination (R 6489, 6491) that the results of her testimony are so unreliable (R 6504, 6506) as to be inadmissible. *See State v. Hurd, supra,* 432 A.2d at 73; Diamond, *supra,* at 340.

2.

To this environment of uncertainty, the hypnotic process adds the element of prejudice. The witness came out of the hypnotic session unshakably convinced of the spontaneity and reliability of her "memory" and totally unaware of the distortion or confabulation which took place during her hypnotic session. *Commonwealth v. Nazarovitch, supra,* 436 A. 2d at 174-176; Pelanda, *supra,* at 621; Diamond, *supra,* at 336; Dilloff, *supra,* at 4; Spector and Foster, *supra,* at 585. The subject's inability to dintinguish fact from fantasy worked with her desire to conform to percieved expectations and to rationalize hypnotic suggestion. *State v. Hurd, supra,*

432 A.2d at 97; *State v. Mena, supra,* 624 P.2d at 1277; *State v. Mack, supra,* 292 N.W.2d at 769; Pelanda, *supra,* at 620; Diamond, *supra,* at 314, 333-5, 337-8; Spector and Foster, *supra,* at 572, 577. The act of verbalization during hypnosis cemented the perception in the subject's mind, even more firmly entrenching her conviction in the truth of her story. Spector and Foster, *supra,* at 592. *U.S. v. Wade,* 388 U.S. 218 (1967), held this factor to be inimical to the defendant's interest in a fair trial.

> "It is a matter of common experience that, once a witness has picked out the accused at a lineup he is not likely to go back on his word later on. So that in practice the issue of identity may . . . for all practical purposes be determined there and then, before trial." *U.S. v. Wade, supra,* 388 U.S. at 229.

3.

Jurors accord undue weight to hypnotically refreshed testimony. Jurors judge the credibility of a witness by their demeanor. Jurors see the witness' hypnotically refreshed testimony uttered with absolute conviction without realizing that the certainty sprang not from actual perception but from the hypnotic process. *State v. Mena, supra,* 624 P.2d at 1278-9; *Commonwealth v. Nazarovitch, supra,* 436 A.2d at 176; *State v. Hurd, supra,* 432 A.2d at 94; *State v. Mack, supra,* 292 N.W.2d at 769; Diamond, *supra,* at 339-40; Dilloff, *supra,* at 9; Spector and Foster, *supra,* at 593.

Jurors also accord special truth telling powers to the hypnotic process. Pelanda, *supra*, at 630; Spector and Foster, *supra*. at 4594-5. The crucial issue does not involve the witness, but the jury's faith in a "scientific" procedure.

The distinction made in *Clark v. State*, *supra*, 379 So.2d 372 at 375, between hypnotically induced and hypnotically enhanced testimony is not viable. *See*, *State v. Mack*, *supra*, 292 N.W.2d at 771; *see also*, *Crawford v. State*, *supra*, 321 So.2d 559 at 561. The Eighth Circuit addressed the issue of the popularly held perception of scientific omniscience in *U.S. v. Alexander*, 526 F.2d 161 (8th Cir. 1970). Scientific evidence is likely to be shrouded by jurors with an aura of near infallibility, akin to the ancient oracle of Delphi.

> ". . . present day jurors, despite their sophistication and increased educational capacities, are still likely to give significant, if not conclusive weight [to scientific evidence]." *U.S. v. Alexander*, *supra*, 526 F.2d at 168.

U.S. v. Brown, 557 F.2d 541 (6th Cir. 1977), addressed another facet of the same problem. "Because of its apparent objectivity an opinion that claims a scientific basis is apt to carry an undue weight with the trier of fact." *U.S. v. Brown*, *supra*, 557 F.2d at 556.

The hypnosis of Nita Neary created a situation rife with the danger of unreliability and prejudice. Hypnosis imbued the subject with absolute faith in the truth of her

"recollections." Ms. Neary's hypnosis effectively prevented the jury from evaluating her credibility on the basis of demeanor, since, after hypnosis, no way existed to determine whether her certainty was genuine or merely the fruit of post-hypnotic suggestion, as hypnotic subjects subconsciously rationalize explanations to fabricate a factual basis for suggestions implanted during hypnosis. Ms. Neary's hypnosis session foreclosed any legitimate opportunity the jury might have had to judge the trial reliability of her testimony since after hypnosis, no determinative evaluation could be made of whether the consistency of her testimony resulted from accurate perception or from hypnotically induced confabulation. Finally, by testifying that her testimony had been refreshed by hypnosis, Nita Neary linked her testimony to the mysterious scientific process commonly (but mistakenly) held to have truth compelling powers. By rendering unassertainable so many of the traditional indicia of veracity, the use of hypnotically refreshed testimony effectively preempted the jury from performing its role as trier of fact. *See U.S. v. Brown, supra,* 557 F.2d at 556.

A growing body of case law supports the exclusion of hypnotically refreshed testimony. The defendant's counsel moved to exclude Nita Neary's testimony on grounds of hypnotic taint (R 673-675), and the only expert qualified to testify concerning the reliability of her testimony expressed un-

reserved doubts as to its veracity relating an almost encyclopedic account of the improper suggestiveness of the whole session, (R 6426-6508). Even if hypnosis was *per se* reliable and admissible, the specific abuses cited by Dr. Kuypers' testimony would warrant exclusion of Ms. Neary's testimony. The *Clark* decision emphasized that the hypnotist was alone with the subject. With Ms. Neary, the high sheriff was present, and in fact participated (R 6442). The *Clark* court made a point of the hypnotist's representation to the witness that he had no knowledge of the case. No such representation was made by Dr. Arroyo, indeed Sheriff Katsaris' presence and the fact that "Special Deputy" Dr. Arroyo interviewed several other witnesses (R 6435) indicated that the hypnotist had extensive knowledge of the case, which gave rise to a heightened risk of suggestiveness in the hypnotic session. The nature of the hypnotic process and the suggestiveness of Dr. Arroyo's interview with Ms. Neary rendered her testimony completely unreliable and thus of no probative force. The gross prejudice resulting from her admission to the jury of being hypnotized makes it clear that her testimony should have been excluded at trial, and making a new trial justified.

D.

THE IN-COURT IDENTIFICATION BY NITA NEARY WAS THE FRUIT OF IMPROPER IDENTIFICATION PROCEDURES AND WAS INADMISSIBLE AS A MATTER OF LAW WHICH DENIED DEFENDANT A FAIR TRIAL.

The standard regarding the admissibility of identification testimony has focused on the reliability of the identification procedure used by the police. *Manson v. Brathwaite*, 432 U.S. 98 at 114 (1977). Of chief concern is the desire to avoid the substantial likelihood of misidentification. *Grant v. State*, 390 So.2d 341 at 343 (Fla. 1980); *Neil v. Biggers*, 409 U.S. 188 (1972) at 198; *Simmons v. U.S.* 390 U.S. 377 (1968) at 384. When misidentification occurs, the witness retains the false image rather than that of the person actually seen, thus making the error irremedial. *Simmons v. U.S., supra*, 390 U.S. 384. The suggestiveness of an identification is weighed against the probability of a high degree of accuracy. *Manson v. Brathwaite, supra*, 432 U.S. 110. A two-pronged test has developed. The court must (1) determine whether the identification procedure used was unnecessarily suggestive. If the court so finds, then it must (2) determine, considering the totality of the circumstances, whether the suggestive procedure gives rise to a substantial likelihood of irreparable misidentification, *Neil v. Biggers, supra*, 409 U.S. 199; *Kirby v. Illinois*, 406 U.S. 682 at 692 (1972). The *Neil* court listed five factors to be considered in deciding the issue of likelihood

of misidentification:

1. The opportunity of the witness to view the criminal at the time of the crime.

2. The witness' degree of attention.

3. The witness' prior description of the criminal.

4. The level of certainty demonstrated by the witness at the confrontation.

5. The length of time between the crime and the confrontation. *Neil v. Biggers, supra,* 409 U.S. 199-200.

The evaluation of suggestiveness of an identification procedure must be made with a view toward the totality of the circumstances, considering each case on its own facts. *Simmons v. U.S.,* 390 U.S. at 384; *Stovall v. Denno,* 388 U.S. 302 (1967). Making the determination necessitates discussion of the circumstances under which witness Nita Neary identified TED BUNDY as the man she allegedly saw leaving the Chi Omega house on the night of the crimes.

Within ten days of the incident Ms. Neary was hypnotized in the State Attorney's office by a police hypnotist. The hypnosis session was so suggestive and unreliable as to cast serious doubt on the probative value of her subsequent testimony. Ms. Neary's opportunity to view BUNDY at his Tallahassee trial (R 6050) heightened the probability that his visage would be associated with the man she allegedly saw on 15 January 1978. It is beyond dispute that the in-court show-

up organized by the trial judge (R 6051), tainted by the previous in-court show-up at the October trial, made more suggestive by location at the counsel table (R 6053), was unduly, unreasonably and unconstitutionally, suggestive.

