IN THE SUPREME COURT OF FLORIDA

THEODORE ROBERT BUNDY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

APPELLANT'S MAIN BRIEF

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STATEMENT OF THE CASE

This is an Appeal from the conviction and sentence entered in the case of State of Florida vs. Theodore Robert Bundy, in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida, Criminal Justice Division, Indictment No. Cr79-4650.

The Defendant was convicted in a two (2) Count Indictment of Kidnapping and First Degree Murder. He was sentenced to life imprisonment and to death, respectively.

The case originally arose in the Circuit Court of the Third Judicial Circuit in and for Columbia County, Florida, Case No. 78-169-CF. On October 30, 1979, venue for the trial was changed to the Circuit Court of the Third Judicial Circuit, in and for Suwannee County, Florida, Case No. 79-149-CF (R. 14645). On November 19, 1979, venue for trial was again changed from Suwannee County, Florida, to Orange County, Florida (R. 14687), and assigned the above referred to case number.

Judgment and Sentence were entered on February 12, 1980 (R. 14916). On February 22, 1980, the Defendant filed his Motion for New Trial, preserving for appellate review the points raised herein (R. 14914). On March 16, 1980, the Court denied Defendant's Motion for New Trial (R. 14965).

Notice of Appeal was timely filed (R. 14970), and the State timely filed its Notice of Cross Appeal (R. 14974).

In this Brief, the Appellant, Theodore Robert Bundy, will be referred to as either the Defendant or Bundy. The Appellee, the State of Florida, will be referred to as the State.

The following symbols will be used:

R - For RECORD ON APPEAL
RP - For RECORD ON APPEAL, PENALTY PHASE.

STATEMENT OF THE FACTS

A. THE DISAPPEARANCE

On February 9, 1978, Kimberly Diane Leach, age 12, was driven to the Lake City Junior High School, located on Duval Street (U. S. Highway 90), Lake City, Columbia County, Florida, by her mother, Freda Leach, at approximately 8:00 a.m. (R. 3865) It was a cold, rainy morning (R. 3989).

After chatting with some school friends, the Leach girl went to her homeroom class at approximately 8:30 a.m. (R. 3899) Her homeroom class was located in the Central Building (R. 3957). Her homeroom teacher was John Lawrence Bishop. After approximately fifteen minutes of attendance, the school bell rang for the first period class, which for the Leach girl was Physical Education. Because of the inclement weather, students assembled in the auditorium to watch a movie, as opposed to going outside to play (R. 3944).

For the Leach girl to get from her homeroom classroom in the Central Building to the auditorium, she had to exit the rear of the school building, go outside, walk around some portable buildings, and across the basketball courts (R. 3910), a total distance of approximately 247 feet, to enter the auditorium (R. 6432). After she had departed the classroom, Mr. Bishop noticed that she had left her purse behind. He then dispatched a classmate, Tandy Bonner, to the auditorium to bring Leach back to her homeroom classroom to retrieve her purse (R. 3919). Leach did, in fact, leave the auditorium with the permission of her Physical Education teacher, Mrs. Juanita Caldwell, and returned to Mr. Bishop's classroom and got her purse (R. 3943).

When she exited her original homeroom classroom to return to the auditorium, it was approximately 9:20 a.m. to 9:25 a.m. (R. 13878) This was

the last time that anyone could positively identify having seen Kimberly Diane Leach until her remains were found in a tin hog shed located in Suwannee County, Florida, and approximately 35 to 40 miles west of the Lake City Junior High School (R. 4236).

There was no report of a "positive" identification of having seen the Leach girl after her disappearance until five months, three weeks and two days later (R. 4074).

On the day of her disappearance, as testified to by her mother, the Leach girl was wearing Hush Puppies shoes, white cotton socks, blue denim jeans, a blue football type jersey pullover shirt with the number 83 emblazoned in red on the front, a three-quarter length fur-trimmed coat, and she was carrying a denim purse (R. 3877).

B. THE SEARCH

At approximately 2:30 p.m. that day, the Leach girl's parents were contacted by the school officials and informed that she had not attended her second period and subsequent class periods (R. 3875, 3882).

A search of the school grounds and the school buildings was made and she was not found. The police were called in and began their investigation (R. 3883).

On February 11, 1978, a picture of Kimberly Diane Leach, her description, and facts of her disappearance appeared in the local and state news media, both press and television (R. 5773). Over the course of the next several months, a search in extent and intensity virtually unheard of in the annals of Florida history was conducted to locate her (R. 14522-14529, 4257).

A task force totaling some one hundred members, at any one time, was amassed and virtually every inch of ground in Columbia County, and surrounding

counties, was covered by the search party (R. 4238-4239).

The search was commanded by a group of top-ranking law enforcement officers, who were assisted in their efforts by Assistant State Attorney, George Robert Dekle, of the Third Judicial Circuit State Attorney's Office. (R. 4255, 4258)

On April 7, 1978, (R. 4231) while part of the search party searched a wooded area near the Suwannee River in Suwannee County, Florida, one of the members of the search party, Florida Highway Patrol Trooper Kenneth W. Robinson stumbled upon a tin hog shed. Upon bending down and peering therein, he saw remains of a human body and a pile of clothes (R. 4234-4235). Trooper Robinson then summoned the other members of the search party (R. 4235). The area was cordoned off to await the arrival of the State Medical Examiner and Anthropologist, the Florida Department of Law Enforcement Crime Lab Team, members of the State Attorney's Office, and the Investigators in charge of the disappearance of Kimberly Diane Leach (R. 4250).

During the course of the search and investigation, untold numbers of persons were questioned with regard to the disappearance. Numerous reports of sightings of the Leach girl were made to the task force, but none proved fruitful (R. 5775). Requests for information were made almost daily over the radio and television stations. Almost daily pleas were made in the Press for information from anyone who might have any knowledge concerning the disappearance of Kimberly Diane Leach, and for any such persons to please come forward. Fliers containing her picture, her name, her description, the description of her clothing, were printed and posted in conspicuous places all over Columbia County, Florida, and in particular, at the Police Department located in the same building with the Lake City Fire Department (R. 4142).

C. THE ARREST

On February 15, 1978, at approximately 1:30 a.m., Police Officer David Lee of the Pensacola Police Department, observed an orange colored Volkswagen on Cervantes Street, Pensacola, Florida. It aroused his suspicion (R. 5152). After following the Volkswagen for several blocks, the officer turned on his blue lights and pulled the vehicle over (R. 5154). He ran a radio tag check, which came back showing car or tag missing (R. 5154). The officer ordered the driver out of the car and ordered him to lie prone on the ground with his hands out, so that the officer could "inspect the Volkswagen vehicle for other occupants" (R. 5155).

The officer had his pistol drawn while he attempted to handcuff the driver's hands behind his back (R. 5155). A scuffle ensued, with the driver running away. The officer fired at the fleeing driver. The driver fell down and was eventually completely handcuffed and taken to the officer's patrol car (R. 5156-5157). He was read his Miranda rights and identified himself to the officer as one Kenneth Misner (R. 5173-5174).

Officer Lee testified at the Defendant's trial that the driver said he wished he had killed him and, "If I run at the jail, will you shoot me then?" (R. 5173)

D. THE INVESTIGATION

1. Collateral Crimes

On January 15, 1978, the City of Tallahassee, Florida, awoke to the news that two Florida State University coeds had been murdered and two others beaten at the Chi Omega Sorority House. In addition, a fifth female had been beaten in her apartment two miles from the Chi Omega Sorority House. Bundy was subsequently indicted, tried, convicted and sentenced to death for these

crimes. His appeal from that judgment and sentence is now pending before this Court, being Case No. 57,772. It is respectfully requested that this Court take judicial notice of the record on appeal in that case for the purposes of this appeal.

2. The Interrogation

Over the next several days, "Misner" was extensively interviewed by Officer Norman Chapman of the Pensacola Police Department, Officer Donald Patchen of the Tallahassee Police Department, and Investigator Steven Bodiford of the Leon County Sheriff's Office (R. 10675-10736). Although the State would later abandon any attempt to use, at trial, any of the statements allegedly made to them (R. 10737-10738), many of such alleged statements appeared in the media and were used to establish probable cause in the State's obtaining future search warrants (R. 13038).

During this time, "Misner" revealed his true identity, to-wit: Theodore Robert Bundy. It was learned that Bundy was wanted for escape and homicide in Colorado, and that he was on the Federal Bureau of Investigation's ten most wanted list.

Shortly thereafter, it was reported that Bundy was a "suspect" in thirty-six sex-related murders in the northwest United States (R. 14524).

3. The Connection

During the aforementioned interviews and thereafter, Bundy became the prime suspect in connection with the Chi Omega crimes (R. 14523). It was learned that the orange Volkswagen which Bundy was driving on the night of his arrest was stolen from Ricky Garziniti in Tallahassee, Florida, on February 12, 1978 (R. 5143).

It was also learned that Bundy had been living at the Oaks Apartments

in Tallahassee from January 7, 1978, until February, 1978, under the assumed name of Chris Hagan (R. 4562-4563). Other residents of the Oaks were questioned and their description and impressions of "Chris Hagan" revealed nothing of any evidential import.

Subsequent to Bundy's arrest, Homicide Detective Lester Parmenter of the Jacksonville Police Department contacted Steve Bodiford of the Leon County Sheriff's Office (R. 5024), and told him that his fourteen year old daughter, Leslie, had had an encounter with a man in a K-Mart shopping center parking lot on February 8, 1978. She had been waiting for her brother, Danny, to pick her up after school when a man driving a white van pulled up to her, got out of the van and engaged her in conversation (R. 4934). The man was wearing dark horn-rimmed glasses, a blue Navy-type uniform jacket with a badge that said "Fire Department, Richard Burton", on his chest (R. 4933).

Almost immediately thereafter, Danny pulled up and as he started to get out of his pickup truck, the man got back into the van and drove away. Danny and Leslie attempted to follow him, but lost him in traffice. They were able to get his license tag number, which was 13D11300, Florida.

At Bodiford's suggestion, Parmenter agreed to have his children hypnotized to help Bodiford on a case he was working (R. 5026). On February 14, 1978, Parmenter brought his two children to the Jacksonville Police Department to be hypnotized by Lieutenant Mickler of that department (R. 4961). Each child was hypnotized separately, but each procedure was induced in the presence of their father and his riding partner, Steve Richardson, as well as Officer D. K. Bryan (R. 4962). After the hypnotic sessions, each child was asked to separately make a police composite of the man they saw on February 8, 1978 (R. 4939, 4974). Both composites were introduced into evidence at the trial as State Exhibit Nos. 37 and 38 (R. 5040, 5042).

Several days later, both of the Parmenter children were interviewed by Investigator W. D. Phillips of the Leon County Sheriff's Department. They were each shown six photographs of individuals and each picked out the picture of Bundy as the man they confronted on February 8, 1978. The six photographs were introduced into evidence as State Composite Exhibit No. 36 (R. 4943).

On January 13, 1978, Randall Clayton Ragans reported his license tag had been stolen from his residence at 1002 St. Augustine Street, Tallahassee, Florida. The stolen license tag bore the number 13D11300 (R. 4641).

On February 11, 1978, at approximately 1:47 a.m., Deputy Keith Dawes of the Leon County Sheriff's Office was patroling, in an unmarked car, an area of Tallahassee, one block away from the Oaks Apartments (R. 4643). He observed a man, whom he identified at the trial as Bundy, locking or unlocking a car door (R. 4644). As he approached the man, he asked if he had any identification, to which the man replied, "No". Dawes shined his flashlight into the car the man had been locking or unlocking, and observed a license tag in the floor board (R. 4645). The man opened the car door and handed Dawes the tag. It bore the number 13D11300 (R. 4645-4646). While Dawes went to his patrol unit to run a registration check on the tag, the suspect fled (R. 4647). The tag was introduced into evidence at the trial as State Exhibit No. 26 (R. 4649).

4. The Van

At the trial, Richard Lee Shook, the Audio-visual Material Manager at the Florida State University Media Center, testified that on January 12, 1978, the keys to a white Dodge van, No. 343, owned by the Media Center, disappeared (R. 4674-4675). In the early part of February, 1978, the van itself disappeared (R. 4679). The van was not seen again until February 13, 1978,

when Chris Cochran, a Florida State University Media Center employee, observed it parked approximately two blocks from the Florida State University Student Union while he was on his way home from work (R. 4706). Cochran further testified that when he passed the same spot at approximately 7:45 a.m. the same morning, he did not see the van (R. 4714). All of the witnesses who testified concerning the van stated that numerous people connected with the Media Center had access to and used the van, and that the people wore a wide variety of clothing, including denim pants, cotton socks, tennis shoes, and socks of varying colors (R. 4660-4714).

Freddie McGee, the Media Center employee who was the principal driver of the van, testified that approximately a year to a year and a half prior to February, 1978, the rear of the van had been carpeted with some discarded carpet (R. 4752).

The van was taken into custody by Officer William Charles Wingate of the Florida State University Police Department, who took it to the Leon County Sheriff's Department (R. 4752).

Shortly thereafter, a crime lab unit from the Florida Department of Law Enforcement descended upon the van to process it for physical evidence. Patricia Lasko testified that she "swept" the van to collect and maintain trace debris for micro-analysis (R. 4869). In the debris she found hair samples and an orange price tag approximately one and one-half inches in size (R. 4870). She retained the hair samples for further study and turned the rest of the sweepings over to other Examiners for further investigation (R. 4875).

Ms. Lasko further testified that she processed certain items of clothing belonging to the Leach girl, as well as clothes belonging to Bundy, for trace evidence and turned these trace materials over to Florida Department of Law Enforcement Microanalyst, Mary Lynn Henson, for analysis (R. 5328-5336).

Ms. Lasko was also called as a defense witness (R. 6070). She testified that she did a microanalysis of all the hair samples found in the van, as well as those found at the crime scene (R. 6073-6074). Based upon the standard she had of Bundy's hair, she could make no comparisons between Bundy's hair and the hair samples found at either the crime scene or in the van (R. 6079). Ms. Lasko also testified that her reading of the general information on the viology of the hair and the growth of hair of an individual, on the average, can lose as many as a hundred hairs a day from all over his or her body (R. 6077).

Douglas Barrow, Florida Department of Law Enforcement Latent Fingerprint Specialist, testified that he processed the van for latent fingerprints and was able to identify fifty-seven latent fingerprints, nineteen latent palmprints, and eleven latent impressions, either finger or palm (R. 5077). None of the eighty-seven prints were, in Barrow's opinion, of value (R. 5078). He compared these prints with one hundred and twenty-six known prints of other individuals and was able to match five with the known prints of five Media Center employees (R. 5080), but specifically excluded Bundy from having made any of the prints he was able to raise (R. 5080). He was unable to make a complete comparison with the prints of the Leach girl because he was unable to develop an accurate sample of her prints (R. 5081). He further testified that after comparing the prints in the van with the one hundred and twenty-six known prints, he still had remaining an unidentified fifty-one fingerprints, fourteen palmprints, and ten impressions which could either be a finger or a palm (R. 5113). In addition, he could not compare Bundy's prints with the prints on any other item of physical evidence relevant to this case (R. 5085-5088 & 5114-5116).

The defense also called Dale Nute, another Florida Department of Law

Enforcement Crime Laboratory Analyst, who testified that the soil samples taken from the van were different from the soil samples taken from the crime scene (R. 6090).

Richard L. Stephens, Forensic Serologist and supervisor of the Serology Section of the Florida Department of Law Enforcement Tallahassee Regional Crime Laboratory, was called by the State and testified that he found blood stains in two areas of the carpet in the van (R. 5367). He testified that due to the deterioration of the blood stains, he could only conclude that the blood was of the Group B antigen. All other tests were inconclusive (R. 5374). The Leach girl had Group B blood, as does over fifteen percent of the entire human population (R. 5376-5377). However, he testified that he could not state how long the blood stains had been in the carpet (R. 5431).

Mary Lynn Henson, the State's expert in shoe track identification, and fiber analysis, testified to her examination of the shoe tracks and fibers, and ventured opinions relative thereto. Her testimony will be discussed in greater detail below.

5. The Identifications

Through the testimony of two Holiday Inn Employees and the State's handwriting expert, John McCarthy, the State produced evidence that Bundy had registered at the Holiday Inn, Lake City, Florida, on February 8, 1978, under the name of Rolf Miller (R. 4539 &4549, 4571-4589). As stated above, Danny and Leslie Parmenter were able to identify Bundy as the driver of a whtie van in Jacksonville on February 8, 1978.

However, prior to Bundy's Indictment on July 21, 1978 (R. 14023-14024), only one witness "placed" Bundy and the white van at the scene of the Lake City Junior High School on the morning of February 9, 1978.