A more egregious incident of the prosecution's unnecessarily suggestive ID procedure was the photo array which occurred in Muncie, Indiana on 7 April 1978. Captain Poitinger admitted knowledge of Ms. Neary's limited opportunity to view the assailant, BUNDY had been in custody for nearly two months before any kind of identification procedure took place (R 6013). During this time Ms. Neary has seen a number of pictures of BUNDY in the media (R 6132, 6407), some of them with his head slightly turned to the side (R 5949-50). The suggestion was created when the pictures shown Ms. Neary at the array were profile shots (R 5946). In addition, Captain Poitinger discussed with Ms. Neary the existence of the prime suspect (R 5949) and soon thereafter asked, as he displayed the photographs "If there's one there that resembles *that suspect* please let me know" (R 5950) [emphasis added].

The chief evil to be avoided in pretrial identification procedures is the substantial risk of misidentification. *Neil v. Biggers, supra,* 409 U.S. 198; *Simmons v. U.S., supra,* 390 U.S. 383-384. In *Manson v. Brathwaite, supra,* 432 U.S. 111, Justice Blackmun discussed the problems of unreliability posed by identification procedures. In citing

with approval, *U.S. ex rel. Kirby v. Sturgis*, 510 F.2d 397 (7th Cir. 1975), the court noted that less reliable identification procedures and their fruits should be excluded "unless the prosecution can justify his failure to use a more reliable procedure." *Kirby, supra*, 510 F.2d 405. Captain Poitinger made the photo array unnecessarily suggestive by making inappropriate references to the "suspect," by waiting almost two months until he instituted any kind of identification procedure, and by covering part of BUNDY'S photo and suggesting that Ms. Neary imagine a toboggan cap on it (R 5951).

The only excuse offered by the agent for failure to use the more reliable lineup procedure in a case of such magnitude was "administrative convenience" and the "avoidance of procedural delay" (R 6009). Captain Poitinger's concerns do not reflect the urgency that has excused such less reliable identification procedures in case law history, *e.g.*, *Stovall v. Denno*, (dying witness); *Simmons v. U.S.*, (prompt identification required to capture a fugitive suspect); *Neil v. Biggers*, (difficulty locating others of matching suspects description); *Manson v. Brathwaite*, (undercover police officer trained in techniques of observation, thus offering extraordinary guarantees of reliability).

Even unnecessarily suggestive identification procedures may pass constitutional muster if certain standards

of reliability are met. *Neil v. Biggers, supra,* 409 U.S. at 199. The first two factors to be considered are (1) the witness' opportunity to view the suspect and (2) degree of attention. The decisions upholding these factors involve situations in which the witness was also the victim of crime observed. *Neil v. Biggers, supra,* 409 U.S. 198; *Judd v. State,* 402 So.2d 1279 (Fla. 4th DCA 1981); *Grant v. State, supra,* 390 So.2d 341 (Fla. 1980); *State v. Britton,* 387 So.2d 556 (Fla. 2d DCA 1980); *State v. Fischer,* 387 So.2d 473 (Fla. 5th D.C.A.1980); *Smith v. State,* 362 So.2d 417 (Fla. 1st DCA 1978); *Baxter v. State,* 355 So.2d 1234 (Fla. 2d DCA 1978). Each of these cases except *Judd* was a rape case in which the victim had a clear opportunity to view the assailant and in which a high degree of attention was assured. As the United States Supreme Court noted in *Neil, supra,* 409 U.S. 200, the witness "was no casual observer, but rather the victim of one of the most personally humiliating of all crimes." These guarantees of reliability do not inhere in Ms. Neary's testimony, who caught but a brief glimpse of a man leaving the Chi Omega house (R 6034). Her view was not even of a complete profile, but an oblique profile. (R 6082). A court could not expect of her a high degree of attention nor an accurate perception of the events of 15 January 1978. She did not suspect any foul play until sometime after the man left the house. (R 6076). She was coming down with a cold (R 6067), and

stayed for seven (7) hours at a fraternity party at which she was drinking alcohol (R 6025, 6060). Ms. Neary's entire testimony is based on a brief, obscured glimpse of a person whom she believed to be a man, made when she was tired, sick and had consumed alcohol. On the basis of these factors, there was no reason to accord threshold reliability to her observations.

The Court must also consider the accuracy of her description. The inconsistencies in Ms. Neary's statements call this into question. Prior to the hypnosis session, Ms. Neary described the assailant as a light complected man about 5'8" in height. (R 6274). At trial, however, she described a dark complexioned man about 5'10" or 5'11". Whether either one of these descriptions happens to be an accurate description of the defendant is irrelevant. At issue on appeal is the accuracy of the witness' recall. Any witness can enhance the probability that they will accurately describe a suspect by submitting several different descriptions. Such a "shotgun approach" to suspect identification does not assist (and in fact works against) the determination of Ms. Neary's reliability. Any correlation that might exist in one of the two descriptions does not support a finding of the reliability of her testimony.

In BUNDY'S case, the issue of the witness' level of certainty cannot be considered independently of the length of

time that elapsed between initial viewing of the alleged assailant and confrontation. At trial, Ms. Neary was "certain" of her identification of BUNDY (R 6056). Her resolute certainty did not exist, however, at the initial view of the alleged assailant, when she thought that the man at the door was Ronnie Eng, the sorority houseboy. (R 6035). The events of the subsequent two months did much to alter her sense of certainty. A lapse of two months between a witness of the event and identification may not ordinarily arouse the court's suspicion. *See Neil v. Biggers, supra,* 409 U.S. 188 (lapse of seven months). However, two months was sufficient time to subject Ms. Neary's memory to distortion by hypnosis. The airwaves and newspapers were filled with pictures of BUNDY and sensational accounts of the crimes for which he was suspected, some of which Ms. Neary had knowledge before the photo array (R 6132, 6047). Her view of BUNDY at the October trial in Tallahassee (R 6050) insured what was already a foregone conclusion. The history of the BUNDY identification contains incident upon incident each of which created the unreasonable risk of the evil addressed in *Baxter v. State, supra,* 355 So. 2d 1234 (Fla. 2d DCA 1978), at 1238, that "the witness has lost or abandoned his or her mental image of the offender and has adopted the identity suggested".

The due process clause of the Fifth and Fourteenth Amendments forbids an identification procedure which is so

unnecessarily suggestive that it creates the substatial likelihood of irreparably mistaken identification. *Manson v. Brathwaite, supra,* 432 U.S. 113; *Moore v. Illinois,* 434 U.S. 218 (1977), at 218; *Neil v. Biggers, supra,* 409 U.S. 198; *Kirby v. Illinois, supra,* 406 U.S. 691; *Smith v. State, supra,* 362 So.2d 420; *Baxter v. State, supra,* 355 So.2d 1237. Because of the absence of any indicia of reliability, the unnecessary suggestiveness of the identification procedures used in BUNDY'S case violate his Fifth and Fourteenth Amendment right to a fair trial. Since BUNDY'S conviction rests upon unduly suggestive identification evidence, the judgment should be reversed, or in the alternative the evidence suppressed (stricken).

E.

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

1. Joinder

It is a fundamental principle of law in Florida that separate and distinct crimes cannot be tried together. *Houckins v. State,* 175 So.2d 82 (Fla. 1944). In case, *Hall v. State,* 66 So.2d 863 (Fla. 1953) this Court held that two cases of larceny of cattle were properly joined and gave as criteria the facts that the crimes occurred on the same day,

at nearly the same time, in the same vicinity. The cattle were transported in the same vehicle; the same witnesses were to testify in both crimes, and the same issues and evidence were to be used in both cases. *Hall, supra,* 66 So.2d 864. The crimes blended together so as to form a series of related events or transactions, neither separate nor distinct, and were properly joined at trial. In the more recent case of *Ruffin v. State,* 397 So.2d 277 (Fla. 1981), this Court again found that a series of events were so similar and related as to be properly combined at trial. In *Ruffin,* the victim was abducted and later killed with a handgun. The defendant appropriated the victim's car and proceeded back into the town intending to rob a convenience store. Aborting the planned robbery, the defendant tried to leave but encountered a law enforcement officer outside the store. The defendant shot and killed the officer with the same gun that he had used to kill the first victim and then drove away in the first victim's car. The court reasoned the facts were a chain of events within an ongoing transaction, and that the crimes were similar and related. Although the case was a test of *"Williams'* rule" evidence, *Williams v. State,* 110 So.2d 654 (Fla. 1959), the analogy should not be lost to Appellant's case. The Supreme Court held that the evidence was admissible because it was relevant, it was relevant because of factual similarity overlapping. *Ruffin, supra,* 397 So.2d 279.

In the instant prosecution, not only were the bases for Counts I through V separate and distinct from Counts VI and VII, but evidence from Counts I through V would have been irrelevant and inadmissible, under *Williams*, in a separate trial on these counts. The crimes were factually distinct and separate, and should have been severed under Rule 3.152 (a)(1), Fla.R.Crim.P..

A comparison of the "Chi Omega" and "Dunwoody" crimes yields only the following similarities according to the prosecutor: (1) the victims in each instance were young white women (R 7060); (2) each victim was battered with some object (R 7061); (3) the crimes occurred on 15 January 1978 (R 7060) and; (4) all were asleep in bed (R 7061). There are distinct differences in several areas of comparison between the two episodes. The Chi Omega situs was a large sorority house, while the Dunwoody residence was a duplex housing only one person to a unit. The Dunwoody residence was "two miles" (R 7360) from the Chi Omega sorority house. The two episodes were hours apart (Chi Omega at approximately 2:30 A.M. [R 6065] and Dunwoody at approximately 4:00 A.M. [R 7329] *et seq.*). *Cf. U.S. v. Shearer*, 606 F.2d 819 (8th Cir. 1979); *U.S. v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978); *U.S. v. Jines*, 536 F.2d 1255 (8th Cir. 1976), and "bite marks" only at Chi Omega.

The cause of death of two of the victims at the Chi Omega sorority house was strangulation; there was no evidence

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

The only major connection between these two events was the allegation that the Appellant was the perpetrator. The case law applicable holds that there must be more in common between the events than a few similarities, and the mere allegation that Appellant committed both acts. *Bradley v. State*, 378 So.2d 870, 872 (Fla. 2d DCA 1979); *Paul v. State*, 365 So.2d 1063, 1065-1066 (Fla. 1st DCA 1979); *and see, Davis v. State*, 376 So.2d 1198, 1199 (Fla. 2d DCA 1979), where *Williams* rule evidence is discussed.

In *Bradley v. State, supra*, 378 So.2d 970, three burglaries were committed in the same neighborhood within two weeks. Entry was made in the same manner, and similar "fabric mark" evidence was found in each case yet the court held the crimes not similar enough to be admitted as *Williams* rule evidence. *Bradley v. State, supra*, 872. If evidence of a crime is not sufficiently similar under *Williams* to be admissible in a trial on another charge, then the crime is not properly joined with the collateral crime in a single trial. The assertion creates a test for joinder. At the low end of this test scale would be the *Williams* rule evidence: minimally similar, but

used to establish identity, common plan, *etc.*; *Williams* rule evidence would be admissible as a collateral crime in a single trial. Highest on the scale would be those crimes that are sufficiently similar and related to warrant joinder in that the crimes are almost identical; exactly the same place or point in time, or continuously executed in the same transaction. At a median point would be those crimes that are not identical, but so similar or related that they could be charged together and tried together. Appellant asserts, that not only did the state fail to meet this median test for joinder, but that at separare trials the two episodes would have been inadmissible as a collateral matter under *Williams*. Failure to meet the minimum standard leads to the conclusion that the charges were improperly joined, and the defendant's Motion to Sever (R 429, 1442-1443) should have been granted.

2. Severance

In *U.S. v. Foutz*, 540 F.2d 733 (4th Cir. 1976), [*Macklin v. State*, 395 So.2d 1219 (Fla. 3 DCA 1981) and *U.S. v. Dennis*, 625 F.2d 782, 802 (8th Cir. 1980)], prejudice is necessarily created as a result of the jury hearing evidence of two separate and distinct crimes. *U.S. v. Foutz, supra*, 540 F.2d 736. The court stated that two crimes may be joined under Rule 8, Fed.R.Crim.P., if they are: (1) of the same or similar character; (2) based on the same transaction; or (3) based on two or more acts or transactions connected together or consti-

tuting parts of a common scheme or plan. *U.S. v. Foutz, supra,* 540 F.2d 736. In the *Foutz* prosecution, as in the BUNDY prosecution, the two crimes were joined together because of alleged similarity. *U.S. v. Foutz, supra,* 540 F.2d 736 (R 7059). The *Foutz* court held that a severance under Rule 14, Fed.R.Crim.P., is justified when prejudice arises. *U.S. v. Foutz, supra,* 540 F. 2d 736. The prejudice from joinder may take any of three forms: (1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep the evidence properly segregated; (2) the defendant may be confounded in presenting defenses as where he desires to assert his privilege against self-incrimination with respect to one crime but not the other; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition. *U.S. v. Foutz, supra,* 540 F.2d 736.

In the BUNDY prosecution, the preponderance of the evidence went to proving the Chi Omega crimes. The joinder of the Chi Omega and the Dunwoody crimes served only to convenience the State and created the three types of prejudice present in the *Foutz* case. *Foutz* held that the jury will necessarily consider one crime while considering the defendant's guilt or innocence of another. *U.S. v. Foutz, supra,* 540 F.2d 736. *Drew v. U.S.,* 331 F.2d 85, 89-90 (D.C. Cir. 1964). Admissibility

of other crimes, (*Williams* rule) is strictly limited. The evidence cannot be used to show defendant's criminal disposition. *U.S. v. Foutz, supra,* 540 F.2d 736. The probative value must outweigh the certain prejudice that evidence of other crimes carries with it. *U.S. v. Foutz, supra,* 540 F. 2d 736. In Florida, and in the federal courts, the test is whether the evidence of one crime is admissible at trial for another crime. If it is not admissible, then the defendant would be prejudiced by a joinder of the two crimes. *U.S. v. Foutz, supra,* 540 F.2d 736; *U.S. v. Willaimson,* 482 F.2d 508, 511 (5th Cir. 1973); *Williams v. State, supra,* 110 So. 2d 654 (Fla. 1959).

If the *Williams* standard is applied to the facts and evidence of the BUNDY prosecution, the Chi Omega evidence would not be admitted in a trial for the Dunwoody crimes and *vice-versa*. *Foutz* states further, that when crimes are joined only because they are "similar." admissibility at separate trials is less likely than if they are part of a common "plan, scheme, or purpose." *U.S. v. Foutz, supra,* 540 F.2d 737. The *BUNDY* prosecutor alleged only facts that would show similarity between the Chi Omega crimes and the Dunwoody crimes. (R 7060). Thus, even if the crimes were similar, they were severally inadmissible in a separate trial under the *Williams* rule. According to *Foutz* if the evidence of two crimes is not admissible in a separate trial for the other, the joinder of the

two creates prejudice to the defendant resulting in a misjoinder under Rule 8, Fed.R.Crim.P., *U.S. v. Foutz, supra,* 540 F.2d 737.

The court has ruled in *U.S. v. Graci,* 504 F.2d 411, 413 (3d Cir. 1974) that misjoinder is not harmless error.

The court in the *BUNDY* prosecution should have granted defendant's Motion to Sever because the joinder of the Dunwoody episodes and the Chi Omega episodes resulted in prejudice to the defendant and seriously impaired his right to a free and impartial determination of guilt or innocence on each charge.

In *Ashley v. State,* 265 So.2d 685 (Fla. 1972), the court refused to grant a motion for consolidation in a case factually similar to the instant case. *Ashley* involved two episodes, one of four murders and another of one murder. *Ashley v. State, supra,* 265 So.2d 687. The first episode involved four killings: one immediately after another; at the same location; during the same transaction; and all were based upon the same evidence. The second episode involved one murder: an hour earlier than the other four; factually distinguishable from the four subsequent murders; at a different location; and it was based upon separate evidence. The court held that since the single murder was committed an hour earlier and in a different location, they were not properly joined because they were not part of the same transaction.

Ashley v. State, supra, 265 So.2d 689.

An application of the *Ashley* criteria to the BUNDY prosecution yields a similar result. The murders and batteries at the Chi Omega sorority house were in close proximity in time and space while the single battery at the Dunwoody residence was two miles (R 7360) and at least an hour later in time. Under the *Ashley* criteria, the severance should have been granted because the two episodes were not the subject for proper joinder under Rule 2.150, Fla.R.Crim.P.

In *Rubin v. State,* 407 So.2d 961 (Fla. 4th DCA 1982) nine sexual batteries, all factually similar, but ocurring over a period of weeks, could not be joined because they were separate and distinct. In contrast, *Moore v. State,* 259 So. 2d (Fla. 3d DCA 1972), held that joinder was proper because of strong linking evidence between two crimes. The *Moore* facts showed: (1) that eyewitnesses identified two black males [the defendants] riding in a white car; (2) a man with a gun robbed or attempted to rob the victims; (3) all the robberies ocurred on the same night within fifteen minutes. *Moore v. State, supra,* 259 So.2d 180. In the BUNDY prosecution, there was an absence of strong linking evidence; no common eyewitness, no common weapon, and a period of time much greater than that of the *Moore* case. The facts in BUNDY do not rise to the level of *Moore* and do not meet the minimum standard for joint trial.

The facts in the BUNDY prosecution should have led the trial court to infer separate and distinct episodes calling for severance in order to preserve appellant's Constitutional right to a fair and impartial trial. U.S. Const., Amend. V, as applied to the State of Florida through U.S. Const. Amend. XIV; and Art. I §9, Fla. Const.

F.

THE JURY SELECTION PROCESS VIOLATED THE *WITHERSPOON* DOCTRINE

Witherspoon v. Illinois, 391 U.S. 510 (1968), 88 S.Ct. 1710, 20 L.Ed.2d 6, established that a defendant's right under the Sixth and Fourteenth Amendments to a jury which represents a true cross-section of society forbids the automatic exclusion of veniremen who have strong moral or ethical objections to capital punishment. A prospective juror may be excluded from service only when he or she is "irrevocably committed, before the trial has begun to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon v. Illinois*, 391 U.S. 5110, 522 n.21. The Supreme Court, by way of delineation, specified that a trial court may honor a challenge for cause in such cases only when the veniremen make unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

The subsequent cases *Boulden v. Holman*, 394 U.S. 478 (1969) and *Maxwell v. Bishop*, 398 U.S. 262 (1970), 90 S.Ct. 1578, 26 L.Ed.2d 646 molded the *Witherspoon* rule, invalidating

excusals based on fixed opinions or conscientious scruples against imposing the death penalty. The *Witherspoon* doctrine was further buttressed by the decision *Davis v. Georgia*, 429 U.S. 122 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). In a *per curiam* opinion, the Court held that the exclusion of a single venireman in violation of the *Witherspoon* rule would suffice to defeat a death sentence, without regard to whether the defense had unused peremptory challenges. In *Lockett v. Ohio*, 438 U.S. 595 (1978) 98 S.Ct. 2954, 57 L.Ed. 2d 973, the Court applied the *Witherspoon* standard to deny habeas corpus relief. The *Lockett* decision, however, noted that the veniremen had admitted to the trial judge that their conviction against capital punishment was so strong that they were unable to take an oath to follow the law, knowing that it might result in the imposition of the death penalty.