Clinch Edenfield was a 71 year old school crossing guard at the Lake City Junior High School on February 9, 1978 (R. 3987). He had held that post for six or seven years (R. 3987) Edenfield identified Bundy as the man he saw driving a white van in front of the Junior High School around 8:45 a.m. (R. 3991) He also testified that he might have seen the van come by once or twice before on that same morning (R. 3992). He testified that he saw Bundy on television a week or so later and recognized him as the man who came through the school zone (R. 4041). However, Edenfield did not report this to the police, nor was he even questioned until a number of weeks later by Special Agents C. Dalton Bray and Joe Uebelner of the Florida Department of Law Enforcement (R. 8347).

Although Edenfield was certain the person he saw on television was the man he saw driving the van, he could not pick Bundy's picture out of a photo lineup (R. 8348) Having seen Bundy's picture on television, "a lot since", he was then able to identify him at trial (R. 4045). Edenfield also "remembered" that the weather was good, the sun was shining, and it wasn't raining, that it was not cold and that it was in the summertime when he saw Bundy driving past the Junior High School (R. 4034-4035). Finally, Edenfield stated that he had never before seen Defense Counsel Thompson, even though Thompson had deposed Edenfield for over an hour on October 11, 1979 (R.4046).

Although John McCarthy, the State's expert on questioned documents, stated that he could not testify that the Green Acre's orange price tag found in the van (R. 4871) came from the Green Acre's Sporting Goods Store in Jacksonville, Florida, (R. 4919), John Farhat, the owner of that store, was able to take the stand and identify Bundy as the man who purchased a Buck knife with that price tag on it in early February, 1978 (R. 4881).

On cross-examination, Mr. Farhat described the man who bought the

knife as having long, uncombed hair, facial hair "like a drifter" (R. 4885). On at least two occasions, Mr. Farhat had been shown a photo lineup with Bundy's pictures in them. He was shown the same photo lineup as Clinch Edenfield (R. 6109) when he was interviewed by Special Agent Miller Robert Miley of the Florida Department of Law Enforcement on April 24, 1978 (R. 6108). The photo lineup was introduced into evidence as Defense Exhibit No. 4 (R. 5664). Mr. Farhat was not only unable to pick out Bundy's picture, but he speculated that another of the men depicted in the spread looked most like the man who came into his store and purchased a Buck knife. The man whose picture he identified was Timothy Dale Allen, who bears absolutely no resemblance to Bundy (R. 6108).

Mr. Farhat testified that sometime after he testified before the Columbia County Grand Jury which indicted Bundy, he saw Bundy's picture in the newspaper and recognized him as the man who bought the knife (R. 4898). The newspaper photo was introduced as State Exhibit No. 31 (R. 4897), and bears little resemblance to a man with "long, uncombed hair, facial hair like a drifter".

Jacqueline D. Moore was called by the State (R. 3949 & 4260). She stated that on February 9, 1978, in the early afternoon she was driving east on Highway 90 from Live Oak, Florida, to Lake City, Florida, and observed a white van coming toward her from the opposite direction (R. 4260).

The van was weaving back and forth into her lane of traffic and caused her to pull off the road and make the remark, "What in the world is he going to do?" (R. 3953) She described the driver of the van and said she had a mental picture in her mind of the profile of the person who endangered her and her maid's life that day (R. 3957). Notwithstanding the fact that she had seen Bundy's picture on television and in the newspapers on numerous

occasions (R. 4279), was aware of the intensive search for the missing Leach girl (R. 4281), and that Bundy had been indicted for her kidnapping and murder (R. 4281), she never reported to the police, for almost two years, that Bundy resembled the man driving the van (R. 4281). Yet she was allowed to take the stand and testify that Bundy clearly resembled that man (R. 4261).

On July 28, 1978, Clarence L. Anderson, an Emergency Medical Technician employed by the Lake City First Aid Rescue Department, with the rank of Lieutenant, had his attention directed to the television set at the Lake City Fire Department (R. 4082). The profile of the person he saw on T.V. just jumped out on him and bore a striking resemblance to the man that he had seen at the Junior High School with the girl (R. 4082). He got permission from his Chief to go to the Lake City Police Department (R. 4083), which is housed in the same building with the Fire Department. Mr. Anderson met there with Larry Daugherty, Chief Investigator for the Lake City Police Department, and Assistant State Attorney, George R. Dekle. He told them that the person on the newscast bore a striking resemblance to the man that he had seen with a girl that looked like the Leach girl (R. 4083). As soon as Anderson told his story to Dekle, Dekle asked him if he would undergo hypnosis to "make his memory better - to make things clear" (R. 4083). Shortly thereafter, Imogene Keene, a Social Worker at the Lake City Veteran's Administration Hospital, hypnotized or attempted to hypnotize, Anderson (R. 4085). Copies of the cassette tape of that hypnotic session were introduced at the trial as Defense Exhibit No. 22. After the Anderson-Keene hypnotic encounter, it was suggested by Dekle that Anderson be hypnotized again (R. 4105). On July 31, 1979, Larry Daugherty went to the Fire Department and asked Anderson if he was ready to be hypnotized again (R. 4107). Anderson was taken to the City Commission Room and this time he was hypnotized by another

Social Worker from the Veterans Administration Hospital, JohnnyJack Burnette (R. 4112). A cassette tape recording of this hypnotic encounter was introduced into evidence as Defense Exhibit No. 23.

At some point in time between the two hypnotic sessions, Anderson was summoned into the Fire Chief's Office where Dekle, Daugherty and others were going over Anderson's work records (R. 4165). Anderson was made aware that they were trying to determine if he had been working on February 9, 1978, because if he had been, then he would have had to be at the Fire Station and would have been mistaken as to whom and what he could have seen on that date (R. 4165). This was the first time the date, February 9, 1978, became significant to him (R. 4167).

For the five months, three weeks and two days after the disappearance of the Leach girl until he reported the incident to Dekle and Daugherty, Anderson was aware of the intense activety involved in the search for the missing girl, the reports on T. V., radio and in the newspapers; he had seen her picture in the paper and on T.V. (R. 4142); was aware of Bundy's arrest and that he was a prime suspect (R. 4138-4139), and had seen Bundy's picture in the paper and on T.V. (R. 4143) Yet, he did not reveal what he had seen because:

> "I didn't want to really be involved. I wasn't absolutely sure that I saw anything of, you know, any importance. I wasn't sure of any dates. I just knew that I saw a girl that looked like the Leach girl and was not sure exactly that I saw her, and mainly just not wanting to be involved, the biggest reason I didn't come forward." (R. 4074)

However, after having his memory jogged by seeing Bundy's profile on television on July 28, 1978, after having been told to think about it by Dekle and Daugherty (R. 5087), after having talked it over with his wife (R. 4087), and after having been hypnotized twice, Anderson became the State's one and

only eyewitness to the abduction of Kimberly Diane Leach.

He testified that he was working overtime at the Fire Station on February 8, 1978, and slept there that night (R. 4057). At some time between 9:00 or 9:15 the next morning, he left the Fire Station to go home, shower, shave and change clothes (R. 4058) He traveled west on Duval Street (U. S. Highway 90), which would have taken him past the front of the Lake City Junior High School (R. 4059). As he approached the Junior High School, he noticed a white van stopped in the westbound lane of Duval Street. There were two cars backed up behind the van, and then his own truck. As he was waiting for the van to move on, he looked to his left and noticed a young girl, approximately twelve or thirteen years old, dark shoulder length hair, parted in the middle. He stated that the probable reason he noticed the girl was that she "looked like one of his nieces" (R. 4063). With this girl was a man, approximately early thirties, light to dark brown hair, full cut. He really noticed the man's hair because he had "a nice head of hair" (R. 4063). He got the impression the girl was either crying or had been crying. The man had a scowl on his face (R. 4063). He got the impression that the little girl had gotten into trouble at school and that her father had come to pick her up (R. 4064). The girl was wearing a dark blue pullover football jersey and probably dungarees. The football jersey had either the numbers 63 or 83 in red-orange on it (R. 4064). She was carrying a pocketbook or a rolled up jacket or maybe both. The man had her by the left arm, about the elbow, and was leading her toward the white van. The girl was not actively resisting, but she wasn't anxious to go (R. 4064). They crossed the street, went in front of the van, the man opened the passenger door of the van, helped the girl in, slammed the door, jogged around to the driver's side, got in and drove off (R. 4065). When shown State Exhibit J

(photograph of the white van), he identified it as being very similar to the white van he saw that morning (R. 4069). When shown State Exhibit I (Picture of Kimberly Diane Leach), he positively identified her as the young girl he saw at the school on February 9, 1978 (R. 4071). When asked to look around the courtroom to see if there was anyone who closely resembled the person he observed leading the young girl to the white van on the morning of February 9, 1978, Anderson immediately turned to Bundy and stated, "The Defendant" (R. 4072).

Leland Douberly, the custodian of records of the Lake City Fire Department, testified that the department's records reflected that Anderson did, in fact, work overtime on February 8, 1978. The records indicated that he worked until 11:03 p.m. (R. 4190) Douberly also testified that if Anderson had been at the Fire Station from midnight until 8:00 a.m. on February 9, 1978, he would have been paid for that time, and that the records did not indicate that he had been paid for that time (R. 4196). The records also indicate that Anderson commenced work on Feburary 9, 1978, at 8:00 a.m.

E. PRETRIAL MOTIONS

Bundy filed numerous pretrial motions, most of which were denied by the trial court. (See Defendant's Motion for New Trial [R. 14924-14932])

1. Hypnosis

Although the defense was aware that no less than eight states' witnesses had undergone state-sponsored hypnosis in an attempt to enhance their memory and recall, only C. L. Anderson's testimony was sought to be suppressed on the grounds that his recall was either affected or induced by hypnosis. The defense filed its first Motion to Suppress the Anderson testimony and identifications on

September 17, 1979 (R. 13002, 13006) Hearing was held on said Motion on November 10, 19, and 20, 1979 (R. 13699-14022). The defense called Dr. David S. Kuypers, who qualified as an expert in forensic psychological hypnosis (R. 10878).

Dr. Kuypers described the differences in the use of hypnosis in the clinical setting and the forensic setting:

> "In the clinical setting, for example, if we use the age regression procedures, which basically is taking a person back to 're-live' a -- it's not quite reliving, it's more a stimulation, but going through that procedure, we are more concerned, for example, in some cases about the emotional response of individual, the accuracy of what is reported or recalled is not that important in terms of helping them to learn how to deal with what might have happened in the traumatic incident and so on. In the case of forensic hypnosis, there's a great concern for accuracy of recall and this is one of the established reasons why certain standards have been established and guidelines are used in order to insure that the results obtained are as accurate as possible." (R. 10884)

In describing why the procedures in the forensic setting are so important, Dr. Kuypers stated:

> "The three characteristics of hypnosis that I referred to before: increased susceptibility to suggestion, the utilization of imaginative capacities and the decrease in critical judgment or awareness. All those factors would create difficulties in the following way. In the state of hypnosis, a person is more responsive to suggestions. Inappropriate suggestions are given and a person is going to accept them. We also know that in the state of hypnosis that people are capable of confabulating-- these are made up responses to account for gaps in memory or other things that may have taken place or even feelings that they have. They may have no basis in reality, however, the individual in the state of hypnosis and afterwards believes them very sincerely to be correct and true. These kinds of things can happen in hypnosis, part of the problem we encounter is that it is difficult to ascertain whether or not it actually occurred because the people who experience these things are sincere and truthfully believe that accurate recall has been estab-

> lished when, indeed, it may be a confabulatory response, it may be an altered response or something of that nature that can occur either spontaneously in the state of hypnosis or because a particular suggestion that may have been given by the operator." (R. 10886-10887)

Dr. Kuypers defined the term, "confabulation":

> "A confabulatory response or a confabulation in hypnosis is a response that is made up and does not have a basis in reality. This can be to account for a gap in memory that the individual cannot recall even in hypnosis. It can be used to account for emotional feelings that are going on. And, in that sense could be a type of explanation, but basically, it is a made up response." (R. 10887)

as well as "altered response" or "altered memory":

> "As I am referring to an altered response in this situation of forensic hypnosis, I'm basically talking about a recall that the individual has. Something they actually remember that is altered or changed as a result of the hypnotic procedures." (R. 10888)

He also stressed the importance that careful consideration be given in making the determination of whether or not a potential witness should be hypnotized in the first place (R. 10888-10890), and that if the decision is made to go forward, certain protocols must be employed to minimize contamination of the witness' memory (R. 10890-10897).

Dr. Kuypers further described the numerous inappropriate procedures and questions utilized by Keene and Burnette in their attempts to enhance Anderson's recall through hypnosis (R. 10940-10961). He further opined that Anderson should never have been hypnotized in the first place, because of the lapse of time between the event he was attempting to remember and the hypnotic episodes, and because of all the information he had learned about the event during that intervening period of time (R. 10961-10962 & 10972-10976).

His opinion of Anderson's testimony was that it was unreliable (R. 10962).

The defense also called Dr. Milton V. Kline, who was qualified as an expert in clinical and forensic psychology (R. 13674).

After defining and describing the phenomena of hypnosis, Dr. Kline stated that the protocols employed by the therapist in submitting a subject to clinical hypnosis or forensic hypnosis are very different (R. 13678-13679). The reasons for the difference in protocols is that in clinical hypnosis, the therapist is attempting to help the subject; to alleviate physical or emotional pain and to persuade him to deal with unpleasant or repressed memories (R. 13681), whereas with forensic hypnosis the recall itself, and in particular the accuracy of it, are the objectives (R. 13681).

In response to the question of whether or not the therapist, in a clinical or therapeutic setting, is concerned about the accuracy of that recall, Dr. Kline stated:

> "Sometimes, ultimately, yes. Initially, no. We are concerned with the meaningfulness or the value of being able to recall traumatic events, disturbing events, in one's life history that has been repressed rather than forgotten, and the process of opening up that repressive mechanism, is what contributes and helps the patient to get better, but-very often, the memory, initially uncovered, in the analytic or other therapeutic workings, which hypnosis or other techniques are used, the memories that are recovered are frequently what we call a screen memory, and they are not valid memories. They encompass the same effect, or the same emotion, but they are not necessarily actual memories. They may be fantasies, they may be confabulated, but they may serve to bring this person in contact with those feelings, and that's why it's important therapeutical treatment. The validity of that specific fantasy is of no greater consequence, therapeutically, than the fact that you may have had last night a very meaningful dream and that dream may reflect what's going on in your mind about the events of today, or the events of two weeks from now, but that dream was invented by you, you wrote the script, it wasn't an actual experience, but it may never-the-less be very revealing, of the things that you wanted them to reveal.

> The same thing with hypnotic recall. The organization with the structure of the material within the individual's mental apparatus does not necessarily have to be a valid recollection for it to be meaningful and emotionally viable and therapeutically corrective."
> (R. 13682-13684)

Dr. Kline stated further that because of a subject's ability to develop screen memories or to confabulate under hypnosis, a number of very specific guidelines should be employed in the forensic hypnosis setting to minimize inaccurate recall (R. 13684).

First, one should determine whether to use forensic hypnosis in the first place. Dr. Kline stated in that regard:

> "One would use it in order to gain access to aspects particular to an individual's memory, which might not on any other basis be available for elucidation. There would be no justification - in my opinion, and most of my colleagues' opinion, for utilizing hypnosis, unless it's for the purpose of getting at material, which it has been demonstrated cannot be obtained by more conventional, appropriate methods of interviewing, interrogation, or mental status examination."
> (R. 13685-13686)

With regard to guidelines to be followed, once the decision has been made to employ forensic hypnosis, Dr. Kline stated:

> "...So, the first guideline that I would establish would be a careful psychological, or in general terms, a mental assessment of the individual with whom hypnosis is going to be utilized. And that clinical assessment should be comprehensive enough to give you an idea of the emotional stability, of the possibility of any psychopathology, the instances of delayed recall, or the instances in which there are instances of periods of amnesia, instances in which there are some disassociation in terms of everyday functions..."
> (R. 13687-13688)

> "Another guideline..., unless there are extenuating circumstances, the subject to be examined should be examined in a room only with the examiner, with video tape, and ideally, the video tape should be done through a one-way vision screen..."
> (R. 13689)

> "Third parties, unless they are for security reasons, if there are security problems, should be excluded from the room in which the hypnosis is going on." (R. 13689)

Another guideline stated by Dr. Kline:

> "All communication about the individual's memory that one wishes to ascertain or retrieve should be communicated to the investigator in writing, never verbally on the part of the subject. The investigator should himself, or herself, involve in a direct verbal examination or integrate her examination of the subject on a verbal basis prior to the induction of hypnosis."
>
> "Everything he or she needs to know should be provided in written form, every aspect of that individual that is available shoudl be transmitted and should be carefully studied and prepared." (R. 13690-13691)

Dr. Kline had been furnished copies of investigative reports of Daugherty, dated July 28, and 31, 1978, pertaining to the witness, C. L. Anderson, as well as the transcript of the Dekle-Anderson interview of July 28, 1978, He was also furnished with a transcript and tape of the hypnotic session between Anderson and Keene on July 28, 1978; a transcript and tape of the hypnotic session between Anderson and Burnette on July 31, 1978; a copy of C. L. Anderson's deposition taken on August 27, 1979; copies of articles appearing in the Lake City Reporter on February 13, June 28, July 24, and July 28, 1978; and copies of the depositions of Keene and Burnette (R. 13695).