Read together, the cases indicate that a single excusal of a venireman for less than a full two pronged disposition constitutes grounds for reversal from a jury-imposed death sentence. Two such improper excusals occurred in BUNDY'S case, both involving violation of the second prong of the *Witherspoon* case.

The first instance occured during the voir dire of potential juror Westbrook (R 4264-4274). According to *Witherspoon:*

> "The critical question, of course, is not how the phrases employed in this area have been construed by the courts and commentators. What matters is how they might be understood or misunderstood by prospective jurors" *Witherspoon v. Illinois, supra,* 391 U.S. at 515 n.9.

On *voir dire*, Ms. Westbrook expressed reserved about the possibility of inflicting the death penalty (R 4267-4268). Counsel addressed the potential *Witherspoon* problem by initiating the following dialogue:

> MR. HAGGARD: Could you put aside any problem you might have about imposing a death judgment on Mr. Bundy and simply determine the issue as to whether he committed the crime?
>
> MISS WESTBROOK: I really don't know.
>
> MR. HAGGARD: You really what?
>
> MISS WESTBROOK: At the time I really don't, you know. You know, I can't explain it or say it, but I think I could.
>
> MR. HAGGARD: You think you could?
>
> MISS WESTBROOK: Uh-huh.
>
> * * * *
>
> MR. HAGGARD: Well, if, the State fails to prove that Ted Bundy committed the crime beyond and to the exclusion of a--every reasonable doubt, could you find him not guilty?
>
> MISS WESTBROOK: Yes, I could. I think so.
>
> MR. HAGGARD: Now, I'm sure Mr. McKeever will ask you will ask you, so I will ask you, if he proved beyond and to the exclusion of a every reasonable doubt that he committed the crime, could you find him guilty?

MISS WESTBROOK: Yes.

(R 4269-4270)

Counsel thus established that, notwithstanding her reticence to impose the death penalty, Ms. Westbrook could adequately fulfill her oath as a juror. The Supreme Court noted in *Adams v. Texas*, 100 S.Ct. 2521 (1980), that

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

Unfortunately, counsel's subsequent attempts to ascertain that Ms. Westbrook understood the differences between the functions of the two stages of the jury process met with repeated interruption (R 4270-4273). The Court concluded the *voir dire* with this question

> THE COURT: . . . [W]ould you be able to return a verdict of first degree murder if the evidence warranted it knowing that that crime has a punishment, a possible punishment of death?
>
> MISS WESTBROOK: No.
>
> THE COURT: All right. The Court will excuse her for cause. (R 4273-4274)

By creating a strong suggestion that a sentence of death would ensue a finding of guilt, the court held that Ms. Westbrook could not perform her duties as juror unless she was willing to impose the death penalty if BUNDY was

found guilty. As such, the court, who had the final word, obfuscated the issue that counsel had previously made clear, i.e., that Ms. Westbrook could consider BUNDY'S guilt or innocence separately from the penalty issues.

The *voir dire* of venireman Constance (R 5386-5395) presented similar problems. The potential juror was having extreme difficulty distinguishing the guilt determination phase of the jury process from the penalty phase (R 5393-5394). Again the trial judge cut short the *voir dire* with its line of question:

> THE COURT: Would you be able to return a verdict of guilty of murder in the first degree, assuming that the evidence that you'd found to be credible beyond and to the exclusion of a reasonable doubt, brought you to that conclusion, *knowing that by that finding, you would be subjecting someone to the death penalty.* (emphasis added)
>
> JUROR CONSTANCE: No sir, I don't believe so. (R 5394-5395)

In neither instance did the Court establish that the venireman's attitudes regarding the death penalty would prevent them from making a fair and impartial decision as to the defendant's guilt. The *Witherspoon* court made it clear that a state may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon v. Illinois, supra,* 391 U.S. at 521. A criminal defendant is entitled to have

his case determined by a jury representing a cross section of the community. If the exclusion of a single venireman is in violation of the *Witherspoon* rule, the death penalty cannot stand. *Davis v. Georgia, supra,* 429 U.S. 123. Two veniremen were improperly excluded in BUNDY'S case. Therefore, under the principles laid down in *Witherspoon* and its progeny BUNDY'S sentence should be vacated.

G.

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

1. Right to Counsel

On 18 July 1978, Assistant Public Defender Joe Nursey filed a series of motions challenging the Grand Jury, to-wit: "Motion to Inform Defendant of Grand Jury Proceedings," (R 705, 1079), "Motion for Temporary Restraining Order and Preliminary Injunction Restraining Grand Juries from Returning Indictment Against the Defendant" (R 709, 1083), "Challenge to the Grand Jury" (R 7111, 1085). Judge Rudd denied the motions stating that (1) the grand jury could not be retroactively attacked, (2) the defendant had no preindictment right to counsel and (3) the public defender had no standing to make the motions. (SR 276-277, 285-286). Judge Rudd later reversed himself on the issue of BUNDY'S right to public defender assistance to argue the motions. (R 715).

Florida and federal law require that counsel be appointed to an indigent person "when he is formally charged with an offense, or as soon as feasible after custodial restraint or upon his first appearance before a committing magistrate whichever occurs earliest" Fla.R.Crim.P. 3.111(a). *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), *Huckelbury v. State*, 337 So.2d 400 (Fla. 2d DCA 1976). As a matter of law BUNDY'S right to counsel was triggered as soon as he was subject to custodial interrogation with respect to the Chi Omega murders in Pensacola on 15 February 1978. *Miranda v. Arizona*, 384 U.S. 436 (1966). *Escobedo v. Illinois*, 378 U.S. 428 (1964). The first question is whether BUNDY'S right to counsel ceased to exist between his custodial interrogation in Pensacola and his indictment in Tallahassee.

A survey of cases involving the right to counsel indicates a negative answer. The principle for permitting pre-trial access to counsel stems from the due process theory that denial of legal assistance at any stage in the prosecutorial process when a defendant's failure to assert rights or raise defenses would result in a permanent loss of those rights and defenses constitutes a violation of law. *Gerstein v. Pugh*, 420 U.S. 108 (1975) at 103; *Coleman v. Alabama*, 399 U.S. 1 (1970) at 7; *United States v. Wade*, 388 U.S. 218 (1967) at 224-227; *Massiah v. United States*, 377 U.S. 201

(1964) at 205; *White v. Maryland*, 372 U.S. 59, (1963) at 60. *Hamilton v. Alabama*, 368 U.S. 52, (1961) at 52; *Michel v. Louisiana*, 350 U.S. 91 (1955); *Reece v. Georgia*, 350 U.S. 85 (1955). The majority of these cases, also hold that the "critical stage" of the prosecutorial process which triggers the right to counsel occurs after the commencement of adversary judicial criminal proceedings *Id.* See also *Brewer v. Williams*, 430 U.S. 387, (1977); *United States v. Ash*, 413 U. S. 300 (1973); *Kirby v. Illinois*, 406 U.S. 682 (1972). BUNDY'S right to appointed counsel for the purpose of a grand jury challenge depends on two factors. First, did the grand jury challenge constitute an adversary judicial criminal proceeding. Second, did BUNDY lose any rights because he did not have counsel to timely assert them.

Both questions may clearly be answered in the affirmative. A grand jury proceeding is not itself an adversary proceeding, but the challenge to a grand jury is. See *State ex rel Ashman v. Williams*, 151 So.2d 437 (Fla. 1963). §905.05 Fla.Stat. provides that a defendant may challenge the grand jury only before impanelment, unless defendant did not know or have reasonable grounds to know that his case was being heard before the grand jury. Because he lacked counsel, BUNDY lost his primary right to challenge the grand jury. *cf. State v. Lewis*, 11 So.2d 337 (Fla. 1943). The

pre-impaneled period constituted a critical stage of the proceedings which required the presence of counsel to preserve BUNDY'S right to challenge. *Moore v. Illinois*, 434 U.S. 220, at 225 (1977); *Brewer v. Williams, supra*, 430 U.S. at 398. *Gerstein v. Pugh, supra*, 420 U.S. at 123; *United States v. Ash*, 413 U.S. 302, at 311 (1973); *Coleman v. Alabama, supra*, 399 U.S. at 7; *United States v. Wade, supra*, 388 U.S. at 224-227; *Massiah v. United States*, 377 U.S. at 204-205; *White v. Maryland, supra*, 372 U.S. at 60; *Hamilton v. Alabama, supra*, 368 U.S. at 53-54; *Reece v. Georgia, supra*, 350 U.S. at 88-89. *Seay v. State*, 286 So.2d 532 (Fla. 1973).