After having studied these materials, Dr. Kline was asked to express his opinion as to whether Anderson would have been a proper subject for attempted forensic hypnosis on July 28, 1978. His response was:

> "In my opinion, no." (R. 13697)

In response to the question, "And why not, sir?" (R. 13697), Dr, Kline stated:

> "I review this as a contaminated examinational situation, in that too long a period of time has

> elapsed - during which he has been exposed to material in the media, he's been exposed to comments from friends and associates, fellow citizens, in a community that would obviously be concerned about a crime of such violence, particularly with a youngster - this is the kind of crime which has a high rate of publicity, which it should have, in a community that is concerned, and he would have had material presented to him which he may have registered, and - or may not have - there's no way of knowing this, but my opinion is that he was already so bombarded by the media's contrusion in terms of his ideas, associations and particularly, his feelings, - that the induction of hypnosis would complicate rather than clarify this situation. Unless there were extraordinary circumstances, which I do not find, from my opinion, present in this instance, I would preclude the use of hypnosis as a viable and projective tool in the examination of this particular witness." (R. 13697-13698) (Emphasis supplied)

Dr. Kline's opinion of both the Keene and Burnette hypnotic interviews was:

> "...I would say that there is clear evidence of there being confabulated material that in all probability would be mixed into his responses. But because of the manner these proceedings were undertaken, it's impossible to know where and how, but rather that the whole thing has no reliability - and there's no one aspect that one could accept as, again, reliability, contextual consistency, because of this confusion and confabulation, and contamination." (R. 13725-13726)

> "...Frequently, material that has been blurred or acquired or imputed at some point, prior to the hypnotic experience, may be recalled out of position, may be recalled as something observed, as something read - in other words, he has no ability to really discriminate or differentiate as to the source of the material in one's head. That's the problem with this kind of contamination. It will come out, and the subject is unable to discriminate and know from what source that material came." (R. 13726-13727)

As an example of why Dr. Kline doubted the reliability of Anderson's identification, the fact that in none of Anderson's reports to Daugherty, Dekle

Keene, Burnette, nor at his depositions, did Anderson recall seeing the Leach girl's rather distinctive coat. A number of witnesses, including her mother, testified that she was wearing a three-quarter length car coat, tan colored, with a fur collar and fur trim around the front and sleeves, on the day she disappeared. Tandy Bonner, who testified at the suppression hearing and who was the last person to see the Leach girl before she disappeared, said she was, in fact, wearing the coat moments before Anderson said he "witnessed" her abduction. (R. 13877-13878)

Dr. Kline was asked if, in his opinion, there was any reason Anderson selectively perceived things, if he was reliving and seeing that scene and reviewing the events (R. 13728).

Dr. Kline responded:

> "The answer to that is Yes - but one would have to know the reasons for the selectiveness or the intention. If he is recalling a scene, and can't identify an article of clothing, which in fact is known to have been worn at that time, that then would mean one of several things; one he did not see that scene. Or that he saw that scene and there was selective inattention to that fact. Why there would be selectiveness as to that fact, and nothing else, in itself only poses another problem. The most likely interpretation to that would be that he was describing another scene, and another situation. If something as basic as outer garments seen is now being retrieved from the memory. One thing about memory retrieval is that it comes through in details, not in fragments. If comes through or it doesn't come through. If we are getting confabulated responses, then we will be getting gaps in details in terms of independent things, which will have to be filled in, so that -- I add this, because it is important, in relation to hypnosis - individuals who fill in what they remember, and use their imagination to do that, may draw on facts that they have incorporated from non observed sources. They are not lying - they really believe this as they are perceiving it, but it is a confabulated memory creation. It is not retrieval. Retrieval has distinct characteristics and spontaneity. If this was omitted, this would imply most likely, that this was not a retrieval process that we are observing, but a confabulatory process, part of which has actual

> elements, actualized from on the spot experience, part of which is taken from an unassociated source - in other words, it is like source amnesia - when somebody can not remember something, when he draws upon what he does remember, it will fit the general characteristics and inspurse (sic) it and you get the memory. It is not accurate, but a person feels it is. There is not a question of the deception on the part of the witness, but there is a very real question as to the accuracy. One could not say it was real." (R. 13728-13730)

The bottom line of Dr. Kline's testimony was that C. L. Anderson's testimony was unreliable. (R. 13743)

In addition to the testimony of Drs. Kline and Kuypers, the defense also provided the trial court with their written critiques of the Keene and Burnette hypnotic interviews filed with the court, as an exhibit to said Motion, the affidavit of Martin T. Orne, Ph. D., filed with the United States Supreme Court in the case of **Quaglino v. California**, 58 L.ed. 2d, 189 (1978); rehearing denied 58 L.ed 2d, 670, and the opinion rendered by the Honorable Ted E. Wedemeyer, Jr., in the case of **Wisconsin v. Joseph R. White**, (unreported) March 27, 1979, Circuit Court, Branch 10, Case No. J-3665, Milwaukee County, Wisconsin.

The State offered no scientific evidence in rebuttal at the Suppression Hearing. The trial court entered its order denying the Motion without prejudice to raise the issue again at the time of trial (R. 13387).

On January 22, 1980, Bundy filed his Second Suppression Motion to Suppress Testimony of Certain Witnesses whose recollection had been affected and altered by hypnosis (R. 14732). The purpose of this Motion was to bring to the Court's attention a resolution adopted in August, 1979, by the International Society of Hypnosis condemning the use or attempted use of forensic hypnosis by police officers and other lay people (R. 14724). The Second Motion to Suppress Testimony of Certain Witnesses called whose testimony

was affected and altered by hypnosis; together with the Resolution of the National Society of Hypnosis, was denied by the trial court immediately preceding the trial testimony of C. L. Anderson (R. 4055).

2. Fibers and Shoe Tracks

Analyst Mary Lynn Henson qualified, over defense objection, as an expert in fiber and shoe track analysis (R. 5460). She had examined various objects, articles of clothing, shoes, shoe tracks, and fibers in connection with the Leach case (R. 5460). Her examinations fell into two groups: those involving the comparison of various latent shoe tracks with several shoes (R. 5461-5468); and those comparing similar fibers collected from various items of clothing and a carpet (R. 5468-5500).

The shoe track analysis, as described by Ms. Henson, involved determing whether or not a particular type of shoe made a specific track (R. 5461). She testified that a piece of Saran wrap is placed over a photograph of a shoe track, the detail is traced onto the plastic, and then the plastic is placed over the sole of the shoes (R. 5461). A comparison is made between the plastic overlay and the shoe, and then a determination is made as to whether or not that particular shoe could have made a specific track (R. 5462).

Henson stated no scientific points of comparison other than those readily apparent to the casual, untrained observer: the size, shape, and tread design of the shoe (R. 5462).

Henson also testified as to certain fiber examinations and comparisons she made in the Leach case (R. 5468-5500). She collected literally thousands of fibers from the clothing of Leach, the carpet of the van, and the clothing of Bundy (R. 5468-5500). Henson stated that the fiber analysis was in two stages: 1) a particular fiber would be identified through observation of size,

shape, texture, luster and cross section; and 2) the fiber would be compared to those known fibers from the clothing of Leach and Bundy and the van carpet to determine the source (R. 5468, 5487-5490). Out of the thousands of fibers collected, she searched for and found: four fibers like the known fibers from the carpet; two fibers like the known fibers from Leach's pants or purse; three other fibers like the known fibers from the purse; one fiber like the known fibers from Leach's socks; one fiber like the known fibers from Leach's coat collar; one strand of fibers like the known fibers from Leach's jersey; one fiber like the known fibers from Leach's pullover shirt; two fibers like the known fibers from Bundy's sports coat; and one fiber like the known fiber from Bundy's shirt (R. 5487-5495). She compared the source of each fiber with the object on which the fiber was located to determine if a "cross-transference" had taken place (R. 5494).

Based upon her "observations", without ever using a verifiable scientitic procedure of analysis, she concluded that it was extremely probable that Leach's clothing had come into contact with the carpet of the van at some time, that Bundy's clothing very probably had come into contact with the carpet of the van, and that the clothing of each probably had come into contact with each other (R. 5499).

Henson stated on cross-examination that she did not look for any fibers other than those that could have come from Leach's clothes, Bundy's clothes, or the van carpet (R. 5543). She stated that she could not tell if a specific fiber came from a particular garment (R. 5540). Henson had no idea how many potential sources existed for those few fibers she identified (R. 5541-5542). She immediately dismissed, and for some reason ignored, any fiber that could not have come from Leach or Bundy's clothing or from the van carpet (R. 5544-5545). She did not consider the other fibers when determining

who or what else might have come into contact with the three sources (R. 5545). She stated that it was possible that the three sources never came into contact with each other, although her opinion, unsupported by any scientific data, was that it was unlikely (R. 5553).

3. Change of Venue or in the Alternative, Abatement of Prosecution

Bundy's trial was scheduled to commence on November 5, 1979, in Columbia County, Florida. On September 17, 1979, the defense filed its first Motion for Change of Venue (R. 14522), citing the massive and pervasive publicity that Bundy had received had precluded any opportunity for him to receive his constitutional right to a fair trial. A supplemental motion was filed on October 4, 1979 (R. 13116). Hearing on the motion was held in Columbia County, on October 22, 1979 (R. 11020-11335). The court reserved ruling pending voir dire of prospective jurors and, because the Indictment against Bundy alleged that the crime of murder was committed in either Columbia or Suwannee County (R. 14023), gave Bundy the opportunity to elect venue in either county, pursuant to **§910.03, Florida Statutes** (R. 14638).

Bundy filed his notice of election on October 26, 1979 (R. 14639). In the notice the defense specifically stated that the election of venue in Suwannee County was not acquiescence that a fair trial could be obtained there, but was merely compliance with a statutory requirement.

On November 6, 1979, an attempt to pick a jury in Suwannee County was commenced (R. 11346). The defense also filed another Motion for Change of Venue or in the Alternative to Abate Prosecution (R. 14654). After three days and after examining only twenty-seven prospective jurors, the court granted the Motion for Change of Venue, but denied that portion of the motion praying for Abatement of Prosecution (R. 14687).

The court found that:

> "...because of the pervasiveness and situation of the press and media coverage, not only of this case, but also of the Defendant's recent murder trial in Miami, Florida, which was, for a large part, prosecuted concurrently with this case...",

along with other factors, it would be "highly improbable, if not impossible" to empanel a jury in Suwannee County, Florida (R. 14688).

The court ordered the case transferred to the Ninth Judicial Circuit, Orange County, Orlando, Florida, and trial to commence there on January 7, 1980 (R. 14688).

4. Limitation of Death Qualification of the Jury

In anticipation of the prosecution's attempt to "Death Qualify" the jury, the defense, on November 6, 1979, filed a Motion to Limit Death Qualification of Jury (R. 14658). The defense urged that the court should prohibit any questioning of trial jurors (as distinguished from advisory sentence jurors) regarding their attitudes toward the death penalty. (Emphasis supplied) (R. 14658) As an alternative, the defense moved the court not to eliminate or disqualify potential jurors for cause because of their views on capital punishment if those views would not preclude them from finding the defendant guilty of a capital crime (R. 14658).

The motion was denied and substantial inquiry about the death penalty was allowed during voir dire commencing on November 6, 1979.

F. TRIAL

1. Motion for Change of Venue or in the Alternative to Abate Prosecution.

On January 9, 1980, the defense again filed a Motion to Change Venue

or in the Alternative Abate the Prosecution (R. 13470). A hearing was held on the Motion on January 10, 1980 (R. 1159-1269). The defense again documented for the court, through exhibits and testimony, that the Orange County area had been permeated with as much, of not more, pervasive media notoriety about Bundy, as had been demonstrated to be present in the Columbia-Suwannee County area.

Professor Kyle Phillip Taylor of the University of Central Florida testified at the hearing (R. 1220). Professor Taylor was a Professor of Communications and qualified as an expert in the field of public opinion polling.

Professor Taylor had been commissioned by the defense to conduct a poll concerning the Orange County voters' knowledge and attitudes about Bundy and the Kimberly Leach case (R. 1224). Of the three hundred and thirty-one persons contacted in the poll, three hundred and twenty-five, or ninety-eight percent, indicated that they knew the name of Ted Bundy (R. 1237).

The court reserved ruling on the Motion pending further attempts to seat a jury (R. 1269).

The court never entered a specific order denying the Motion. However, implicit in the court's swearing in of a jury and proceeding to trial is the denial of that motion.

2. Voir Dire

Voir Dire examination of over one hundred and eighty prospective jurors, which took over eleven days, resulted in a jury being seated in Orange County. Virtually every venire person examined expressed knowledge of Bundy and the facts of this case or the Chi Omega case in some greater or lesser degree.

Each venire person was individually voir dired. Prior to Counsel's examination, the Court admonished each juror to set aside any prior opinions and/or preconceived notions and judge the case solely on the evidence presented.

The court asked each if they could do that and each of the twelve jurors and three alternates selected said they could (R. 765).

Even though the defense was given back three peremptory challenges it had previously used, the defense was forced to use all of its twenty peremptory challenges on jurors it contended should have been removed for cause.

The defense requested and was denied additional peremptory challenges (R. 3258).

The standard applied by the court was that if a juror would say he or she could put preconceived notions and opinions aside and judge the case solely on the evidence, they were not challengeable for cause.

In addition, five potential jurors who expressed an opposition to the imposition of the death penalty were excluded, even though they stated that they could impartially determine guilt or innocence. (See: Sutton, R. 658; Neel, R. 1329; Strong, R. 2095; Speir, R. 2465; and Hinkle, R. 3016)

All five venire persons, Sutton, Neel, Strong, Speir and Hinkle, were excused by the trial judge because they said they would not vote for the death penalty. (Sutton, R. 666; Neel, R. 1330; Strong, R. 2095; Speir, R. 2474; and Hinkle, R. 3022) Defense counsel objected in timely fashion to the exclusion of each of these persons, with the exception of Neel. (Sutton, R. 666; Strong, R. 2096; Speir, R. 2474; and Hinkle, R. 3022) Counsel's failure to object to the removal of Neel should not be interpreted as a waiver in light of counsel's continued objections to the removal of subsequent venire persons for the same identical reason.

There were no jurors on Bundy's jury who expressed opposition to or any reservations toward the death penalty in general, or its possible imposition in the present case.

3. Flight

During the course of the trial, over defense objections, the state was allowed to present evidence of alleged flight by the defendant. The court allowed two police officers, Officer David Gordon Lee of Pensacola (R. 5150-5192), and Deputy George Keith Daws of Leon County (R. 4642), to testify that the defendant, on separate occasions attempted to elude capture by fleeing.

The defense had filed a motion to exclude this testimony entitled, "Motion in Limine to Exclude Testimony of Flight", in open court on January 22, 1980 (R. 14920). The court reserved ruling upon the motion until the testimony was offered. The defense renewed the motion prior to the testimony of each of the two law enforcement officers (R. 4590-4639 & 5124-5129).

Upon conclusion of the trial, the trial judge, over defense objection (R. 6741), instructed the jury concerning the evidence of flight:

> "You are instructed that flight of the defendant is a circumstance which may be taken into consideration with all other facts and circumstances in evidence, and if you, the jury, believe and find from the evidence beyond every reasonable doubt that the defendant fled for the purpose of avoiding arrest and trial under the charges herein, you may take this fact into consideration in determining the guilt or innocence." (R. 6939)

4. View

On January 29, 1980, the defense filed its Motion for View in open court (R. 14787). The defense had contended, in the hypnosis arguments and through the testimony of its experts that while the witness, C. L. Anderson, may have seen "something" at "sometime", his factual account of "what" he saw was totally unreliable.

Since the court declined to suppress Anderson's testimony, it placed the

burden upon the defense to negate the incriminating import of his testimony. It was the contention of the defense that the only way the jury could fully appreciate the argument that what Anderson "saw" was not the abduction of the Leach girl by Bundy, was for the jury to actually visit the site to see the spatial relationship and distances between the homeroom class building, the auditorium, the place where he first saw the man and girl, where he said the van was parked, and his own vantage point (R. 5590).

The court denied the motion, finding there were other adequate means of demonstrating the distances and spatial relationships (R. 14808).

The only way the defense could "adequately" demonstrate the distances and spatial relationships was to send its investigator, Donald Robert Kennedy, to the Lake City Junior High School to photograph and measure distances.

The slides and photographs taken by Kennedy were introduced into evidence as Defense Exhibits 27 and 28, respectively (R. 6435 & 6455). Kennedy also prepared a plastic overlay which corresponded to the aerial photograph previously introduced into evidence as State Exhibit 2 (R. 6428). The plastic overlay became Defense Exhibit 26 (R. 6430).

Anderson had previously marked the aerial photograph, identifying three locations:

"A" - as the place where he had to stop (R. 4066)

"B" - as the place where the white van was located (R. 4066).

"C" - as the place where he first observed the man and girl (R. 4067).

Kennedy testified that the distance from point "C" to the steps of the auditorium (where the Leach girl would have been going after she retrieved her purse and left the Central Building), was two hundred and sixty feet(R. 6431);

that the distance between "B" and "C" was forty feet (R. 6432); that the distance between where the Leach girl would have exited the Central Building where Bishop's class was located, to where she would have entered the auditorium, was two hundred and forty-seven feet (R. 6432); and the distance from the corner of a portable building which the Leach girl would have had to walk around on her way back to the auditorium, to the point where she would enter the auditorium, was seventy-seven feet (R. 6434).

Kennedy testified, and as depicted in the photographs, that from location "B" (the van), the Central Building could not be seen nor could the east entrance steps to the auditorium be seen (R. 6438), but the corner of the portable building could be seen (R. 6439).

Kennedy also testified that in February, 1978, between the hours of 7:45 a.m. until 10:00 a.m., the traffic on Duval Street (U. S. Highway 90) in front of the Lake City Junior High School would have been very heavy. (R. 6445)

G. POST TRIAL

1. Penalty Phase

The defense submitted a Motion to Enter Life Sentence on Verdict and to Prohibit Penalty Phase of Trial to the court on February 9, 1980 (R. 14840-14842). The Motion alleged that Bundy was forced to risk a death sentence to exercise his right to a jury trial. The court, after lengthy debate by defense and prosecution, denied the motion (RP. 13)

The defense moved for a statement of particulars regarding aggravating circumstances and a proposed state witness list (RP. 7). Both motions were denied (RP. 13). Thereafter followed a motion to poll the jury to inquire about intervening influences upon them (RP. 13). That motion was denied (RP. 15).

The state began its presentation of aggravating factors to the jury with the testimony of Jerry Thompson (RP. 20-25). Thompson was a law enforcement officer from Utah, there to testify about Bundy's Utah conviction for kidnapping (RP. 21). The state introduced, over defense objection, copies of the Judgment and Sentence from Utah (RP. 24). The state then called Mike Fisher, a law enforcement officer from Colorado, there to testify about the alleged escape by Bundy from Colorado authorities while awaiting trial on criminal charges (RP. 25-33). Fisher was allowed, over defense objection, to testify that Bundy had escaped from a Colorado jail (RP. 28-32). The state last called Larry Simpson, an Assistant State Attorney in Leon County, Second Judicial Circuit, Florida (RP. 34). Simpson testified, over defense objection, to the prosecution of Bundy for crimes committed in Tallahassee, Florida, (RP. 37) and Bundy's conviction on those charges (RP. 38). The trial Judge denied a final defense motion for Judgment of Acquittal (RP. 45).

The defense presented only one witness in mitigation, Carole Ann Boone (RP. 46-66).

The defense submitted written jury instructions regarding the penalty phase of trial and moved that they be adopted (RP. 14837-14839). The Court considered each instruction, decided to modify and use numbers one (1), three (3) and ten (10), while denying the others (RP. 69-83). The trial judge specifically modified number ten (10) to read:

> "The physical changes of the body occurring after death cannot be considered by you in your determination of whether the state has proved beyond a reasonable doubt that the capital crime was especially heinous". (RP. 82)

The court then allowed, on defense motion, two final arguments to each side (RP 83-88). Final arguments on each side were presented to the jury (RP. 90-130), and the jury retired to deliberate (RP. 138). The jury returned

briefly for additional instruction, then returned to deliberate (RP. 139).

The jury returned again with an advisory sentence: Death (RP. 144). The jury was polled (RP. 144-147), and sentencing was set for February 12, 1980 (RP. 147).

2. Sentencing

Court reconvened on Tuesday, February 12, 1980, with all parties present, whereupon Bundy was adjudicated guilty of the kidnapping and murder of Kimberly Diane Leach (RP. 159). The defense again objected to the aggravating circumstances alleged by the state and the trial judge again denied those objections (RP. 160-172). The court then denied a defense motion to defer sentencing (RP. 172).

Immediately after a final statement to the court by Bundy, the trial judge read his sentence and his findings of aggravating and mitigating factors (RP. 186).

Bundy was sentenced to life imprisonment for the kidnapping, and to death for the murder, of Kimberly Diane Leach (RP. 194-195).

ARGUMENT

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

A. The pretrial identification procedures utilized by the State on the witness, C.L. Anderson, in his identification of the Leach girl, Bundy and the alleged "abduction" were inherently suggestive and a violation of due process.

At the time the defense was arguing its position on the unreliability of hypnotically induced memory, the weight of legal authority on the subject was as set forth in the State's brief in opposition thereof, i.e., that the fact that a witness had been hypnotized went to the weight or credibility of his testimony, rather than to its admissibility (R. 13198-13212).

It was the contention of the defense, however, that due to the lapse of time between the disappearance of the Leach girl and the revelation of Anderson almost six months later, the massive amount of information about the events that Anderson had ingested during that period of time, and the blatant misuse of hypnosis by Keene and Burnette, that a substantial likelihood of an irreparable in-court misidentification of Bundy by Anderson would occur.

The defense relied upon the case of **Neil v. Biggers,** 409 U.S. 188, 34 L.ed. 2d 401, 93 S.Ct. 375 (1972).

The **Neil v. Biggers** court outlined the factors to be considered by the trial court in determining:

> "...whether under the 'totality of the circumstances', identification was reliable even though the confrontation procedure was suggestive".
>
> "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification

> include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation".
> **Neil v. Biggers**, supra, at 198-199.

The entire scenario, as described by Anderson, leaves little doubt that he had the opportunity to see the abduction of the Leach girl. The state did not introduce one shred of evidence to corroborate Anderson's identifications.

Anderson's recollection of the time he claimed he saw the "abduction" was fraught with vacillation and indecision. From the time he first reported his revelation to Dekle, until he testified at the suppression hearing, he gave varying estimations of what time of day he saw the "abduction". His first answer before the court on the subject was:

> "...Well, that's as close as I can get to it, around 8:30, but it could have been easily 9 o'clock, but I think, it was around 8:20, 8:45, somewhere around that, but it could have been later, easily." (R. 14017)

His original recollection of when it happened:

> "MR. DEKLE: When was it that you saw this man put this girl into the white van?
>
> MR. ANDERSON: I can't remember the exact date.
>
> MR. DEKLE: Just approximately?
>
> MR. ANDERSON: Four months ago around April, ah--"
>
> (Defense Trial Exhibit 24, page 2)

The records of the Lake City Fire Department reflect that Anderson worked on February 9, 1978, starting at 8:00 a.m.

Subsequent to his initial report to Dekle, Anderson was told that the day the Leach girl disappeared was on February 9, (R. 13980), and then

reports it as a "date remembered" during the Burnette hypnotic episode (*Defense Trial Exhibit 25, page II*).

The fact that it took Anderson almost six months to "realize" what he thought he saw casts grave doubt that he actually saw any "abduction". During this time he was exposed to tremendous media attention about the Leach girl, her disappearance, Bundy and their "suspected connection" (R. I3990-I3993). His neice looks just like the Leach girl (R. I3986), and he had seen pictures of the Leach girl in the papers and on T.V. (R. I3990)

The fact that his description of the girl and the man he saw vary dramatically from his initial accounting to Dekle and his report to Burnette, as well as the glaring omissions of what he did not see, i.e., the Leach girl's coat, which she was wearing when last seen, and Bundy's facial hair, casts doubt that he was actually recalling anything under hypnosis.

The fact that Anderson went from a man who had a lot of doubt and did not want to send police on a wild goose chase, to an eyewitness who could positively identify the Leach girl as the girl being led from the Lake City Junior High School into a white van by a "man who looks a hell of a lot like Bundy", also casts grave doubt upon the reliability of his identification. Compound these facts with two totally inappropriate hypnotic episodes, and not only was the identification procedure overly suggestive, but in addition, there was an absolute contamination of the witness, C. L. Anderson.

Under the "totality of the circumstances" doctrine announced in **Neil v. Biggers**, supra, Anderson's in-court identifications of the Leach girl, Bundy, and the events should have been suppressed as totally unreliable and a violation of due process as guaranteed by the Fifth Amendment to the **United States Constitution** and Article I, Section 9, **Florida Constitution.**

B. Anderson's testimony should have been suppressed on the basis that hypnosis contaminated his testimony and made his testimony totally unreliable.

The defense contends that the state's evidence against Bundy, without the testimony of Anderson, would have been a series of meaningless incidents. The fibers, the Parmenter and Farhat encounters, Bundy's being at the Lake City Holiday Inn on February 8, 1978, would have had little impact without the critical eyewitness who "actually saw" the Leach girl, Bundy and a white van together. It was Anderson's testimony that brought these incidents together and shrouded them with an inference of guilt.

Some six months after the "abduction, and a week after Bundy's Indictment, Anderson sees Bundy's profile (where have we heard that before?) on television. This triggers a "recollection" that he "may have seen this guy before". He reports that he had some nagging doubts that "he may have seen something". Had he been left alone to ponder on his independant recollection, the defense would have only had to contend with, and could only have attacked, the credibility of his testimony.

However, the state, in their zeal to enhance the recollection of this vague, doubtful and unsure, but necessarily vital potential eyewitness, sought, without benefit of any scientific expertise or advice, to have him hypnotized.

Rather than proceeding with caution in this area of possible contamination of a possible eyewitness, the state immediately employed the services of two social workers whose expertise and experience in the use of therapeutic hypnosis was limited, at best, and whose expertise and experience in the use of forensic hypnosis was non-existent.

As stated earlier, at the time of the suppression hearing, the greater weight of legal authority was that the hypnotizing of a witness went to the

credibility of the witness and not to the admissibility of his testimony. Although the defense presented uncontroverted scientific testimony that:

a) Due to the lapse of time from when the event occurred and the time Anderson was hypnotized, and because of the information received by him during the intervening time, Anderson should never have been hypnotized in the first place; and

b) The hypnotic procedures employed by Keene and Burnette were so inappropriate and violative of the accepted protocols for utilizing forensic hypnosis that they created a high risk of confabulation; and

c) That Anderson's testimony was unreliable;

the court ruled based upon the greater weight of the existing legal authority.

the only legal authority relied upon by the defense was Judge Wedemeyer's opinion in **Wisconsin v. White,** supra.

Since that time a number of jurisdictions have taken a more enlightened look at the use and misuse of hypnosis in the forensic setting. Undersigned counsel will not attempt, in this brief, to quote the scientific literature and expert testimony relied upon by courts in this new trend of judicial attitude toward hypnosis. The decisions to be hereinafter discussed and relied upon by the defense contain lengthy quotes from the scientific literature, and any restatement herein would be duplicitious and time consuming. Suffice it to say, the scientific literature and expert testimony relied upon in these decisions handed down since the suppression hearing in the instant case are consistent with the unchallenged expert testimony and opinions of Drs. Kuypers and Kline given at the suppression hearing, and the affidavit of Martin T. Orne, Ph. D., and the opinion of Judge Wedemeyer in **Wisconsin v. White**, supra.

In **State v. Mack**, 294 N.W. 2d 764, the Minnesota Supreme Court addressed the issue as one of first impression. The record before the **Mack** court contained the opinions of no less than five experts in hypnosis and memory retrieval, including Dr. Martin T. Orne. The **Mack** court relied heavily on the affidavit of Dr. Orne, which was attached to the suppression motion filed by defense in the instant case. The question certified to the **Mack** court at 767 was:

> "...whether a previously hypnotized witness may testify in a criminal proceeding concerning the subject matter addressed at the pretrial hypnotic interview".

The **Mack** court, based upon the scientific data presented, elected to view the issue as now going to the admissibility of the witnesses' testimony and not to its credibility.

The court adopted the proposition advanced by the defense that the doubtful reliability of hypnosis prompted recollection raised an admissibility question which should be governed by the standards announced in **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923):

> "Under the **Frye** rule, the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate. Although hypnotically adduced 'memory' is not strictly analogous to the results of mechanical testing, we are persuaded that the **Frye** rule is equally applicable in this context, where the best expert testimony indicates that no expert can determine whether memory retrieved by hypnosis, or any part of that memory, is truth, falsehood or confabulation, a filling of gaps with fantasy. Such results are not scientifically reliable as accurate." **Mack**, at 768.

Although the **Mack** court echoed the fears of Dr. Orne that:

> "...a case-by-case decision on the admissibility question would be prohibitively expensive, and reveals the difficulty of getting experts qualified to testify about

> hypnosis as an investigative rather than a therapeutic tool.",

the court, in the opinion of undersigned counsel, stopped short of adopting an "inadmissible, per se," rule. The rule adopted by the **Mack** court was:

> "...a witness whose memory has been 'revived' under hypnosis ordinarily must not be permitted to testify in a criminal proceeding to matters which he or she 'remembered' under hypnosis." (emphasis supplied) **Mack**, at 771.

In early 1981, the Arizona Supreme Court handed down its decision in **State v. Mena**, 128 Ariz. 226, 624 P.2d, 1247 (1981).

In **Mena**, the court acknowledged, as the defense was compelled to do in this case, that:

> "Few reported cases have addressed the issue of admissibility of testimony offered by witnesses who have undergone hypnosis in an attempt to increase their memories concerning events about which they may testify...most courts which have considered the question have concluded that prior hypnosis neither renders a witness incompetent nor renders a witness' testimony inadmissible." **Mena**, at 1277.

The court then went on to cite virtually every case cited by the state in its trial brief in opposition to the motion to suppress. In its brief, the state correctly recognized and cited **Harding v. State,** S. Md. App. 230, A.2d 302 (1968), as the earliest case deciding the precise question in issue here.

In addressing the rationale of **Harding**, the **Mena** court stated that the **Harding** court "handled the admissibility question cursorily, relying solely on the witness' declaration that she was testifying from her own recollection." **Mena**, at 1227.

The **Mena** court went on to say:

> "None of the early cases following Harding which approved the admission of testimony from previously hypnotized witnesses contain any analysis of the effects of hypnosis or even acknowledge its power to distort memory..." **Mena**, at 1278.

> "Accepting a witness' statement that he is testifying from his own recollection requires the assumption that the witness is capable of making a determination that what he perceives as his recollection actually came from his prior observations as opposed to impressions planted in his memory through hypnosis. Such an assumption is contrary to the opinion held by many authorities that a witness will recall memories fabricated under hypnosis as his own recollection and will be unable to distinguish his true memories from pseudomemories implanted during hypnosis."
> **Mena**, at 1278.

> "The faith which the above courts placed in the power of cross-examination also seems misplaced. One article claims that 'the subsequent opportunity for cross-examination at the trial is virtually ineffective as a means of assuring no false suggestions have been implanted'". **Mena**, at 1278 (Citing Spector and Foster, Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible? **38 Ohio St.** L.J. 567 (1977)

In adopting an inadmissible, per se, rule, the **Mena** court based its decision on two criteria: First, that:

> "The determination of guilt or innocence of an accused should not depend on the unknown consequences of a procedure concededly used for the purpose of changing in some way a witness' memory. Therefore, until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue change or distortions, delusion or fantasy, we feel that testimony of witnesses which has been tainted by hypnosis should be excluded in criminal cases." **Mena** at 1279.

This is a restatement of the **Frye** rule adopted in **Mack**, although the **Mena**court does not cite **Frye** by name.

The second criteria established in **Mena** was:

> "Until the general scientific reliability of hypnotism as an effective and accurate memory enhancer has been established and/or the barriers which it raises to cross-examination are somehow overcome, we think the confrontation clause of the Sixth Amendment of the United States Constitution requires an exception to A.R.S. Sec. 13-3989 for hypnotically tainted testimony."
> **Mena**, at 1280.

A.R.S. Sec. 13-3989 is Arizona's statute which governs the general admissibility

of eyewitness' testimony.

While the first criteria announced in **Mena** was inherent in the argument of the defense at the suppression hearing below, the second criteria was specifically argued to the court, but without success.

The Arizona Supreme Court again addressed the issue in **State ex rel., Collins v. Superior Court and Silva**, 132 Ariz. 180, 644 P.2d (1982). In its original opinion, the **Collins** court reaffirmed its decision in **Mena**. A motion for rehearing was granted and there was a replacement of a Justice on the original court.

In a supplemental opinion, filed on May 4, 1982, the newly composed Court modified its original "inadmissible per se" rule and added the exception that "hypnosis does not render a witness incompetent to testify to those facts demonstrably recalled prior to hypnosis." **Collins**, at 1295.