A logical construction of law favors the preimpanelment appointment of counsel in capital cases. BUNDY'S indictment charged him with first degree murder, (R 1-4). Article I §15(a) of the Florida Constitution mandates that a grand jury return an indictment. Florida law further grants the defendant the right to challenge the grand jury. §§905.02-04 Fla.Stat. (1970). As discussed, the defendant, unless justifiably ignorant of the proceeding, may not challenge the grand jury after its impanelment. §905.05 Fla.Stat. (1970). Finally, Florida and federal law guarantee indigent defendants the right to appoint counsel.

The state argued that BUNDY'S right to counsel for purposes of grand jury challenge should not accrue until he

was arrested, charged, or indicted with the offense being considered by the grand jury (SR 269-270). This construction of law would give BUNDY the right to challenge the grand jury, but would deny him the opportunity, through appointed counsel, to exercise that right until it had been waived.

Statutes should be construed in such a way that they operate harmoniously *District School Bd. of Lake County v. Talmadge*, 381 So.2d 698 (Fla. 1980); *Mann v. Goodyear Tire & Rubber Co.*, 300 So.2d 32 (Fla. 1975) *Foley v. State ex rel Gordon*, 50 So.2d 179 (Fla. 1951). Statutes do not operate harmoniously together where, as the state has recommended, one statute grants a legal right while another precludes its exercise. §§27.51(1)(a) Fla.Stat. provides the public defender shall represent persons "under arrest for, or is charged with a felony ...." To make the statute authorizing grand jury challenges meaningful requires that counsel be appointed for this purpose before the right is lost because of impanelment.

Reece v. Georgia, 350 U.S. 85 (1955), involved a defendant who, like BUNDY, was prevented from challenging the grand jury before impanelment because he was not charged with any crime until after his indictment. Reversing Reece's conviction, the court held that "the right to object to a grant jury presupposes an opportunity to exercise that right." *Reece v. Georgia, supra*, 350 U.S. at 84.

The Court further stated that

> "it is utterly unrealistic to say that he had such an opportunity when counsel was not provided for him until the day after he was indicted. In *Powell v. State of Alabama*, (citation ommitted) this Court held that the assignment of counsel in a state prosecution at such time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of a capital case *is a denial of due process of law.*" *Reece v. Georgia, supra,* at 89-90. (emphasis added).

Equal protection of law, as well as due process consideration militates against the state's argument. The state's position creates a cognizable class of persons charged with and held in custody with regard to offenses considered by grand jury and those defendants (like BUNDY) who are held in connection with charges unrelated to the offenses being so considered. By means of a distinction not grounded in statute the state would grant the right to appointed counsel to the first class and withhold it from the latter. Adoption of this rule would enable the prosecution to effectively deny certain indigent defendants their right to effective assistance of counsel, by holding them in custody on unrelated offenses until the grand jury returns an indictment. The distinction urged by the state discriminates, without basis in law or policy, against an entire class of defendants and violates the Equal Protection clause of the Fourteenth Amendment and should be

rejected.

2. Timeliness

Notwithstanding Judge Rudd's sudden reversal on the issue of BUNDY'S right to pre-indictment (not pre-impanelment) counsel, he nonetheless denied the motions and challenges as being untimely filed. The statute pertinent to timeliness of a grand jury challenge exempts from its application those "who did not know or have reasonable ground to believe, at the time the grand jury was empaneled and sworn, that cases in which he was or might be involved would be investigated by the grand jury." §905.05 Fla.Stat. (1970). No notice of the subject of the grand jury investigation was served on BUNDY. The Florida Supreme Court, in *State v. Lewis*, 11 So.2d 337 (Fla. 1943) addressed the issue whether defendants failure to challenge grand jury proceedings as a waiver of their right.

> "It is hardly consistent with the spirit of fair trial to assume that a capital offense will be lodged against them and then require them to challenge the competency of the grand jury before it is drawn. They would in other words be required to defend against a probability that may never become a reality." *State v. Lewis, supra, 11 So.2d at 339.*

Since BUNDY did not have notice (nor was counsel appointed) that the grand jury would consider the offenses of which he was suspected, requiring him to challenge the

grand jury before he was the certain subject of its investigation violates BUNDY'S right to a fair trial and ignores the exception set forth in F.S. §905.05. As such the trial court erred in denying defendants motions.

3. Notice

If as Judge Rudd held, the defendant was on notice on the date of the bitemark search and seizure, 26 April 1978, that he would be the object of a grand jury investigation yet to be empaneled, BUNDY had a right to counsel at that point. If the appointment of counsel on related charges carried over to the homicide investigation, counsel did not timely perfect the rights of the accused and was ineffective under the Sixth and Fourteenth Amendments. Either (1) the defendant was denied the right to timely appointment of counsel, or (2) the defendant had *de facto* counsel who was ineffective, or (3) the court erred in denying the challenges as untimely.

What was wrong with the search warrant?

H.

THE TRIAL COURT ERRED IN ADMITTING THE BITEMARK IDENTIFICATION OPINION TESTIMONY

1. Admissibility *vel non*

While neither "conceding" nor "admitting" the admissibility of bitemark identification testimony, it is without dispute the weight of legal authority weighs toward admissibility of bitemark identification testimony. The following is a series of legal citations where "bitemark" has been admitted into evidence. The BUNDY case is one of first impression in Florida.

The first bitemark case appeared in legal literature over one hundred years ago [Skrzeckas (1874) Superarbitrium, betr. der Verlezung Zweir Finger usw., *Vjschr. Gerichtl. Med. Band 21*]; Cameron, J.M., and Sims, B.J., "Bite-marks," *Forensic Dentistry* (Churchill-Livingstone, London, 1974). However seventeen centuries ago the Kama Sutra of Vatsyayana recited some of the more striking classifications of bitemarks on human skin. Burton, R. and Arbuthnot, F.F., The Kama Sutra of Vatsyayana, Translation (Allen and Unwin, London, 1963). Cameron and Sims, *supra*, at 132.

The standard announced in *Frye v. United States*, 293F 1013 (D.C. Cir. 1923) has been recognized in Florida. *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968) citing

Kamiski v. State, 63 So.2d 339 (Fla. 1953).

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. U.S.*, *supra*, 293F 1014.

The standard for admissibility of new scientific evidence at a criminal trial is then neither common to criminal litigation, nor easily applied in the individual case. *U.S. v. Addison*, 498 F.2d 741 (D.C. Cir. 1974). The landmark case, *People v. Marx*, 54 Cal.App.3d 100; 126 Cal.Rptr. 350 (1975), upheld the admissibility of bitemark evidence on the grounds of superior trustworthiness, as the trier of fact could see for itself, by looking at the material object exhibits of slides, photographs, x-rays and models of the victim's bitemark wounds, and what constituted the basis for comparison with the defendant's dentition. *Marx* did not rely on untested techniques, umproven hypothesis, intuition or relevation, rather scientific and professional techniques to the solution of a particular problem which, though novel, was within the capabilities of those techniques. *People v.*

Stone, 143 Cal.Rptr. 61, 69 76 Cal. App.3d 625 (Cal. 2d D. C.A. 1978). The most exhaustive legal treatise on bitemark identification is found in *State v. Sager*, 600 S.W.2d 541 (Mo.W.D.C.A. 1980), cert.den. 450 U.S. 910, 101 S.Ct. 1348, 67 L.Ed.2d 334 the most recent, *People v. Middleton*, 444 N.Y.S.2d 581 (N.Y.C.A. 1981).

Many other jurisdictions have admitted bitemark comparison and identification into evidence:

State v. Garrison, 120 Ariz. 255, 585 P.2d 563, (AZ. 1978); *People v. Slone*, 76 Cal.App.3d 611, 143 Cal.Rptr. 61 (Cal.2d DCA 1978); *People v. Watson*, 75 Cal.App.3d 384, 142 Cal.Rptr. 134 (Cal. 1st DCA 1977); *People v. Milone*, 43 Ill,App.3d 385, 2 Ill, Dec. 63, 356 N.E.2d 1350 (Ill.2d DCA 1976); *Niehaus v. State*, 265 Ind. 655, 359 N.E.2d 513 (Ind. 1977); cert. den. 434 U.S. 902, 98 S.Ct. 297, 54 L.Ed. 2d 188; *State v. Peoples*, 227 Kan. 127, 605 P.2d 135, (Kan. 1980); *State v. Kleypas*, 602 S.W.2d 863 (Mo. 2d DCA 1980); *State v. Temple*, 302 N.C. 1, 273 S.E.2d 273 (N.C. 1981); *State v. Routh*, 30 Or.App. 901, 568 P.2d 704 (Or. C.A. 1977); *United States v. Holland*, 378 F.Supp. 144 (E.D.P.R. 1974) affd. *sub nom. Appeal of Ehly*, 506 F.2d 1050, cert.den.*sub nom. Ehly v. United States*, 420 U.S. 994, 95 S.Ct. 1433, 43 L.Ed.2d 676 (1975); *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120, (S.C. 1979); *Patterson v. State*, 509 S.W.2d 857 (Tex. Crim. 1974); and see Ann., 77 A.L.R.3d 1122). *cf. Mikenas v.*

State, 367 So.2d 606 (Fla. 1978); *Peek v. State* 395 So.2d 492 (Fla. 1980); *Jent v. State*, 408 So.2d 1024 (Fla. 1981).