The **Collins** opinion contains most of the relevent excerpts from the scientific community on the subject.

The Justice who authored the original opinion in **Collins** also wrote a very cogent opinion concurring in part and dissenting in part in the supplemental opinion. In his opinion, Vice Justice Gordon expresses great fear in allowing a hypnotized witness to testify as to his recall prior to hypnosis.

In **State v. Hurd**, 86 N.J. 525, 432 A.2d 86 (1981), the Supreme Court of New Jersey viewed the question in a different light. The Court rejected the rigid **Frye** rule adopted in **Mack** and **Mena**. It found that "the purpose of using hypnosis is not to obtain the truth, as a polygraph or 'truth serum' is supposed to do". **Hurd**, at 92. Instead, it found that hypnosis can legitimately be employed as a means of overcoming amnesia and restoring the memory of a witness.

> "In light of this purpose, hypnosis can be considered reasonably reliable if it is able to yield recollections

> as accurate as those of an ordinary witness, which likewise are often historically inaccurate. Based on the evidence submitted at trial, we are satisfied that the use of hypnosis to refresh memory satisfies the **Frye** standard in certain instances. If it is conducted properly and used only in appropriate cases, hypnosis is generally accepted as a reasonably reliable method of restoring a person's memory. Consequently, hypnotically-induced testimony may be admissible if the proponent of the testimony can demonstrate that the use of hypnosis in the particular case was a reasonably reliable means of restoring memory comparable to normal recall in its accuracy." **Hurd**, at 92.

Having determined that the use of hypnosis to aid a witness met the **Frye** rule in certain instances, the **Hurd** court went on to quote elaborately from the testimony of Dr. Orne, one of **Hurd**'s defense experts. Orne's testimony in **Hurd**, and his procedural guidelines which the **Hurd** court adopted, were consistent with his affidavit submitted to the trial court below, and the testimony of Drs. Kuypers and Kline.

The **Hurd** court adopted the following rule:

> "Whenever a party in a criminal trial seeks to introduce a witness who has undergone hypnosis to refresh his memory, the party must inform his opponent of his intention and provide him with the recording of the session and other pertinent material. The trial court will then rule on the admissibility of the testimony either at a pretrial hearing or at a hearing out of the jury's presence. In reviewing the admissibility of hypnotically refreshed testimony, the trial court should evaluate both the kind of memory loss that hypnosis was used to restore and the specific technique employed, based on expert testimony presented by the parties. The object of this review is not to determine whether the proffered testimony is accurate, but instead whether the use of hypnosis and the procedure followed in the particular case was a reasonably reliable means of restoring the witness' memory."

The **Hurd** court then went on to elaborate how the trial court should implement this rule. First, the court should determine whether hypnosis should have been used on the witness in the first place, and once it is deter-

mined whether the witness was one who would yield normal recall with properly administered hypnosis, then determine whether the procedures followed were reasonably reliable. **Hurd**, at 95 and 96.

The **Hurd** court then went on to adopt the six procedural safeguards set forth in the Orne affidavit and mandated compliance with these safeguards by the proponent of testimony enhanced by hypnosis. It further casts the burden of proof on the proponent of such evidence to establish admissibility by clear and convincing proof.

The court justified where it was placing the burden by stating:

> "...We recognize that this standard places a heavy burden upon the use of hypnosis for criminal trial purposes. This burden is justified by the potential abuse of hypnosis, the genuine likelihood of suggestiveness and error, and the consequent risk of injustice. Hypnotically refreshed testimony must not be used where it is not reasonably likely to be accurate evidence. The burden of proof we adopt here will assure strict compliance with the procedural guidelines set forth in this opinion. It will also limit the admissibility of this kind of evidence to those cases where a party can convincingly demonstrate that hypnosis was a reasonably reliable means of reviving memory comparable in its accuracy to normal recall." **Hurd**, at 97.

The facts in **Commonwealth v. Nazarovitch**, 436 A.2d 170 (Pa. 1981) are similar to the case at bar in that they involve the hypnotically refreshed recollection of the purported witness to a crime as opposed to the victim. Three years to the date of the murder of a twelve year old girl, Pamela Wilfong walked into the Ambridge Police Station and told the Chief that she was having nightmares about the girl and that she might know something about the murder. Prior to that, Mrs. Wilfong was questioned several times about the murder, but provided no significant information. Wilfong was hypnotized on four separate occasions and on the basis of her hypnotically refreshed recollections, Nazarovitch and others were charged with the murder.

Nazarovitch made a pretrial motion to suppress Wilfong's testimony, which was granted.

The Appeal by the State to the Pennsylvania Supreme Court resulted in the affirmance of the trial court.

The **Nazarovitch** court opted to follow the rationale found in **Mack** and **Mena.**

> "...the **Hurd** court's rationale that hypnotically refreshed recollection might as well be admissible since ordinary eyewitness accounts are also vulnerable to error and inaccuracies does not do full justice to the fact that the traditional guarantees of trustworthiness as well as the jury's ability to view the demeanor of the witness are wholly ineffective to reveal distortions of memory induced by the hypnotic process... The probative worth of the hypnotically adduced evidence cannot overcome the serious and fundamental handicaps inherent therein."
> **Nazarovitch**, at 177.

The court went on to say:

> "While we do not want to establish a per se rule of inadmissibility at this time, we will not permit the introduction of hypnotically refreshed testimony until we are presented with more conclusive proof than has been offered to date of the reliability of hypnotically retrieved memory."
> **Nazarovitch**, at 178.

In **People v. Shirley**, 31 Cal. 2d 18, 641 P.2d 775 (1982), the California Supreme Court rejected the liberal application of the **Frye** rule, as applied in **Hurd**, supra, and opted to follow the **Mack**, supra, and **Nazarovitch** rationale:

> "After careful consideration, we decline to join in foregoing effort to develop a set of 'safeguards' sufficient to avoid the risks inherent in admitting hypnotically induced testimony. To begin with, we are not persuaded that the requirements adopted in **Hurd** and other cases will in fact forestall each of the dangers at which they are directed. Next, we observe that certain dangers of hypnosis are not even addressed by the **Hurd** requirements: virtually all of those rules are designed to prevent the hypnotist from exploiting the suggestibility of the

> subject; none will directly avoid the additional risks, recognized elsewhere in **Hurd**, that the subject (1) will lose his critical judgment and begin to credit 'memories' that were formerly viewed as unreliable (2) will confuse actual recall with confabulation and will be unable to distinguish between the two, and (3) will exhibit an unwarranted confidence in the validity of his ensuing recollection.
>
> Lastly, even if requirements could be devised that were adequate in theory, we have grave doubts that they could be administered in practice without injecting undue delay and confusion into the judicial process.
>
> ...we join instead a growing number of courts that have abandoned any pretense of devising workable 'safeguards' and have simply held that hypnotically induced testimony is so widely viewed as unreliable that it is inadmissible under the **Frye** test."
> **Shirley**, at 787.

In a footnote appearing in **Shirley**, at 786, the California Court makes note of two New York trial courts having adopted an even more elaborate set of safeguards than adopted in **Hurd**, supra. **People v. Lewis** (County Ct., 1980) 103 Misc. 2d 881, 427 N.Y.S. 2d 177; **People v. McDowell**, (County Ct., 1980 103 Misc. 2d 831, 427 N.Y.S. 2d 181. The **Shirley** court, supra, notes that these two cases were "derived from an unreported but widely cited ruling of a Wisconsin trial court in 1979". **Shirley**, at 786. That ruling was **Wisconsin v. White**, supra, cited to the trial court below.

The standard announced in **Frye** has been recognized in Florida. **Coppolino v. State**, 223 So.2d 68 (Fla. 2d DCA, 1968) citing **Kaminski 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 well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in this particular field in which it belongs." **Frye**, at 1014.

As we have seen, the contemporary and almost universal trend of authority is to exclude the testimony of witness' whose recall has been attempted to be enhanced by hypnosis. The dangers inherent in the use of hypnosis in the forensic setting are now being recognized by the courts which have faced the issue in the recent past.

The fact that hypnosis was used extensively in this case and on at least one "eyewitness" in the Chi Omega case and the fact that hypnosis is the current vogue amongst investigators in criminal cases throughout the State of Florida, gives rise to the opportunity for the court to make its position known on the subject. The cases relied upon by the State in its brief below are archaic in their insight and do not address the real problem. It is time for the State of Florida to get in step with the current trend of legal authority.

Under the **Frye** rule, Anderson should never have been allowed to testify. Even under the guidelines set forth in **Hurd**, supra, Anderson's testimony would have been excluded. As both Drs. Kuypers and Kline testified, he would not have passed muster on the threshold question of being a likely candidate for hypnosis. Too much time had elapsed between the event and the hypnotic episode. He had been exposed to too much information after the event to make it reasonably likely that his recall under hypnosis would be comparable in accuracy to normal human memory.

And finally, the inappropriate manner in which Keene and Burnette conducted the hypnotic episodes on Anderson created the very strong likelihood that his testimony at trial would be fraught with confabulation.

Bundy should be granted a new trial, exclusive of the testimony of C. L. Anderson, and any other witness who has been hypnotized.

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

A. The Witherspoon Rule must be considered in light of critical differences in sentencing procedures between Illinois and Florida.

The standard most frequently referred to for the exclusion of venire persons because of their views on the death penalty was developed by the United States Supreme Court in **Witherspoon v. Illinois**, 391 U.S. 510 (1968). The language often cited from **Witherspoon** spells out the following rule:

> "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakeably 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". **Witherspoon**, at 523 n. 21.

The trial judge in the present case relied upon this rule as it was adopted in **Witt v. State**, 342, So.2d, 497. (R. 288)

"We repeat, however, that nothing we say today bears upon the power of the State to execute a defendant sentenced to death by a jury .." **Witherspoon**, at 523, n. 21. (Emphasis supplied) The language from **Witherspoon** reveals a critical factor made explicit throughout the case, the implicit to its rationale: the jury in **Witherspoon** had the final power to sentence the

defendant, and did in fact, sentence him to death. Time and time again the court in **Witherspoon** refers to the jury's authority to sentence. See **Witherspoon** at 512, 518, 518 n. 12, 519, 519 n. 15, 520 n. 18, 521 n. 18, 523, 523 n. 21.

The jury's penalty determination in Illinois in 1960 was binding upon the trial judge, although the law was changed in 1967, to permit the trial judge to reject a jury determination of death. **Witherspoon**, at 518 n. 12. The law governing capital cases in Illinois today allows for a binding jury life verdict, unless the jury unanimously agrees on death. **Illinois Ann. Stats. §38-9-1 (1979)**

The death penalty sentencing statute in Florida differs significantly from the one that gave rise to **Witherspoon,** as well as the one in Illinois today. See **§921.141, Florida Statutes** (Supp. 1976-77). In finding Florida's current death penalty statute unconstitutional, the United States Supreme Court in **Proffitt v. Florida**, 428 U. S. 242 (1976) said:

> "The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty should be imposed." **Proffitt**, at 251. (Emphasis supplied)

Since the Florida capital jury in Bundy's case did not have the power to sentence him, as did the jury which sentenced **Witherspoon**, the first part of the **Witherspoon** rule, which allows for the exclusion of those venire persons who "would automatically vote against the imposition of capital punishment" should not have been invoked at Bundy's trial. The trial judge, however, did employ it and did excuse for cause the five aforementioned venire persons on that ground (See Statement of Facts, pp 29-31)

In so doing, the trial judge violated Bundy's Sixth and Fourteenth Amendment rights to a fair cross section of the community represented on the jury, as guaranteed by the **United States Constitution.**

B. Florida has no significant interest in excluding from capital juries venire persons who would not vote for the death penalty.

Before addressing the violation of Bundy's right to a representative jury, it is necessary to take up the question of state interest, as it relates to the exclusion of venire persons.

In a key fair-cross-section case, **Duren v. Missouri**, 439 U.S. 357 (1979), the United States Supreme Court held that a state must show:

> "...a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process...that result in the disproportionate exclusion of a distinctive group." **Duren**, at 367-368.

Thus, "the state bears the burden of justifying this infringement by showing attainment of a fair-cross-section to be incompatible with a significant state interest". **Duren**, at 368.

Reflecting the will of the people, the Florida Legislature passed into law a statute which made death an optional punishment for first degree murder. If a venire person's opposition to the death penalty would cause him or her to be unable to impartially determine guilt, then Appellant concedes, due to the requirement of a unanimous verdict of guilt, a single such juror could unreasonably nullify the will of the people of Florida, the Legislature, his or her fellow jurors, and the trial judge. Under these circumstances, the significant state interest at stake is clear and such a venire person would be properly excused for cause in accordance with **Witherspoon**, supra.

It is important to note at this point that Florida statute law does cover such situations involving the exclusion of persons in capital cases. **Florida Statute §913.13** states simply: "A person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by

death shall not be qualified as a juror in a capital case."

Of greater importance is what **§913.13, Florida Statute**, does not cover. It does not authorize Florida trial judges to exclude for cause a person whose beliefs would preclude him from voting for the death penalty.

Since Florida does not empower the jury in a capital case to sentence a defendant to life or death, it does not have a significant state interest in excusing for cause venire persons solely because they state they cannot vote for the death penalty under any circumstance. Such exclusions are not relevant to venire persons' abilities to impartially render a verdict of guilt, and they are not relevant to sentencing, since the ultimate sentencing in capital cases is the sole province of the trial judge. If venire persons who would not vote to impose the death penalty were actually allowed to sit on capital juries in Florida, assuming they indicated an ability to determine guilt or innocence, their presence would not nullify, prevent or otherwise frustrate Florida's significant interest in imposing death sentences.

C. Florida is the exception to national practice in capital jury sentencing.

Since the decision in **Furman v. Georgia**, 408 U.S. 349 (1972), thirty-seven states have adopted death penalty statutes. Thirty-two of those states have adopted "guided discretion" death penalty statutes allowing for jury participation in the penalty phase. (Note: New Jersey recently became the thirty-eighth state to adopt the death penalty. Defendant does not yet have any information on the sentencing procedure under the new statute) See Appendix A for list of all statutes.

Of the thirty-two states, only Florida, Indiana and Alabama permit judge imposed death sentences after jury decisions for life, and of these,

only Florida allows for an advisory death verdict upon a mere majority vote. In the remaining twenty-nine states, a jury's verdict for a life sentence is binding. In five states, the judge alone sentences. See Appendix A.

The twenty-nine states with jury participation in sentencing and binding jury life verdicts also require that a jury verdict for the death penalty be unanimous. Clearly, these twenty-nine states, unlike Florida, have a significant state interest, pursuant to **Duren**, supra, in excluding for cause venire persons who would not vote for the death penalty under any circumstance.

It is Bundy's contention that the Florida death sentencing procedure applied to him is in actuality most like the ones in Arizona, Idaho, Montana and Nebraska, where the penalty determination is made by the judge alone. In these four states, unlike Florida, a venire person is only voir dired concerning the death penalty in relation to how his or her feelings on that issue would affect the ability to determine guilt or innocence. **State v. Anderson,** 296 N.W. 2d, 440 (1980); **State v. Clark**, 616 P. 2d, 888 (1980); **State v. Creech**, 589 P. 2d, 114 (1979); **State v. Hallam**, 575 P. 2d, 55 (1978); and **State v. Ramirez**, 569 P. 2d, 201 (1977).

The precedent here, which is ignored in Florida, is that venire persons in these states are not excluded for cause solely because their feelings about the death penalty would cause them not to impose the death penalty in the event of a guilty verdict.

It is Bundy's position that the limited application of **Witherspoon** in the four judge-sentencing states also should have been the law during jury selection in his trial. Florida's departure from national practice in sentencing in capital cases only underscores the reason why the **Witherspoon** rule should not be applied in Florida as it is in the vast majority of states where

the jury actually sentences.

D. Defendant was denied a representative cross-section of the community on his capital jury.

The improper application of the **Witherspoon** rule in this case serves to highlight an even more fundamental error: The total exclusion of persons opposed to the death penalty in any way from his jury. As has been said, no one on Bundy's jury voiced any objection to the death penalty. It has been shown that five prospective jurors, who could have impartially determined guilt or innocence, were excused for cause by the trial judge because they said they would not have voted for an advisory death verdict. Furthermore, the state cannot carry the burden, as stated in **Duren**, supra, that a significant state interest was served by excluding those five persons.

In a leading United States Supreme Court case involving the right to a fair-cross-section, **Taylor v. Louisiana**, 419 U.S. 522 (1975), the court said:

> "We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced the requirement has solid foundation...Restricting jury service to only special groups or excluding identifiable segments playing minor roles in the community cannot be squared with the constitutional concept of jury trial...[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.' **Thiel v. Southern Pacific Co.**, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)".
> **Taylor**, at 530-531.