2. Qualifications

If the Court finds the bitemark evidence lacks sufficient scientific depth, further argument is unnecessary on the issue; if the Court finds the underlying scientific principles do provide the predicate only one of the three questions raised in *State v. Sager, supra*, 600 S.W.2d 561 is satisfied:

> (1) Has the science of bitemark identification developed to such a degree as to its reliability and credibility to permit its use as evidence in criminal proceedings? *Id.*

The second test enunciated is:

> (2) Does the evidence show or establish the qualifications of the state's witnesses as experts, enabling them to render an expert opinion? *Id.*

The trial judge expressed concerns over the impartiality of the state's expert witness (R 3357-3358). The concern was voiced over the star witness Dr. Richard Souviron deliberately violating a court order and conducting a symposium on the TED BUNDY bitemark analysis prior to trial (R 1142-1144). Trial judge Cowart ultimately denied Defense Motion to Strike Testimony of State's Forensic Odontologist (R 8641) after initially deferring ruling pretrial until after the selection of the jury (R 3357).

The partiality and bias of the witness is a disqualifying feature in itself sufficient to preclude his testimony. *People v. Kelly*, 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976). By his association with the technique of bitemark identification, by his manifest vested interest in protecting his own reputation and personal interests, and by his disregard for the orders of the court, the witness effectively disqualified himself, or should have been disqualified by the court. He suffered such a fate before in his history (R 2759).

3. Factual Basis

The third test recognized in *Sager, supra*, 600 S.W.2d 561, and cases therein cited is:

> (3) Was the factual basis which served as the basis for expert opinions herein supported by reliable and credible evidence?

The original photograph of the bitemark on Lisa Levy's left buttock was made by St. Howard Winkler (R 8649-8650). The negative of that photograph was supplied to Frank Lanzillo, FDLE;together they comprised exhibits 3-E and 3-F (R 8650). Of critical concern for later bitemark analysis was the blow-up of these exhibits (R 8701-8703), no expert in the field of photography authenticated the relationship,if any,between the original negatives and prints to the life sized one-to-one prints used by the state's

witnesses (R 8743). Only Dr. Souviron whose impartiality was already suspect testified as these measurements and relationships which were of critical concern (R 8675, 8850) to the bitemark comparison (R 8647, 8698).

Dr. Souviron was self acknowledged as an expert in the field of "forensic dentistry" (R 8633). "Forensic odontology" is a synonymous term comprised of (a) dental identification of remains, (b) bite mark comparison, (c) trauma and oral injury and (d) dental malpractice. 51 *So. Cal.L.R.* 309, "Admissibility of Bite Mark Evidence," n.3. See also *Wright v. State*, 348 So.2d 26 (Fla. 1st DCA 1977) at 29. The same photographs were used by both experts (R 8739) for their analyses. Comparisons between the image in the photograph were made with stone and wax casts of BUNDY'S mouth (R 8713, 8856) by each doctor.

The failure to adduce expert testimony regarding the photographic techniques leaves an insufficient factual predicate for the comparison based opinions. "Distortion" was not explained or accounted for. *U.S. v. Sellers*, 566 F.2d 884 (4th Cir. 1977). The "variations in lens, perspective, light, and development paper," *id.* should be accounted for.

> "[N]o evidence was offered to substantiate . . . measurements by testimony as to the type of lens used, and the probable position and angle of the

> camera when the photograph was taken. Thus it is impossible to determine whether or not the photograph in question distorts the heights and lengths . . ., although it was the [state's] obligation to establish that the [experts'] calculations were not based on distortious. As it now appears, these *calculations are unreliable.*" *U.S. v. Tranowski*, 659 F.2d 750 (7th. Cir. 1981). (emphasis added)

Within the context of a criminal trial, scientific or expert testimony particularly courts the danger of undue prejudice or of confusing the issues or misleading the jury because of its aura of special reliability and trustworthiness. In recognition of the outcome determinative impact of opinion evidence, clothed with the weight of expertise shown to be unreliable and untrustworthy, the case should be reversed. *U.S. v. Brown*, 501 F.2d 146 (9th Cir. 1974), *rev'd* on other grounds *sub. nom. U.S. v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) [photo comparison identification].*cf.* Rules 702, 704, Fed.R.Evid.; §§90.702, 90.703 Fla.Stat.

4. Opinion on Guilt

> DR. SOUVIRON: I was given four pictures, has obviously (sic) blood in the rectal area here, the individual has been beaten to death, I don't think this is consistent with a 12 year (R 8788) old child (R 8789).

The testimony was improper and prejudicial, It should have been stricken by the court of its own motion *Gibbs v. State*, 193 So.2d 460 (Fla. 2d DCA 1967) at 463,

citing *Blackwell v. State*, 76 Fla. 124, 79 So. 731, 1 A.L.R. 502; *Urga v. State*, 104 So.2d 43 (Fla. 2d DCA 1958). In *Gibbs* the witness Walker when asked to identify a picture, stated it was his nephew lying on the ground dead. Thereafter

> "Q. Mr. Walker, do you know when that photograph was taken?
>
> A. That was taken immediately after the ___he murdered my nephew." *Gibbs v. State, supra*, 193 So.2d 403.

The testimony of Dr. Souviron did not contain the legal conclusion, but for a forensic odontologist is similar to the situation encountered by the witness doctor in *Farley v. State*, 324 So.2d 662 (Fla. 4 DCA 1975), at 663:

> A. "Well, my opinion from the history, and cursory examination and from finding the vagina loaded with sperm at the time, was that she had been raped."

No predicate was established for the testimony as the subject matter was beyond the doctor's expertise and his analysis was entirely based upon photographs and the suspects dentition, not personal observation of the victim (R 8793). *Johnson v. State*, 314 So.2d 248 (Fla. 1st DCA 1975) at 252, would stand for reversal on prejudicial error.

5. Standards

Every expert who testified regarding bitemark analysis testified that no standards have been articulated for bitemark identification; state's witnesses: Dr. Souviron (R 2873, 2902, 8728), Dr. Levine (R 3049), Dr. Sperber (R 3116); defense witnesses, Dr. Grew (R 3151), Dr. DeVore

(R 3195-3196, 3228-3231). "No evidence allows us to say a particular set of teeth left a particular [bite] mark," Dr. Lowell J. Levine (R 3053).

The problem of specificity of the camparison is the most difficult and controversial area within the realm of forensic odontology. Sopher, I.M., *Forensic Dentistry*, "Bite Mark Analysis," [Thomas Publisher; Springfield, Ill (1976)], p. 140. "The problem of specificity in the bite mark analysis results from the lack of a scientific core of basic data for comparison." *Id.* Classification of dentition on a sufficiently large segment of the population is at a similarly embryonic stage as the classification of the first one hundred fingerprints. *Id.*;51 So. Cal.L.R. 309, 324, n.90.

From the lack of definition and lack of standards opinions vary widely; examples illustrate the breadth of discrepancy:

a. *Sopher, supra,* at 152: "The bite mark analysis indicated that there was absolutely no doubt that the individual from whom the models were made would be expected to produce a bite mark pattern identical to the one noted on the arm of the victim." The opinion was later expanded to "extremely consistent."

b. *People v. Watson, supra,* 75 Cal.App.3d 402, 142 Cal.Rptr. 143 (Dr. Beckstead): "... the dental impressions taken of the defendant's teeth were consistent with the bitemarks found on the victim's face.

c. *State v. Sager, supra,* 600 S.W.2d 563 (Dr. Luntz): ". . . the bite mark reflected in the photograph was beyond a reasonable doubt placed

Furness) *id.* at 564 "'based upon reasonable medical and dental certainty' that the person from whom the casts were obtained inflicted the wound depicted in the photograph."

d. *People v. Slone, supra,* 76 Cal.App.3d 622, 143 Cal.Rptr. 67 (Dr. Berg) "' . . . it is very highly probable that the bite mark on the victim was perpetrated by the teeth belonging to the defendant.'" *Id.* at 68 (Dr. Vale)" . . . it was highly probable that the bite mark on the body of the decedent . . . was made by the teeth of the defendant." "Highly probable" was equated with "reasonable dental certainty."

e. *Niehaus v. State, supra,* 359 N.E.2d 516 (Dr. Standish) the "bitemarks found upon the victim had been inflicted by the defendant."

f. *State v. Garrison, supra,* 585 P.2d 566 (Dr. Campbell): "'my conclusion was that the bitemarks on the deceased, and the bitemarks produced by the model that I received, were consistent, the marks were consistent with those being made by the teeth that I received.'"

g. *State v. Kleypas, supra,* 602 S.W.2d 868 (Dr. Gier): "'It's my opinion that within a reasonable scientific certainty that the bitemarks were made by the defendant.'"

h. *State v. People, supra,* 605 P.2d 141 (Dr. Krauss): ". . . it was highly probable the appellant bit the victim's left breast."

i. Gustafson, G. *Forensic Odontology,* "Bite Marks" (American Elsevier Pub. Inc.; N.Y. 1966), p. 162. (Strom) "positive or no basis for conclusion; (Schaidt) high probability. (Strom) "positive or no basis for conclusion; (Schaidt) high probability."

j. *BUNDY* (Dr. Souviron): Within a reasonable degree of dental certainty (R 8738) BUNDY'S teeth made the bitemarks. (Dr. Levine): Within a reasonable degree of dental certainty (R 8952).

Florida law, *North v. State*, 65 So.2d 77 (Fla. 1952), and procedure, §90.703 Fla.Stat., allow expert opinions which encompass ultimate issues of fact. But *Gibbs* and *Farley* caution against opinions which encompass the whole case. Two facts of must be absolutely established as a predicate for the bitemark opinion evidence: (1) proximity of time of infliction of the bitemarks on the deceased with death and (2) caustion of the bitemarks by the accused. Both legs must stand together to bear the weight of relevancy.

Dr. Souviron opined that the bitemarks were inflicted at or near death (R 11); the pathologist Dr. Thomas P. Wood joined in the opinion (R 7796). The identification comparison testimony of Dr. Souviron (R 8738) and Dr. Levine (R 8898-9001) opinionated that BUNDY'S teeth had made the bitemarks. The whole case is closed. The whole case is based on opinion testimony. Standards must be fashioned by the Court in this case of first impression. The bitemark comparison identification opinion testimony, in the facts of this case, being in no way restricted, resulted in expert opinion testimony on the guilt of accused in violation of *Gibbs* and *Farley*. Appellant would propose that the *facts*

only of analysis and comparison be presented to the jury, and the opinion testimony be disallowed. As Dr. Souviron noted (R 2826), it is similar to assembling a puzzle which to a certain extent, lay persons are capable of putting together. A verdict, as a matter of law and fact, would presuppose this conclusion.

I.

THE TERM "FAILURE" CONTAINED IN THE JURY INSTRUCTION, FLA.STD. JURY INSTR. (CRIM.) 2.13(h), (R 9478) CONNOTED A PERSONAL REQUIREMENT ON THE ACCUSED WHICH WAS OMMITED OR NEGLECTED AND AMOUNTED TO JUDICIAL COMMENT ON THE ACCUSED'S SILENCE IN DENIAL OF HIS CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL TRIAL.

The essential mainstay of the United States criminal justice system guarantees the right of a person to remain silent unless he chooses to speak of his own free will. A person should suffer no penalty for exercising those rights. *Malloy v. Hogan*, 378 U.S. 3, 84 S.Ct. 1498 at 1493 (1964); *Griffin v. California*, 370 U.S. at 679, 84 S.Ct. at 1493 (1965); *Rogers v. Richmond*, 368 U.S. 534, 81 S.Ct. 735, 739, 5 L.Ed.2d 760 (1961).

The term "failure" is defined, "omission of performance of an action or task *esp.* neglect of an assigned, expected, or appropriate action." *Webster's Third New International Dictionary*, (Merriam Co.; Springfield, MA 1971). The instruction literally is for the jury to draw adverse references from the defendant's silence as the instruction ignores other possible reasons for the defendant remaining silent.

Griffin v. California, 380 U.S. 609, 84 S.Ct. 1493 (1965) stressed that comment on refusal to speak was a penalty imposed by courts for exercising a constitutional privilege. Using the term "failure" in the jury instruction eroded the privilege, making it costly. *Griffin v. California*, 380 U.S.

at 614; *Malloy v. Hogan*, 378 U.S. 5 (1965); *Tehan v. United States*, 382 U.S. 413, (1966). Adverse inferences drawn from a defendant's exercising his right not to testify are not warranted since a defendant may have reason to avoid testifying which bear no relation to fear of exposing guilt, such as poor demeanor or timidity. *Wilson v. United States*, 149 U.S. 60, 13 S.Ct. 765 (1893).

The *Griffin* court held there could be no negative comment on refusing to testify. The use of the term "failure," however, accomplishes the exact opposite. The term "failure" rather than underscoring the defendant's fifth amendment rights, reflects literally "a duty to explain that which has been ommited." Prejudice attached to the defendant despite the good intentions of the Court. *Trafficante v. State*, 92 So.2d 811 (Fla. 1957), *Harper v. State*, 151 So.2d 881 (Fla. 2d DCA 1963). *Mathis v. State*, 267 So.2d 846 (Fla. 4th DCA 1972); *Wilson v. State*, 371 So.2d 126 (Fla. 1st DCA 1978). Florida law prohibits any comment to be made, directly or indirectly, on the right to silence of a defendant in a criminal trial. *Trafficante v. State*, 92 So.2d 811 (Fla. 1957); *Harper, v. State*, 151 So.2d 881 (Fla. 2d DCA 1963), Fla.R.Crim.P. 3.250.

The instruction is in effect, a judicial comment on the fact that the defendant should have taken the stand and makes the accused a witness against himself contrary to §12

of the Declaration of Rights of the Florida Constitution, *Tolliver v. State*, 133 So.2d 565 (Fla. 3d DCA 1961). The comment is all the more devasting when initiated by the trial judge. *Layton v. Florida*, 346 So.2d 1244 (Fla. 1st DCA 1976); *Hamilton v. State*, 109 So.2d 422 (Fla. 3d DCA 1959). The instruction served only to highlight the fact that the accused did not take the stand. The instructions added to the weight of any adverse inferences the jury may have already drawn from their own observation that the defendant did not take the stand.

Any comment which is "fairly susceptible" of being interpreted by the jury as referring to a criminal defendant's refusal to testify constitutes reversible error, without resort to the harmless error doctrine. *Trafficante v. State*, 92 So.2d 811 (Fla. 1957), cited in *David v. State*, 369 So.2d 943 (Fla. 19790 at 944; *Kolsky v. State*, 182 So.2d 305 (Fla. 2d DCA 1966); *Milton v. State*, 127 So.2d 460 (Fla. 2d DCA 1961); of *King v. State*, 143 So.2d 458, 464-466 (Fla. 1962). *cf. Layton v. Florida*, 346 So.2d 1244 (Fla. 1st DCA 1976); *Trafficante v. State*, 92 So.2d 811 (Fla. 1957); *Tolliver v. State*, 133 So.2d 324 (Fla. 2d DCA 1967); *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

J.

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

A legally sufficient defense to the case against THEODORE ROBERT BUNDY required experienced supervisory counsel to coordinate trial tactics and implement overall legal strategy from the time BUNDY contacted him. On the day after his arrest (R 6895) through pretrial (R 16-17, 24, 31-32, 438-442, 725-744, 1704, 1705, 1713, 2022-2156) Millard Farmer stood ready to offer his services as supervisory counsel. Farmer took his case in federal court up through the Fifth Circuit, where he was denied federal injunctive relief on two grounds. The Court did not rule on BUNDY'S Sixth Amendment holding that it would violate principles of comity if a federal court intervened in a state criminal proceeding. *Bundy v. Rudd*, 581 F.2d 1126 (5th Cir. 1978) at 1129-1130. The Fifth Circuit panel did, however, reach the merits of Farmer's claim. It ruled that whatever property right an attorney might have in representing a defendant did not attach until he had attained admission *pro hac vice* and commenced representation. *Id*, at 1130-1132. Since counsel had achieved neither, he had no standing to assert that the trial court's failure to admit him *pro hac vice* deprived him of his right to represent BUNDY without due process of law. *Id*. The Fifth Circuit's rejection of Farmer's due process claim anti-

cipated the holding of the United States Supreme Court in *Leis v. Flynt*, 439 U.S. 438 (1979) reh.den. 441 U.S. 956, which denied a similar challenge.

It is BUNDY'S right to counsel, not, Farmer's right to represent him that is raised here. The right to counsel of one's choosing is one of the most fundamental constitutional guarantees. *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *United States v. Burton*, 584 F.2d 488 (D.D.C. 1978); *United States v. Dimitz*, 538 F.2d 1214, 1219 (5th Cir. 1979) cert.den. 429 U.S. 1104. Although the right to choose counsel is not absolute, and courts may impose reasonable limitation on this right, BUNDY'S case does not have the characteristics which have triggered the restriction. The right asserted here is BUNDY'S, not Farmer's. *Leis v. Flynt*, 439 U.S. 438 (1979). Farmer requested to appear *pro bono;* it is not a case of BUNDY'S insisting that the court appoint a particular counsel, as Farmer's admission *pro hac vice* would impose no inconvenience on himself or on the court. *United States v. Brown*, 591 F.2d 207, 310 (5th Cir. 1979); *United States v. Gray*, 565 F.2d 881, 887 (5th Cir. 1978); *United States v. Harrelson*, 477 F.2d 383, 384 (5th. Cir. 1973); *Douglas v. State*, 212 So.2d 42 (Fla. 2d DCA 1968); *Wilder v. State*, 156 So.2d 395, 396-397 (Fla. 1st DCA 1963). BUNDY requested no continuance to facilitate Farmer's representation which moots any argument that he moved for the *pro*

hac vice appointment to delay the proceedings. *United States v. Burton, supra,* 584 F.2d 488, 490-491; *Gandy v. Alabama,* 569 F.2d 1218, 1323-1325 (5th Cir. 1978).

Judge Cowart justified his denial of Farmer's motion for admission *pro hac vice* in part by referring to the availability of the office of the Public Defender to represent BUNDY (R 438-442). *Sanders v. Russell,* 401 F.2d 241 (5th Cir. 1978), addressed the issue of defendants choice of counsel:

> Lack of necessity as in the judge's view simply is not and cannot be a proper basis for exclusion in these cases. The trial court cannot substitute its judgment for that of the litigant in the choice or number of counsel that the litigant may feel is required to properly represent his interest *Id.* at 246.

Ethical Canon 3-9 of the Florida Code of Professional Responsibility recognizes the desirability of *pro hace vice* admissions.

> [T]he legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or on the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyers not permanently admitted to practice. (See also *Flynt v. Leis,* 574 F.2d 874, 878 (5th Cir. 1977) reversed on other grounds 439 U.S. 438).