In establishing a fair-cross-section violation, it need not be proven that the exclusion of an identifiable group or segment resulted in actual harm. In **Ballard v. United States**, 329 U.S. 187 (1946), two important themes emerge.

First, it is impermissible to eliminate a significant prospective juror from the jury pool. Second, it is not necessary in challenging an exclusionary practice to show that those who are removed would act differently: Prejudice is inherent in the removal from the courtroom of an outlook, a point of view. In **Ballard**, supra, the court said, at 194:

> "To insulate the courtroom from either (men or women) may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

This view is reflected in another cross-section case, **Peters v. Kiff**, 407 U.S. 493 (1972), which noted that illegal jury selection procedures "create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well". **Peters**, at 502.

The line of cases represented by **Duren** supplies a framework within which to apply the constitution principles of **Taylor, Ballard, Peters**, and other cases. **Duren** qualifies the right to a fair-cross-section by first requiring that a defendant make out a "prima facie" showing of a fair-cross-section violation, and then by shifting the burden to the state to justify the infringement on the basis of a significant state interest.

Bundy submits that the constitutional principles embodied in the right to a fair-cross-section representation, summarized above, are relevant to the exclusion of persons opposed to the death penalty from death penalty cases in general and in his case in particular.

To begin with, Bundy believes that he has made a "prima facie" showing that persons opposed to the death penalty were disproportionately excluded from his jury.

Next, Bundy holds that there is no more identifiable or cognizable segment or class in the community when it comes to "playing a major role" in the debate over the death penalty than those opposed to it. For this reason, their presence on capital juries is indispensible to give such juries a "representative character". Just as in **Taylor** and **Ballard**, supra, where it came down to excluding one of the two sexes from juries: women; so it was in the present case that Bundy witnessed the exclusion from his jury of one of the two groups vital to the dialogue on capital punishment: those opposed to capital punishment.

When only those in favor of the death penalty are allowed to sit on death penalty cases, there is no way to avoid "the appearance of bias", and "the risk of actual bias" decreed in **Peters**, supra.

Bundy asks this Court to take judicial notice that while those who oppose capital punishment, admittedly, are in the minority, they are a substantial and often vocal minority, and that the nature of the entire death penalty issue in our society would be vastly different without this minority. Moreover, they are as substantial a minority as, say, Republicans, Methodists, Blacks, and unemployed workers; groups which are not excluded from service on juries in Florida. Polling data suggests that those opposed to the death penalty constitute between twenty and thirty percent of the population.

For the purpose of a fair-cross-section analysis of a death penalty case jury, those opposed to that penalty are a preeminently cognizable class.

Certainly, Bundy recognizes that there are limitations on the degree to which capital juries in Florida can, in the words of **Taylor**, "reflect the various distinctive groups in the population". **Taylor**, at 538. However, when it comes to capital cases, those opposed to the death penalty are not an

insignificant albeit distinctive group and care should be taken to insure their presence on capital juries "as a hedge against the overzealous or mistaken prosecutor...", **Taylor**, at 530.

Defendant also realizes that significant state interests can legitimately, in the words of **Duren**, "result in the disproportionate exclusion of a distinctive group". **Duren**, at 368. However, in the instant case, because:

> 1) The jury didn't have the power to sentence Appellant;
>
> 2) Persons opposed to the death penalty were erroneously excluded for cause because whether or not such persons voted for or against the death penalty bore no significant impact upon the penalty ultimately imposed by the court;
>
> 3) There was, therefore, no significant state interest supporting said exclusions; and
>
> 4) No one opposed to the death penalty sat on Bundy's jury.

Bundy's Sixth and Fourteenth Amendment rights as guaranteed under the **United States Constitution** to a fair-cross-section representation on his jury was violated.

Accordingly, the conviction should be reversed because it was produced by an unconstitutionally selected jury, and a new trial granted with instructions to prohibit or at least limit death qualification of the jury.

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

The civil rights and Liberties guaranteed by the State and Federal Constitutions are not discretionary. Bundy was due a fair trial before an impartial jury, as delineated by Article I, Section 16, **Constitution of the State of Florida**, and the Sixth and Fourteenth Amendments to the **United States Constitution.** Bundy was guaranteed a right to due process by Article 1, Section 9, **Constitution of the State of Florida**, and the Fifth and Fourteenth Amendments to the **United States Constitution.** The language of these sections is clear and unequivocal. Therefore, the court had no power to demote these rights from "absolute" to "variable" in their application. It was error to avoid any possibility in which the constitutional rights guaranteed could be secured intact, which the court did by denying the defense motion.

In all fairness, the court was faced with a collision between the First Amendment and Fifth and Sixth Amendments of the **United States Constitution.** When this conflict develops, the court must decide which right must give way to the other. On one hand, the right of the press to investigate and publish information without restraint is sacred to our sense of ordered liberties; on the other hand, the right of the individual to have a fair and impartial trial is the greatest restraint on government oppression of the individual. When the right of the press to publish information so drastically alters the right of an individual to have a fair trial, the court must decide to harm one party in order to protect the other. The court may initially subjugate the First Amendment right of the press to the individual's Sixth Amendment right to a fair and impartial jury, but any restraint on the press

will be strictly scrutinized and most likely will be declared unconstitutional.

The court need only consider what harm each group would suffer. If the court restrained the press, thus technically violating the First Amendment, the press and public (possibly a vast number of people) lose a quantity of information that may interest them. If the court lets the press run rampant, the resulting negative prejudicial impact removes any possibility that an accused can obtain a fair trial before an impartial jury. The resulting loss to the accused is much more serious; he loses his fortune, his freedom, or his life. When, in capital cases particularly, the choice is an impairment of the right of the press or the unfair taking of a defendant's life, the choice should be very clear; the press must be restrained in some way, directly or indirectly.

The most burdensome way to obtain the desired result in the instant case was to restrict the press directly, to prohibit them from publishing any information about Bundy at all, or until a later date. This choice is too restrictive and would not stand upon review. A less burdensome manner to achieve the desired result was to grant the Motion to Change Venue or Abate the Prosecution (R. 13470-13479). A change of venue would have removed Bundy from the physical site of the most pervasive publicity, while an abatement of prosecution would have removed the urgency of the press to publish the information. It is unlikely that the press could have kept up the rate and quantity of information that it was publishing about Bundy, had the court abated the prosecution for a substantial period of time.

The least burdensome manner of dealing with the problem was to adopt a more liberal attitude toward the defense challenges for cause of certain jurors. Alternatively, because the pretrial publicity was prejudicial to the defense and not to the state, additional peremptory challenges could have been granted to the defense, as requested in an oral motion during voir dire (R. 3253-

3258). If the defense had been able to exercise additional peremptory challenges, it is more likely that an impartial jury (those without substantial knowledge of Bundy) could have been selected.

When other jurisdictions have been faced with this conflict between constitutional rights, they have tried to choose the least restrictive measure to restrain the press, thereby favoring the right to a fair trial of the defendant. Because the Sixth Amendment to the **United States Constitution** guarantees a "trial by an impartial jury", and the due process clause of the Fourteenth Amendment extends this right to state criminal proceedings, there is an infringement of rights when the pretrial publicity permeates and infects a community so that the guaranteed "impartial jury" is an impossibility. **Duncan v. Louisiana,** 391 U.S. 145-149 (1968); **Apodaca v. Oregon**, 406 U.S. 404-406 (1972).

In the vast majority of criminal prosecutions, pretrial publicity is manageable and, therefore, does not threaten this constitutional right to an impartial jury. Indeed, in some cases, the court has held that a trial was fair in spite of widespread publicity. **Murphy v. Florida,** 421 U.S. 794, 803 (1975); **Beck v. Washington**, 369 U.S. 541 (1962); **Stroble v. California**, 343 U. S. 181 (1952).

However, in the instant case, as well as those few other cases where the crime is so "sensational" or "heinous" that it receives an enormous amount of pretrial publicity, tension develops between the defendant's right to an impartial jury and the rights of others to the First Amendment rights of free speech and press. In **Irvin v. Dowd**, 366 U.S. 717 (1961), an Indiana court sentenced the petitioner to death for the murder of six persons. Pretrial news coverage had been incriminating, pervasive and hostile. Petitioner's counsel

had secured a change of venue, but only to the next county. Of the jury panel of 430 persons, almost ninety percent had some opinion as to the Petitioner's guilt, ranging in intensity from near suspicion to absolute certainty. Eight of the twelve who finally served admitted that they believed tha the Petitioner was guilty, but felt they could render an impartial verdict nonetheless. Holding that the Petitioner was not accorded a fair and impartial trial, the Supreme Court unanimously vacated his conviction and remanded his case to the district court, stating:

> "With his life at stake, it is not requiring too much that this Petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony to possession of a belief in his guilt." **Irvin**, at 730.

In **Rideau v. Louisiana**, 373 U.S. 723 (1963), a state court convicted the petitioner of murdering one of three hostages during a bank robbery. On the morning of his arrest, a videotape was made of a twenty-minute interview between the petitioner and the Sheriff, at which time the petitioner, in a highly emotional state, confessed in detail to the bank robbery, kidnapping and murder. Noting that the filmed interview was broadcast for three days to the community from which the jury was chosen, the Supreme Court reversed the conviction on the following grounds:

> "This spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial--at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." **Rideau**, at 726.

Perhaps the most sensational case concerning the right to an impartial jury was **Sheppard V. Maxwell,** 384 U.S. 333 (1966), in which Dr. Sam

Sheppard was convicted of bludgeoning his pregnant wife to death. Virulent and incriminating pretrial publicity about the petitioner and the murder made the case a cause celebre in the community from which the jury was selected. After Sheppard had spent twelve years in prison, the Supreme Court ordered a new trial and held that the massive, pervasive and prejudicial publicity had prevented a fair trial. **Sheppard**, at 363.

As the facts show, from nearly the day Bundy was arrested until he was brought to trial, he was the constant subject of news stories, official statements by law enforcement and prosecution authorities and startling, sensational reports of prospective witness' testimony and evidence that would be presented. As the media perpetuated the image of Bundy, it also shaped that image and gave any prospective juror the opportunity to form an advance opinion about his guilt or innocence. The "Bundy Mystique" was created and perpetuated by an aggressive press and has been cogently summarized as long ago as May 3, 1978, by Judge Charles E. Miner, Jr.:

> "It is true beyond peradventure that Theodore Bundy is newsworthy. Since his arrest and incarceration on the instant charges, Bundy has understandably been the object of intense public interest. Resourceful newsgatherers have proven well equal to the task of keeping the public well informed. Virtually no aspect of Bundy's past or present life, real or imagined, has evaded media discovery, analysis and comment. Fact, speculation, characterization and impression have combined to give Theodore Bundy, wanted or not, a mystique of sorts. He enjoys (or tolerates, as the case may be) a name identification in this area of Florida at least equal to that of Florida's most notable personages." (R. 14527)

It is unreasonable to assume that the judge's admonition to put that opinion out of their minds was sufficient to counter the pervasive effects of the media coverage.

The court should have granted another change of venue, even if it questioned the grounds, for as **Singer v. State**, 109 So.2d 7 (Fla., 1959) states:

> "A change of venue may sometimes inconvenience the State, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and to eliminate a costly retrial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant change of venue." **Singer**, at 14.

Other Florida cases agree with the proposition that more than a mere statement of impartiality is required after a venire person expresses existing knowledge or opinion about the case.

In **Andrews v. State**, 21 Fla. 598, at 604, the court said:

> "...The fact that he states that if taken upon the jury he would give a verdict according to the evidence is not of itself sufficient to overcome the effect of what he has said as to the fixed character of his opinion..."

In **Olive v. State**, 15 So. 925, at 926, the court said:

> "...[T]he statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such fixed and settled nature as not readily to yield to the evidence..."

In **Lamb v. State**, 107 So. 530, at 533, the court said:

> "...[W]e believe that every juror should come to the investigation of each case free from any preconceived impression of it whatever..."

In **Walsingham v. State,** 1911, 61 Fla. 67, 56 So. 195, at 198, the court quoted with approval several statements found in cases from other jurisdictions:

> "...'And we also think that, in criminal cases, whenever, after a full examination, the evidence given upon a challenge leaves a reasonable doubt of the impartiality of the juror, the defendant

> should be given the benefit of the doubt.'
> (**Holt v. People**, 13 Mich. 224, 227)..."

In **Johnson v. Reynolds**, 1929, 97 Fla. 591, 121 So. 793, 796, the court said:

> "If there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused..."
>
> "...'If error is to be committed, let it be in favor of the absolute impartiality and purity of the jurors' ...which we interpret to mean that the mind of the proposed juror should contain no element of prejudice for or against either party in a cause to be tried before him."

The above quotations must be construed as being guides to the trial courts in exercising their discretionary power in determining the competency of jurors. They demonstrate that the goal to be sought is a jury composed of persons whose minds are free of any preconceived opinions of the guilt or innocence of an accused, persons who can in fact give to an accused the full benefit of the presumption of innocence, persons who can because of freedom from knowledge of the cause decide it solely on the evidence submitted and the law announced at the trial.

These cases illustrate that if there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.

The traditional remedy in cases such as these has been a reversal of conviction. This after-the-fact remedy is obviously not the ideal or least onorous method to solve this conflict. Conversely, pretrial measures to restrain the press, implemented to avoid a prospective reversal, run the possibility of infringing upon those First Amendment rights that enjoy co-equal status with the right to a fair trial by an impartial jury.

As Justice Frankfurter recognized in **Irvin v. Dowd**, supra, the tensions between the First and Sixth Amendments is not easily reconciled:

> "This court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional systems--freedom of press, properly conceived. The court has not yet decided that while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade." **Irvin v. Dowd**, at 730.

Other cases also have had convictions reversed because of prejudicial publicity that had affected the defendant's right to trial by an impartial jury. See **Estes v. Texas**, 381 U.S. 532 (1965); **Janko v. United States**, 366 U.S. 716 (1961); **Marshall v. United States**, 360 U.S. 310 (1959).

Although none of the court's previous cases on First Amendment guarantees involved a restrictive order designed to protect a defendant's right to trial by an impartial jury, (see **Nebraska Press Association v. Stuart**, 96 S.Ct., 2791, 2801 (1976)), a brief examination of the cases dealing with prior restraints demonstrates the harshness with which the court views the employment of such measures. Over seventy years ago, the court in **Patterson v. Colorado**, 205 U.S. 454, 462 (1907), stated that the main purpose of the constitutional provisions for freedom of speech and press is "to prevent all such previous restraints upon publications as had been practiced by other governments". **Patterson**, at 462. See also **Commonweath v. Blanding**, 20 Mass. (3 Pick) 304, 313, 314 (1825); **Republica v. Oswald**, 1 Dall. 319, 325 (Penn., 1788).

In **Near v. Minnesota**, 283 U.S. 697, 716 (1931), faced with a claim of prior restraint against the press, the court declared a state statute unconstitutional, emphasizing that though the protection against previous restraints is not unlimited, the exceptional nature of the limitation has fostered the

general conception that liberty of the press has historically meant immunity from previous restraints or censorship. Characterizing prior restraints as "the essence of censorship", the court noted that for approximately 150 years there had been an almost complete absence of attempts to impose previous restraints upon publications relating to malfeasance of public officials, and found that fact demonstrative of the deep-seated conviction that such restraints violate constitutional rights. **Near**, at 718.

There is a presumption of invalidity upon any measure that restricted the First Amendment freedoms. This presumption must be overcome by the proponent of the measure in order to resist constitutional challenge. As the court notes in **Southeastern Promotions Ltd. v. Conrad**, 420 U.S. 546, 559 (1975), citing **Freedman v. Maryland,** 380 U.S. 51 (1965) at 58:

> "The settled rule is that a system of prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards to obviate the dangers of a censorship system."

However, an action that removes the cause for the publicity, and does not directly affect the publishing of that publicity, would not violate the First Amendment. If the court had removed the trial to another site, or abated the prosecution, the press would have been forced to lessen or end the fantastic quantity of coverage in Bundy's case. In either event, the decision not to publish would have been their own, without order from a court. As long as the court was persuaded that substantial publicity existed which precluded the empaneling of an impartial jury, the court could continue to abate the prosecution or change venue. Bundy certainly wasn't going anywhere.

The court in **Nebraska Press Association v. Stuart**, supra, reasoned that the trial court could only speculate as to the impact upon each juror of the pretrial publicity, finding that the judge would be dealing with factors

"unknown or unknowable". In the instant case, the defense produced extensive area research and opinion polls that gave rise to a reasonable inference that the jurors would be impermissibly tainted with pretrial publicity, and unable to render a fair and impartial verdict. Thus the factors the trial judge confronted in this case were known or knowable and the judge could have based a conclusion upon them.

Second, in **Nebraska Press**, at 2805, the court examined measures that were less restrictive and that may have mitigated the unrestrained pretrial publicity. That court made no specific finding that any action short of restraining the press would not have protected the defendant's rights. What the court seems to say is that the trial judge should use the least burdensome method of restraining the press in order to effectuate a fair trial. If the court, after careful deliberation, decides that a restraining order on the press is the only way to safeguard the defendant's rights, then the measure will rebut at least the presumption of invalidity and may survive the full constitutional scrutiny required. However, if the court decided that a restraining order is inappropriate, it should look for a less burdensome alternative to achieve the same result.

In the instant case, it appears that the trial judge did determine that less onerous measures would not deter the press, but the court would not go so far as to issue a restraining order to curb the horrendous publicity given to Bundy. The judge decided not to abate the prosecution, apparently rationalizing that the publicity would regenerate whenever the trial recommenced. The judge would not change venue because he apparently thought that although the publicity was pervasive, prejudicial and a barrier to finding an impartial jury, the same type of publicity would be present at any other site the court chose.

The third consideration in **Nebraska Press**, supra, was whether a restraining order would have been effective. The court, in **Nebraska Press**, ruled that the restraining order was not proper. The order was overbroad and too vague to survive scrutiny because the order prevented the press from publishing those facts and that evidence proved or introduced in the public portions of the trial. In addition, the court noted:

> "Our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied. The practical problems of managing and enforcing restrictive orders will always be present. In this sense, the record now before us is illustrative rather than exceptional." **Nebraska Press**, at 2807.

In conclusion, the court noted that there may be a situation where a prior restraint is justified, but emphasized that "the presumption against [its] use continued intact." **Nebraska Press**, at 2807.

In the instant case, the judge apparently decided that no alternative other than a restraint on the press would work and that he would not impose such a restraint. Bundy would be tried as fairly as possible, even if that was less than a fair trial.

If a logical progression is traced from the beginning in Lake City, to the hopelessly unfair solution in Orlando, Florida, it is clear that the court did not exhaust all the preliminary measures leading up to the imposition of the restraining order. When the court, even in despair over the failure of earlier preliminary measures, refused to grant the Motion for Change of Venue or to Abate the Prosecution, it erred. The error was not de minimus, not harmless error, and not a matter of the court's discretion. The Motion should have been granted if the defendant was ever to receive a fair trial.

It is difficult to endorse a policy that would result in numerous venue changes or delays in prosecution, but in the exceptional case it is necessary. The most beneficial guidelines come from the **Nebraska Press**, supra, case, which held that in order to justify a pretrial restriction on the press, the court must first exhaust all less burdensome alternatives. If these alternatives are not used, any restraint will not survive the scrutiny of the court. **Nebraska Press**, at 2807. If the trial court uses no restraint, nor any less burdensome alternatives, the case will very probably result in a reversal. Each time that the court has reversed a conviction, it has carefully noted that, "...some course of action short of a prior restraint would have made the critical difference". **Nebraska Press**, at 2807.

In the instant case, the less burdensome alternative was to grant the defense Motion for Change of Venue or Abatement of Prosecution. The least burdensome alternative was to grant the defense challenges for cause or to grant the defense additional peremptory challenges to strike those jurors who gave even the "appearance" of having formed a prior opinion. By not doing so, on only the speculation of the court that it would do no good, the court missed two acceptable alternatives that would have upheld the defendant's rights and, instead, opted for a course more convenient to the court, but harmful to the defendant.

Clearly, a constitutional right cannot be denied upon only the speculation of a trial judge. It is not discretionary; it is not a variable right given only when convenient. It is absolute and must be strictly protected.

Accordingly, the defendant must be given the opportunity to a fair trial before an impartial jury, Bundy's sentence must be vacated, the conviction overturned, and the case remanded to the trial court for a new trial.

IV. THE COURT ERRED IN NOT CONDUCTING A FRYE TEST ON ITS OWN MOTION WHEN CONFRONTED WITH THE FIBER AND SHOE TRACK EVIDENCE TESTIMONY.

When Mary Lynn Henson explained her role in the Leach case and her qualifications to perform that role, she stated that all of her training was in-house, by the Federal Bureau of Investigation and the Florida Department of Law Enforcement; that the only formal training she had was her general university courses in chemistry and science; that she had never been trained specifically to analyze fibers or shoe track evidence; and that prior to the time she handled the Leach evidence, she had never qualified as an expert in fiber analysis. (R. 5454-5458) Her lack of independant training, that is, other than at the direction of the law enforcement agencies, necessarily created an inference of unreliability in her testimony. The nature of her testimony was opinion, and that opinion was formulated as a result of her limited training and expectations of what her results should be by the law enforcement agencies who employed her.

The trial judge, because he was charged with presiding over a trial that is fair to the defendant, as well as the state, should have conducted a **Frye**, supra, standard test on its own motion to determine whether the evidence to be presented, and the testimony concerning that evidence were both reliable and relevant. Further, the court should have questioned Henson further to substantiate its ruling that she was qualified to express what amounts to a novel pseudo scientific opinion.

The standard for the admission of newly proposed scientific technique or principal in a court of law is succinctly stated by Justice Van Orsdel in **Frye**, supra, at 1014.

Fiber and shoe track evidence are not based upon well recognized scientific principles or discovery. As Henson stated, her analysis involves only the appearance, size, shape, texture, and cross section of fibers. (R. 5468, 5487-5490) And the appearance of size and shape of shoe tracks (R. 5461-5462). There are no scientific guidelines of similarity of points of comparison as in fingerprints, nor any recognized method of conducting the analysis and comparisons.

It should be apparent to the court that a person who has received no independent or formal training, conducting an analysis using a procedure which has no roots in scientific principle, and using a procedure that cannot be verified, cannot be accepted blindly by the court as an expert capable of expressing a scientific reasoned opinion.

The court erred in not conducting the **Frye** inquiry. It is a question of fundamental fairness. When circumstantial evidence that is highly prejudicial is sought to be introduced, and the development and analysis of that evidence involves a novel, unrecognized principle of science or pseudoscience, it is the duty of the court to protect the defendant to insure that his rights to a fair trial are not compromised.

It is important to note that Henson's ultimate conclusion, the one that went directly to the guilt or innocence of Bundy, was that it was only probable that Leach, Bundy and the carpet were together in one place at one time. (R. 5499) (Emphasis supplied) Something that is only "probable" does not rise to the "beyond a reasonable doubt" standard and cannot be used as a determination of guilt. The court's error in allowing this testimony was not harmless error. It was highly prejudicial error and resulted in an unfair and unjustified statement of guilt by Henson.

The courts of the state and country are rapidly becoming the battle-ground of expert witnesses. More and more, litigants and their lawyers are attempting to prove the ultimate facts of their cases through the opinions of so-called experts in the field.

Some scientific procedures and testing methods are "tried and true". However, such new innovations as fibers and bite-marks, and testing in the fields of chemical analysis, serology, shoe tracks, etc., have not met the test of time, nor has it been established under the **Frye** rule that there is any consensus in the scientific community of the general acceptability of the testing procedures or the conclusions that can be drawn from all of those tests.

This court is urged to adopt the rule the **Hurd** court, supra, adopted with regard to hypnosis, and require that the trial courts of this state conduct an inquiry, sua sponte, to determine whether the **Frye** standard has been met when such evidence is sought to be introduced and to place the burden on the proponent of the evidence.

Accordingly, the conviction in the instant case must be reversed and the case remanded for a new trial with instructions to adopt the proposed rule.

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

It is conceded that Florida law provides for the granting or denying of a Motion for View at the discretion of the court. **Dixon v. State,** 143 Fla. 277, 196 So. 604 (1940); **Rankin v. State**, 143 So. 2d, 193 (Fla., 1962); **Tompkins v. State**, 386 So. 2d 597 (Fla. 5th DCA, 1979). However, the court's rationale in denying the defense Motion for View evidences a clear abuse of discretion. In denying the Motion, the court said:

> "It would seem to the Court that all of the matters sought to be presented by view could be presented by either a stopwatch timing or walking to the areas concerned or by testimony of witnesses or by photographs and that to transport this jury some three hundred and forty miles or whatever it is, roundtrip, and consuming an entire day's time travel and as well as to the disruption of the school system when (sic) a jury going through it, and if there was a desire that they travel between classes, and the attention that would be directed by that, would not, the disadvantages would outweigh any advantages to insure to the jury being able to find the truth in this matter, and that the truth can be presented by measurements of the distances, by photographs of the building and other means of projecting the physical layout, as well as the photograph that's already in evidence. So the motion for the view is denied for the foregoing reasons."

The disadvantage cited by the court did not outweigh Bundy's right to have the jury fully and completely understand all of the facts of the case and his right to have his defenses fairly and effectively presented. The fact that the jury would have to travel "three hundred and forty miles or whatever" (R. 5621), was not the fault of Bundy. The fact that Bundy could not get a fair trial in the venue where the crime was alleged to have been committed was not the fault of Bundy. The court's selection of Orlando, Florida, as the trial site certainly created a logistical problem, but when weighed against

Bundy's right to a fair trial, with his life at stake, the disadvantages cited by the court were de minimus.

To change venues to insure a fair trial and then to deny a critical and absolutely necessary jury view because the new situs of the trial is too far away from the situs of the alleged crime not only defies logic, but is a denial of fundamental due process.

Their ability to attack the credibility of Anderson's testimony was vital to the defense. To deny full and complete opportunity to do so, on the basis of inconvenience or the cursory determination that there were "other adequate means" (R. 14808), was error.

As Bundy himself pointed out to the court:

> "And so I think it's really critical to our case, because C. L. Anderson is critical to their case. Absent a showing that C. L. Anderson saw what he saw, if a jury disbelieves that C. L. Anderson saw what he saw (sic), then there is no evidence of kidnapping. There is no evidence to bring about a verdict of first degree murder, because there is no evidence of premeditation. There is no evidence of an abduction. There is simply the fact of the homicide or the death by homicidal means of Kimberly Leach. And so it's so very critical to our case that we are able to argue to the jury, based upon their viewing of the scene, that what C. L. Anderson saw could not, is not believable under the circumstances." (R. 5594-5595) (Emphasis supplied)

It is obvious that the jury believed the testimony of C. L. Anderson, because they found Bundy guilty of kidnapping and first degree murder.

However, it would have been patently obvious to the jury that C. L. Anderson could not have seen what he said he saw, in the context of it being the abduction of Kimberly Diane Leach by Theodore Robert Bundy, had they been given the opportunity to personally see for themselves.

They would have seen for themselves that from locations "A" and "B"

the Central Building is not visible. They would have seen for themselves that the first moment the Leach girl would have been visible to the operator of a vehicle heading west on Duval Street would have been when she rounded the corner of the portable building. They would have seen for themselves that she only had to walk seventy-seven feet from that point to the safety of the auditorium. They would have seen for themselves that had she been espied by someone driving west on Duval Street, as she rounded that corner, and that someone who immediately became bent upon her abduction would have had to stop his vehicle in traffic, travel three hundred feet to the steps of the auditorium and intercept her before she could get safely inside the building.

Assuming, arguendo, that part of the "Bundy Mystique" was that Bundy did possess such speed and did intercept the Leach girl, it would have taken at least several minutes for him to convince her that there was some legitimate reason for her to leave school with him. However, Anderson stated that when he first saw the girl and man, they were already at location "C" and only two vehicles had backed up behind the van in the line of traffic on this very heavily traveled highway.

Absent hypnosis, Anderson's story would be inconceivable in the context of it being the abduction of the Leach girl; however, through the exploitation of hypnosis, he became convinced that "what he may have seen" was in fact "what he saw", and so convinced the jury. Hypnosis critically impaired the ability of the defense to test Anderson's credibility. Likewise, the denial of the motion for a view critically impaired the ability of the defense to impeach Anderson's testimony in any effective manner. Still photographs and testimony may have been a "means available", but it fell far short of affording Bundy his constitutional right to an effective defense and a

fair trial.

Because the court erroneously excluded relevant exculpatory evidence by denying the Motion for View, the court abused its discretionary function.

Accordingly, the conviction should be reversed and the case remanded for a new trial with instructions that the jury be permitted to view the situs of the alleged crime.

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

A. The Evidence of Flight

The basis for the "Motion in Limine" was that such evidence was irrelevant and immaterial to the issue of guilt or knowledge, and to allow such testimony would be prejudicial. (R. 14920) Defense counsel argued strenuously that there were so many other inferences that could be drawn from the two incidents of flight, that it was not probative in the Leach murder and, therefore, it was not relevant. (R. 4622-4638) The court denied the Motion in Limine and allowed Daws (R. 4640) and then Lee (R. 5150) to testify as to the alleged flight by the defendant.

The trial court based its decision upon two cases: **Batey v. State**, 355 So. 2d, 1271 (1st DCA, Fla. 1978); and **Hargrett v. State**, 255 So. 2d, 298 (3rd DCA, Fla. 1971). These cases are factually limited and should not have been the basis for the court's decision on this issue.

In **Hargrett**, the court held that because there was evidence of flight, an instruction on flight was properly given to the jury. **Hargrett**, at 298-300. The defendant in **Hargrett** contended that there was no evidence of flight, but the court denied the contention and concluded that there was evidence of flight.

In the instant case, the defense objected to the introduction of evidence of flight itself. Clearly, this is a different basis than **Hargrett.** This is a question of relevancy; that the evidence should not have been admitted because it was irrelevant. **Hargrett** never addressed the relevancy of the evidence admitted. It is because of this, with the apparent misreading of **Hargrett** by

the state and the misapplication of **Hargrett** by the court, that the trial court erred in basing its decision on the Motion in Limine upon **Hargrett.**

The court, in the instant case, also cited **Batey**, supra, as grounds for its decision. In **Batey**, in a rather brief and unelucidating Per Curiam Opinion, the court held that:

> "The facts presented at trial were sufficient to find the existence of flight and other circumstances indicating appellant's guilt. Therefore, the flight may be considered as a circumstance of guilt under an appropriate instruction." **Batey**, at 1272. (Emphasis supplied)

As in **Hargrett**, the **Batey** decision cannot be used as the basis for the decision in the instant case. In **Batey**, the appellate court based its decision upon the "Facts presented at trial". Such a limitation, without any showing of what the facts were renders this decision inherently suspect and not a proper case to apply to the instant case. The state, once again, misread the case and apparently misled the trial court as to its scope. Without any way to determine how extreme or how similar the fact pattern was in **Batey,** it was error to apply it to the instant case. Furthermore, from the language, the **Batey** decision was based upon the type of instruction to be given and not whether the evidence was relevant.

The Evidence of Flight was received in error. The court erroneously based its decision upon cases that could not be applied to the instant case, because they were factually different, limited to those facts and the issue involved was the instruction, and not the relevancy of the evidence. The trial court did not address the issues of relevancy, materiality, or prejudice, as raised by the defendant's Motion in Limine. The Motion was denied upon improper grounds by the trial court.

Upon review by this court, the question of relevance should be reviewed as well as the proper inference to be drawn from the use of such evidence.

As the defense contended at trial, the state should not be allowed to draw only one single inference as to the flight of a defendant when there may be a myriad of reasons to justify or explain such flight. The state argued that the defendant was free to assert those myriad reasons in an attempt to prove that the flight was not as a result of the guilty knowledge of the defendant as it related to the crimes charged in the instant case, but this is contrary to all established tradition of fairness in our system of justice.

It is unreasonable and a denial of due process to require the defendant to prove he is not guilty, as the state suggested, and the trial court impliedly agreed, must be done in the instant case. It is unreasonable to place this burden upon any defendant who stands innocent until proven guilty. It must be the state's burden to prove this guilt. The state must be required to prove that the flight was due to the guilty knowledge of the defendant of the crime for which he is on trial, beyond a reasonable doubt and to the exclusion of any other explanation for the flight. Unless the state can show that the defendant had no other reason to flee, the state should not be allowed to introduce evidence of flight. To hold otherwise would mean that the state could obtain a conviction, theoretically at least, upon only inferences of guilt, thereby short circuiting the criminal burden of proof. The state could use the more lenient burdens of the civil court of "preponderance of the evidence", or "clear and convincing evidence", and unfairly convict a defendant without ever having proved the case.

This cannot be allowed to happen. Upon review, this court must hold that:

1) The evidence of flight was not relevant;

2) That **Batey**, supra, and **Hargrett**, supra, were

not the proper basis for the decision to admit the evidence of flight; and

3) That the trial court erred in its decision to admit the evidence of flight.

B. The Instruction of Flight

It was error for the trial court to give the instruction quoted above at page 32. This instruction informed the jury that the defendant must disprove the inference of guilt or it is evidence of guilt.

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 general consciousness of guilt to a specific 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.

When stopped in Pensacola, Bundy was in possession of stolen credit cards and had a stolen car (R. 5176-5177). Bundy was on the Federal Bureau of Investigation's ten most wanted list in connection with a kidnapping conviction in Utah (RP. 28). He had escaped from Colorado. Because of Bundy's awareness of those charges against him, and the fact that he was a fugitive, an inference of consciousness of guilt on his part for the Leach crime 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. 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." **Myers**, at 1051.