Judge Cowart made much of the contempt orders Farmer had suffered in Georgia (R 439). He failed, however,

to consider the anxious circumstances and repetitive prosecutorial abuses which led to the incident giving rise to the contempt citations (R 2042-2067). Although he so stipulated in the order, Judge Cowart also apparently disregarded the significance of Farmer's status as a member in good standing of the Georgia Bar. As the *Sanders* court has held:

> [A]dmission to a state bar is a basic determinant both of the attorney's professional qualification and good moral character because the state bar is the standard setting body that initially investigates and actively takes steps to insure that the canons of professional ethics are observed. *Sanders v. Russell, supra,* 401 F.2d 241, 246.

Perhaps, Farmer's fitness to practice would have been adequately impeached by evidence of disciplinary procedures instituted against him by the Georgia Bar, but no such evidence appears from the record. Nor did the hearing before Judge Cowart (R 2022-2156) produce any incontrovertible proof of Farmer's fitness. The Sixth Amendment guarantees of effective assistance of counsel and the Fourteenth Amendment guarantee of due process of law assumes awesome proportions in a capital case. Where the record is voluminous, the charged offense sensational, and the legal issues Byzantine in complexity, the assurance of right to counsel becomes even more critical. As such, the denial of BUNDY'S motion for *pro bono* counsel to appear *pro hac vice* was constitutional and legal error.

K.

THE COURT'S INCLUSION OF JURY INSTRUCTIONS PERMITTING JURORS TO INFER KNOWLEDGE OF GUILT FROM FLIGHT WITHOUT CAUTIONARY INSTRUCTIONS CONSTITUTED ERROR.

At the close of the trial, the Court instructed the jury that it may infer consciousness of guilt from flight (R 9744-9745). The flight to which this instruction would have applied occurred on 15 February 1978 (R 6787-6795), one month after the Chi Omega slayings. Defense counsel timely objected to the instruction on two grounds. First, the jurors had no knowledge of other crimes (like the credit card theft, see R 6895) of which BUNDY was suspected. Secondly, the Court's instructions did not specify that the jurors had to find some relationship between BUNDY'S flight and guilt *of the crimes charged* to support on inference of guilt from flight (R 9512-9515).

The Fifth Circuit has held that a jury instruction regarding flight as evidence of guilt is justified only where the jury has access to evidence which supports an inference from a consciousness of guilt to consciousness of guilt concerning the crime charged. *United States v. Myers*, 550 F.2d 1036, 1049, 1050, (5th Cir. 1977) cert.den. 439 U.S. 847. BUNDY admitted having stolen credit cards (R 6895). When stopped in Pensacola, he had a stolen license tag on his car (R 6792). BUNDY was wanted by federal authorities in connection with a kidnapping conviction in Utah (R 9863-9878).

Because of BUNDY'S awareness of these charges against him, an inference of consciousness of guilt or his part for the Chi Omega incidents cannot be sustained.

In *Myers*, the possibility of intervening motivations for flight gave rise to the crucial requirement of

> It is the instinctive or impulsive character of the defendant's behavior, like flinching, that indicates fear of apprehension and gives evidence of flight such trustworthiness as it possesses [citation ommited]. The more remote in time the alleged flight is from the commission or accusation of an offense the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense. *United States v. Myers, supra,* 550 F.2d at 1051.

BUNDY'S flight from the arresting officer in Pensacola occurred one month after the Tallahassee offenses. Any inference of guilt from the Pensacola incident or his depature from Tallahassee in mid-February, 1978,(R 7959) was too remote in time to be reliable.

The *Myers* decision in consistent with Florida law. Florida cases upholding jury instruction on flight as evidence of guilt intent have defended the trial court's instruction on grounds that the defendant's flight immediately ensued the commission of crime charged. *Villagelieu v. State,* 347 So.2d 445 (Fla. 3d DCA 1977); *Proffitt v. State,* 315 So.2d 461 (Fla. 1975); aff'd per curiam 428 U.S. 242; *Williams v.*

State, 268 So.2d 566 (Fla. 3d DCA 1972); *Hargrett v. State*, 755 So.2d 298 (Fla. 3d DCA 1969). BUNDY remained in Tallahassee for nearly a month after the Chi Omega incidents. His case is therefore more analogous to *Barnes v. State*, 348 So.2d 599 (Fla. 4th DCA 1977), which held improper a jury instruction on flight because of the lack of any evidence that the defendant had fled the scene of the crime.

In addition to the issues of relevancy and immediacy raised in *Myers* and mirrored in Florida law, another legal principle is violated by the Court's instruction. The Court's refusal to grant defense counsel's request for a modification of the instruction on flight (R 9512-9515) had a great prejudicial impact. He authorized the jurors to infer guilt from flight without cautioning them to ascertain whether any guilty state of mind they found had any relevance to the crimes charged. In *Batey v. State*, 355 So.2d 1271 (Fla. 1st DCA 1978), the court ruled that the propriety of jury instruction on flight would also determine whether the judge had properly or improperly commented on the evidence. Because of the other possible sources of 'guilty knowledge' and the length of time between the Chi Omega incident and the 'flight', the jury instruction in BUNDY'S case was improper. The Court's instruction thus constituted an improper judicial comment on the evidence.

L.

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

1. Standards in General

The record is replete with allegations of or actual instances of the failure of counsel to dispose of their constitutional obligation as counsel. Most noteworthy is the fact that no court appointed counsel had any capital case experience. The trial closed with no counsel with any previous capital experience (R 9822). *Knight v. State*, 394 So.2d 997 (Fla. 1981) sets forth a four tier calculus:

a. The act or omission of counsel must be detailed in pleading.

b. The defendant has the burden of proof that the act or omission of counsel was measurably below that of competent counsel.

c. The defendant has the burden of proving "prejudice" to the extent that the acts or omission of counsel likely affected the outcome of the court proceedings.

d. The state may rebut all assertious by proving beyond a reasonable doubt no prejudice in fact occured.

2. Acts or Omissions

a. Counsel were not sufficiently prepared for the bitemark challenge (R 2465); b. counsel did not adequately notice its motion to exclude the public depositions (R 2681); c. counsel was not timely in moving to challenge the grand jury which indicted the defendant (R 2645); d. counsel did

not adequately confer and consult with their client (R 2597, 2959, 3599, 3651, 5337, 8305); e. counsel was not prepared for trial (R 3960, 6129) despite representations to the contrary (R 9024), counsel had not seen certain exhibits (R 5684, 5930) and was so late in the preparation and production of certain bitemark evidence, (R 9590) the same was not timely produced for the jury's consideration which would have been admitted if timely produced (R 9830, 9988); f. no court appointed counsel had prior capital case experience (R 3651, 3677, 9037, 9287, 9296), and the case concluded with no counsel with any prior capital case experience (R 9822); g. counsel was not timely in producing semen testing analysis (R 9426); counsel assistance was below the standard required in capital cases in the area of trial procedure (R 2465, 2681, 4207, 4274, 5386, 5466, 5222, 5951, 7059-7079, 7167, 7417, 7428, 7534, 8149, 8649, 8673, 9037, 9258, 9372).

3. Standard for Counsel Conduct

Qualitatively, capital cases are different, *Knight v. State*, 394 So.2d 997 (Fla. 1981) at 1001. The standards of conduct for counsel are higher in capital cases. Counsel in every criminal case should sufficiently confer with the accused to be prepared to present available defenses. *U.S. v. Gray*, 565 F.2d 519 (5th Cir. 1978); *U.S. v. Fessel*, 531 F.2d 1275 (5th Cir. 1978); *Davis v. Alabama*, 596 F.2d 1214 (5th Cir. 1979); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978)1 Available defenses regarding bitemark and semen analysis, of

obvious import, should have been resolutely and timely prepared and presented, *Bell v. Georgia*, 554 F.2d 1360 (5th Cir. 1977); *Gomez v. Beto*, 462 F.2d 596 (5th Cir. 1972). Being unfamilar with evidence to be presented by the prosecution is a key point, *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974), and the record reflects clear evidence of unprepared counsel. *Lee v. Hopper*, 499 F.2d 456 (5th Cir. 1974); *Bell v. Georgia*, 554 F.2d 1360 (5th Cir. 1977); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978).

4. Prejudice

The inexperience of counsel was tantamount to no effective sentencing phase at all. *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979); *Estelle v. Smith*, 101 S.Ct. 1866 (1981); *Young v. Zant*, 506 F.Supp. 274 (M.D. GA. 1980).

By preparing no effective or timely defense, by preparing no timely or effective sentencing case, BUNDY was denied a fundamentally fair trial. In fact the organization of counsel, or more correctly, the lack thereof was tantamount to mere lip service to the constitutional precepts underlying the Sixth Amendment. *Kemp v. Leggett*, 635 F.2d 453 (5th Cir. 1981); *Voyles v. Watkins*, 489 F.Supp. 901 (N. D. Miss. 1980); *Young v. Zant*, 506 F.Supp. 274 (M.D. GA. 1980); *Blake v. Zant*, 513 F.Supp. 772 (S.D. GA. 1981).

If nothing else, evidence of material import was kept from the jury by the conduct, or omission, of counsel (R 9830, 9990, 9998). In and of itself, the matter is sufficient prejudice for a new trial.

CONCLUSION

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