Bundy's flight from the arresting officer in Pensacola occurred many days after the Leach disappearance and one month after the Chi Omega offenses he was alleged to have committed. Any inference of guilt from the flight from Lee was too remote in time to be relevant to the crime charged.

Bundy's alleged flight from Daws in Tallahassee is also unreliable. There, Daws caught an individual he claims was Bundy in the act of another crime. If any inference for flight may be drawn, it was the the individual fled to escape prosecution on that crime, and not the Leach crime.

The **Myers**, supra, decision is consistent with Florida Law. Florida cases involving jury instructions on flight as evidence of guilt 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. 3rd 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. 3rd DCA, 1972); **Hargrett v. State,** supra.

Since there was inconclusive evidence as to how long Bundy allegedly may have been in the Lake City area, his case is therefore more analogous to **Barnes v. State**, 348 So. 2d, 599 (Fla. 4th DCA, 1977). In **Barnes**, the court held improper a jury instruction on flight because of the lack of any evidence that the defendant had fled the scene of the crime.

Because the evidence was irrelevant to show Bundy's guilty knowledge, it was immaterial for any other use, and its prejudicial impact far outweighed any theoretical probative value. It was improperly admitted, and because it was improperly admitted, the court should not have instructed the jury to consider it in its determination of guilt. The instruction given to the jury was in error because it shifted the burden of proof from the state to the defendant; an unreasonable and unconstitutional result.

The evidence must be ruled irrelevant and the instruction improperly given. Accordingly, Bundy should be given a new trial exclusive of such evidence.

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

A. The Trial Court did not establish that the crime was especially heinous, atrocious cruel.

In his written findings, the trial judge found that the victim had died as a result of homicidal violence to the neck region of the body (RP. 189). The court concluded that the murder was, "...heinous, atrocious and cruel in that it was extremely wicked, shockingly evil, vile, and with utter indifference to human life." (RP. 189-190) Other than the finding of the apparent fatal wound, the court enumerated various facts about the location of the body and physical condition when it was found, and several items of physical evidence. The court enumerated no specific cause of death, no details as to the acts that preceded or followed death, nor how cruel or painful the death may have been for the victim, beyond a reasonable doubt.

The trial court erred in concluding that death must be imposed in this case. All first degree murders are heinous and cruel. To constitute an aggravating circumstance, the murder must be especially heinous and cruel. It must be:

> "...accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim". **State v. Dixon**, 283 So. 2d 1, 9 (Fla., 1983) See also **Tedder v. State**, 322 So. 2d, 908 (Fla., 1975)

The mere fact that the murder occurred does not amount to and should not be used as an aggravating factor in this sentencing.

Dr. Lipkovic, the state's pathologist, testified that, in his opinion, death was a result of a "...homicidal injury to the neck region, type undetermined". (R. 4481) (Emphasis supplied) Neither Lipkovic nor Jack Duncan, an analyst for the Florida Department of Law Enforcement crime laboratory, could state that the death occurred in the hog pen where the body was found. (R. 4444) Therefore, the location and position of the body and the surrounding physical evidence should not be used to conclude that the death was heinous, cruel or atrocious.

The trial court did not point to any facts to support the finding that the death was "heinous, atrocious and cruel" in the common usage of the terms. See **Alford v. State**, 307 So. 2d, 433 (Fla., 1975) cert. denied 96 S.Ct. 3227; 48 U. S. 912, 49 L.Ed.2d 1221, reh. denied 97 S.Ct. 191, 429 U.S. 873, So.L.Ed.2d, 155.

The trial court did not factually find that the death was extremely wicked or evil. Therefore, it could not conclude that the death was heinous. No facts proved that the death was outrageously wicked or vile. Therefore, the court could not conclude that the death was cruel, because no facts were presented to show that the death inflicted a high degree of pain or that the perpetrator was indifferent to or enjoyed the suffering of the victim.

The court did not point to a factual conclusion beyond a reasonable doubt that the alleged actual or attempted sexual battery took place as an attendant circumstance of death. The mere fact that a sexual battery may have taken place at some time prior to, or after, the commission of the murder does not bring it within the language of **§921.141, Florida Statutes.**

The trial court violated its own instructions to the jury by elaborating upon the location and condition of the body. The court's instructions to the jury were:

> "The physical changes of the victim's body occurring after death cannot be considered by you in your determination of whether the State has proved beyond a reasonable doubt that the capital crime was especially heinous, atrocious or cruel."
> (RP. 135) (Emphasis supplied)

Yet the court violated that instruction by finding the crime heinous, atrocious and cruel based, in part, upon the condition of the body. The court's finding "H" was as follows:

> "Finding: The Court finds that the victim was a twelve-year-old female junior high school student attending the Lake City Junior High School. The Defendant kidnapped her from said junior high school somewhere between 9:00 and 10:00 a.m. on February 9, 1978, and her deteriorated body was found in a hog pen approximately forty-five miles from the scene of the abduction on April 7, 1978. The victim died of homicidal violence to the neck region of the body. At the time the body was found, it was unclothed except for a pullover shirt around the neck. There was semen stains in the crotch of her panties found near the body. Blood was found on the blue jeans found near her body. There were tears and rips in some of her clothes. The Court finds this kidnapping was, indeed, and murder was, indeed, heinous, atrocious and cruel in that it was extremely wicked, shockingly evil, vile and with utter indifference to human life".
> (RP. 189-190) (Emphasis supplied)

Such a finding was highly improper in light of the instructions of the court to the jury.

The trial court seems to have based its findings of aggravation entirely upon the final argument of the State Attorney. During the penalty phase, State Attorney Blair urged the jury to "imagine" what may have happened to the victim between the time she was abducted and the time her body was

found. (RP. 97-99) The jury, and so the trial court, were allowed and encouraged to base a conclusion upon what might have happened, rather than being limited to only what was proved beyond a reasonable doubt by the evidence. The imagination of the ordinary man is much more vivid than real fact would be, and it is clearly prejudicial for the trial judge and jury to conclude that the death sentence is warranted based upon the products of their own imaginations or the suggestions of the state.

The trial court, in its findings, set forth no factual basis for its conclusion that the death was heinous, atrocious, and cruel. Since the court lacked grounds for the finding that the death was heinous, atrocious and cruel, the sentence should not have been based upon this aggravating factor. The sentence must be vacated and the case remanded for resentencing.

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

The trial court, in its finding of aggravation, concluded that the victim had died as a result of a homicidal injury to the neck region. (RP. 33) The finding appears to be based upon the testimony of Dr. Peter Lipkovic, who testified that death occurred, in his opinion, as a result of such wound, type undetermined. (R. 4481) (Emphasis supplied) This fact was controverted by the defense witness, Dr. Joseph Burton, a Medical Examiner from Atlanta, Georgia, and an expert in forensic pathology. (R. 6029-6055)

Dr. Burton testified that no specific cause of death could be determined from the autopsy report on Kimberly Leach. (R. 6045) He agreed with general findings as to the condition of the body, but could not conclude, as Dr. Lipkovic had done, that the wound in the neck area was the cause of

death. Dr. Burton further stated that this loss of neck tissue on the body could be reasonably explained by insect and small animal scavenging. (R. 6045-6046) Furthermore, the alleged injury to the neck could just as easily have occurred after death. (R. 6048)

Because the cause of death and attendant circumstances were not proved beyond a reasonable doubt, the trial court could not conclude that death occurred as a result of this injury and then use the conclusion as an aggravating factor in the penalty and sentencing phases of this trial.

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

Therefore, the sentence must be vacated and the case remanded for resentencing.

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

In the trial court's sentencing report, specific findings of aggravating and mitigating circumstances, as required by **§921.141, Florida Statutes,** were made. (RP. 31-37) The first two findings are reproduced below:

> "A, that the crime for which the Defendant is to be sentenced was committed while the defendant was under sentence of imprisonment.
>
> Finding: The unrefuted testimony established beyond a reasonable doubt that the defendant was under sentence for aggravated kidnapping in the State of Utah, which had not been served, paroled or pardoned.

> B, that at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense or felony involving the use of or threat of violence to some person.
>
> Finding: The unrefuted testimony established beyond a reasonable doubt that the defendant had been convicted of the crime of aggravated kidnapping in the State of Utah and that it was a crime involving the use of or threat of violence to some person."
> (RP. 31)

In **Provence v. State**, 377 So. 2d 783 (Fla., 1976), the Florida Supreme Court quashed a sentence of death for a murder committed in the course of an armed robbery. The trial court in **Provence** found that the fact of robbery established two aggravating factors, to-wit: Commission of the murder in the course of a robbery and commission for the purpose of pecuniary gain. **Provence**, at 786, citing **§821.141(5)(d)(f), Florida Statutes.** The **Provence** court ruled that, while the two factors constitute separate analytical concepts, they both referred in that case to the same aspect of the defendant's crime. As such, the fact of robbery could only validly be considered as one aggravating circumstance. The principle enunciated in **Provence** has been consistently followed in Florida capital cases. **Quince v. State**, 414 So. 2d, 185, 188 (Fla., 1982); **Vaught v. State**, 410 So. 2d, 147, 150 (Fla., 1982) **Francois v. State,** 407 So. 2d, 885 (Fla., 1982); **Welty v. State**, 402 So. 2d, 1159, 1164 (Fla., 1982); **Armstrong v. State**, 399 So. 2d, 953, 962, (Fla., 1981); **Sireci v. State**, 399 So. 2d, 964, 971 (Fla., 1981); **Maggard v. State,** 399 So. 2d, 973, 977 (Fla., 1981); **Palmes v. State**, 397 So. 2d 648 (Fla., 1980); **Gafford v. State**, 387 So. 2d 333, 337 (Fla., 1980); **Harvard v. State**, 375 So. 2d, 833, 934 (Fla., 1977).

In the instant case, as in **Provence**, and its progeny, the same operative fact was held to constitute two aggravating circumstances. A Utah

conviction for aggravated kidnapping was held to provide both the status of being under sentence for a prior conviction and a previous conviction of a crime involving the use of or threat of physical violence. (R. 1637) See also **§921.141(5)(a)(b), Florida Statutes.**

As such, Bundy's sentence is illegal and should be vacated and his case remanded to the trial court for resentencing.

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

During the penalty phase, the State offered the testimony of Michael James Fisher, an investigator for the District Attorney's Office in Aspen, Colorado, to prove that the defendant had escaped from jail in Aspen, Colorado. Mr. Fisher's testimony was offered to prove that: (1) The defendant, Bundy, had been under a sentence in Utah; and (2) that the defendant, Bundy, had been transported to Aspen, Colorado, to face additional charges; and (3) that the defendant, Bundy, was in the Garfield County Jail at Glenwood Springs, Colorado, at some time; and (4) that at some time after the defendant was placed in that jail, he was no longer there. (RP. 28-28)

The defense objected to the use of an investigator's testimony for this purpose. The defense contended that unless the State used the testimony of the jailer and the fingerprint record of Bundy when he was placed in the jail, any testimony offered would be inadmissible heresay.

The trial court overruled the objection by the defense and allowed the investigator to testify as to his second-hand knowledge. This testimony was incompetent and rank hearsay. The investigator did not have custody of

Bundy at the time of any alleged escape. The investigator did not offer evidence to prove that Bundy was the person held in custody in Colorado, and could only have testified to the investigation of various activities of Bundy.

As at least one Florida case has held, evidence that a person had been in the custody of the warden as an inmate prior to his alleged escape does not constitute proof either that, such custody was lawful, or that the defendant was the person committed to the state prison. **Fulford v. State,** 113 So.2d 572 (Fla., 2d DCA, 1959)

As applied to the instant case, the testimony of the investigator could not be used to prove that Bundy was in lawful custody or that Bundy was the same man who was in custody in Colorado and Utah. The State had competent testimony available; the jailer who allegedly booked Bundy and the fingerprint card from the jail in Colorado. The state attempted to short-circuit the burden of proof by using incompetent testimony. Therefore, the state should not have been allowed to prove, as an aggravating factor, the alleged escape by Bundy.

Accordingly, the sentence should be vacated and the case remanded to the trial court for resentencing.

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

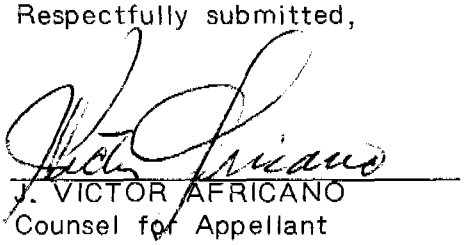
The defense filed a motion that would have prevented the court from convening the penalty phase and from returning a death sentence. (RP. 14840-14842) The motion stated that the defendant was unconstitutionally forced to risk death in order to exercise his right to a jury trial. (RP. 14840-14842) The motion was argued extensively and then denied by the trial judge. (RP. 4-6)

It was error to deny the motion. Therefore, the sentence should be vacated and a life sentence imposed.

CONCLUSION

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

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to the Attorney General of the State of Florida, The Capitol, Tallahassee, Florida, by hand on this 15th day of December, 1982.

J. VICTOR AFRICANO

xc: Theodore Robert Bundy

APPENDIX A

JUDGE/JURY ROLES IN CAPITAL PENALTY DETERMINATION

A Survey of National Legislative Practice, 1972-1981

Legends and Notations:

L - Life sentence unless jury unanimously agrees on death
U - Unanimous verdict required for either life or death
M - Simple majority suffices for verdict of either life or death
A - Alabama system: 10 jurors required for death, 7 jurors required for life
T - Unique Texas procedure: penalty jury answers special questions on deliberate nature of murder, probability defendant would engage in future acts of dangerous violence, and (if raised) lack of provocation by victim. 12 jurors required to answer "yes" to each question for imposition of a death sentence; 10 jurors suffice to answer any question "no" and prevent death sentence.

1) Jury Life Verdict Binding

ARKANSAS	Crim. Code (1977) §41-1301 & 41-1302	L
CALIFORNIA	Penal Code (1979) § 190.3-190.4	U
COLORADO	Rev. Stats. (1979) Cum.Supp. §16-11-103	L
CONNECTICUT	Gen. Stats. Ann. (1979 Pck.Pt.) §53a-46a	U
DELAWARE	Code Ann. (1977 Cum.Supp.) §11-4209	L
GEORGIA	Code Ann. (1977) §26-3102, 27-2302	L
ILLINOIS	Ann. Stats. (1979) §38-9-1	L
KENTUCKY	Rev. Stats. (1978 Cum. Supp.) §532.025	U
LOUISIANA	Code of Cr.Proc.(pkt pt,1979) Art. 905.8	L
MARYLAND	Ann. Code (1978 Cum.Supp.) Art. 27, §413	L
MASSACHUSETTS	1979 Chapter 488, §55	L
MISSISSIPPI	Code (1978 Cum.Supp.) §99-19-101	L
MISSOURI	Crim. Code (1979 Spec.Pamph.) §565.006	L
NEVADA	Rev. Stats. (1977) §175.554	U
NEW HAMPSHIRE	Rev. Stats. Ann. (1977 Supp.) §630.5	L
NEW MEXICO	Stats. Ann. (1979 Supp.) 31-20A-3	L
NORTH CAROLINA	Gen. Stats. (1978) §15A-2000	L
OHIO	Rev. Code (1981 Legislation, File 60) §2929.024(D)(2)	L
OKLAHOMA	Stats. Ann. (1978-1979 Pck.Pt.) §21.701.11	L
PENNSYLVANIA	Act No. 1978-141: §18-1311	L
SOUTH CAROLINA	Code Ann. (1978 Cum.Supp.) §16-3-20	L
SOUTH DAKOTA	State Laws 1979 Chapter 160: §23A-27A-4	L
TENNESSEE	Code Ann. (1978 Cum.Supp.) §39-2404	L
TEXAS	Code Crim.Proc. Art. 37.071	T
UTAH	Crim. Code (1978) §76-3-207	L
VIRGINIA	Code (1979 Cum.Supp.) §19.2-264.4	L
WASHINGTON	Rev. Code Ann. (1978 Pck.Pt.) §10.94.020	U
WYOMING	Stats. (1977) §6-4-102	L
UNITED STATES	49 USC §1473 (1976) (Antihijacking Act)	U

(Cont'd p. 2)

2. Jury Life Verdict Not Binding

ALABAMA	Senate Bill 241, §8-9 (1981)	A
FLORIDA	Stats.Ann. (1977) §921.141	M
INDIANA	Stats.Ann. (1979) §35-50-2-9	U

3. Penalty Determination by Judge(s) Alone

ARIZONA	Rev. Stats. Ann. (1978 Supp.Pamph) §13-454
IDAHO	Code (1978)(Cum.Pck.Supp.)§19-2515
MONTANA	Rev. Codes (1977 Interim Supp.) §95.2206.6
NEBRASKA	Rev. Stats. (1975) §29-2520