IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,176



MANUEL VALLE,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

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APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

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# REPLY BRIEF OF APPELLANT

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### I.

**THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS WHERE THE COURT FAILED TO SUPPRESS INCRIMINATING STATEMENTS OBTAINED BY INTERROGATING OFFICERS WHO REFUSED TO HONOR THE DEFENDANT'S INVOCATION OF HIS RIGHTS TO COUNSEL AND SILENCE.**

In an elaborately contrived reply the state finds a dozen or so ways to say that the defendant's notification to his custodial interrogator that he had consulted his lawyer and that she had said not to speak to anyone acoomplish nothing more than establish the defendant's disposition to equivocate. Ignoring the plain and simple fact that the interrogator definately understood that the defendant had invoked his right to silence, [1] the state says that under Waterhouse v. State, 429 So.2d 301 (Fla. 1983), and Cannady v. State, 427 So.2d 723 (Fla. 1983), the interrogator was nonetheless free to ascertain the defendant's "true" intentions.

Indeed, Cannady and Waterhouse permit inquiry when an ambigiuous invocation of constitutional rights is made during interrogation. But such inquiry is strictly "limited to clarifying the suspect's wishes." Cannady v. State, 427 So.2d, at 728. Accord: Nash v. Estelle, 597 F.2d 513, 517 (5th Cir. 1979). Assume for the moment that some latent uncertainty

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[1] The interrogator testified at the motion to suppress hearing that his response to the defendant's invocation was telling him that "that was his constitutional right" (T. 190). Apparently the state's 20-20 hindsight is not as sharp as its own witness' contemporaneous observation.

in the defendant's invocation now arises (purely because of 20-20 hindsight, see n. 1, supra), the interrogator's response, and the confession which he soon obtained, must be judged by this standard.

The interrogator did not question the defendant about his desires; instead he chose to counter the defendant's invocation by declaring that "that was his constitutional right" and that he was there "hopefully to speak with him." (T. 190, 223). Thus, not only did the interrogator fail to make inquiry, he argued with the defendant by telling him that his own intention conflicted with the defendant's constitutional right.

The interrogator's insistence is of the same ilk that was recently condemed by the Third District in State v. Wininger, 427 So.2d 1114, 1115 (Fla. 3d DCA 1983). Wininger's interrogator told him after he said he wanted to go home "[s]ure, you will be able to go, but I want to talk to you about this . . . ." The Third District applied Cannady and held that the interrogator had not scrupulously honored Wininger's right to silence.

The defendant's interrogator committed the same violation as in Wininger. In both instances there was acknowledgement of the suspect's invocation followed by the interrogator's expression of intent to pursue questioning. This Court must now condemn the police practice of incessant interrogation after any invocation of the right to silence.

In the defendant's initial brief it was demonstrated that under Edwards v. Arizona, 451 U.S. 477 (1983), the defendant's declaration of his lawyer's instructions also constituted

an invocation of the right to counsel. Subsequent to Edwards, the Supreme Court of the United States decided Oregon v. Bradshaw, ___ U.S. ___, 103 S.Ct. 2830 (1983), which elucidates upon an interrogator's obligation when faced with a suspect's invocation of his right to counsel. A majority of the Bradshaw Court held that the rule of Edwards, prohibiting all interrogation after invocation of the right to counsel, is satisfied only if the suspect himself initiates further discussion with police. [2/] See also State v. Padron, 425 So.2d 644, 645 (Fla. 3d DCA 1983) (custodial interrogation prohibited after invocation of right to counsel); White v. Finkbeiner, 687 F.2d 885, N. 9 (7th Cir. 1982) (custodial interrogation by officers not notified of prior invocation of right to counsel prohibited).

Application of Bradshaw to this case leads to the inescapable conclusion that interrogation could not have resumed after the defendant's invocation of his right to counsel. The interrogator's testimony demonstrates unequivocably that he resumed questioning without the defendant's initiation. (T. 190, 223). The resulting confession was, therefore, unlawfully obtained and should have been suppressed.

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[2/] However, the plurality and dissent in Bradshaw differed as to whether limitations should be placed upon the content of the suspect's initiated discussion which thereby renders interrogation permissible under Edwards. This uncertainty in Bradshaw is not here relevant since the only question is whether the defendant initiated any discussion whatsoever.

## II.

**THE DEFENDANT WAS DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW WHERE THE GRAND AND PETIT JURIES WERE SELECTED IN A MANNER WHICH GROSSLY UNDERREPRESENTED THE DEFENDANT'S MINORITY GROUP AND DID NOT REFLECT A FAIR CROSS-SECTION OF THE COMMUNITY.**

All of the state's contentions regarding the unconstitutional selection of both grand and petit juries, save one, are adequately addressed in the defendant's brief and will not be here repeated. The state's bald assertion that latins in Dade County are not a cogizable group entitled to due process and equal protection of law cannot be left unanswered.

In Hernandez v. State of Texas, 347 U.S. 475 (1954), the United States Supreme Court recognized that groups other than blacks could be victimized by discrimination and that the Constitution indeed provided the necessary protection. The Court held:

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory" -- that is, based upon differences between "white" and Negro.

347 U.S., at 478.

Here the state ignores the plain facts in the record which establish that latins in Dade County are a cognizable group. In 1973, the Dade County Commission recognized the difficulties encountered by persons from Cuba, Mexica, Spain, and other South and Central American countries who spoke Spanish but not English; the commission accordingly created the Department of Latin Affairs. (R. 474). The purpose of the department was to facilitate communication among government and latins in the county. (R. 480). The department supervised several programs designed to help accomodate latins in the community. (R. 474-475).

Expert testimony shows that latins differ from other persons in Dade County, primarily because of language, but also for various cultural reasons. (R. 479). Religion and family unity play a more dominant role in latin culture than in others, and latins have different entertainment and culinary tastes. (R. 478-479). More importantly, however, is the fact that latins rely upon Spanish media for news reporting, and news from Spanish sources is frequently reported with a different interpretation than English language media. (R. 479). In any event, the difference in language has a pervasive effect upon the ability of latins to assimilate into the community. (R. 479).

The above facts refute any notion that latins in Dade County are not a distinct cognizable group. This Court must reject the state's offer to ignore reality and grasp the fanciful illusion of societal uniformity which,simply, does not exist.

## III.

**THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE STATE ELICITED TESTIMONY, OVER OBJECTION, THAT THE DEFENDANT REFUSED TO ANSWER A QUESTION PUT TO HIM DURING CUSTODIAL INTERROGATION.**

Every contention by the State that Clark v. State, 363 So. 331 (Fla. 1978), was not violated when the prosecutor elicited testimony over objection that the defendant invoked his Fifth Amendment right to silence during police questioning was previously addressed in the defendant's initial brief and are therefore not here recounted.

## IV.

**THE APPLICATION OF SECTION 921.141, FLORIDA STATUTES, TO IMPOSE DEATH UPON THE DEFENDANT VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.**

### A. The Improper Exclusion of A Prospective Juror Who Merely Stated That She Would Have Difficulty Recommending A Sentence of Death Requires That The Death Sentence Be Vacated.

Recently this Court held that the exclusion of a juror who "'might go towards' life imprisonment rather than death" or who "'probably leans towards life rather than death . . .'" was reversible error. Chandler v. State, ___ So.2d ___ (Fla. 1983) (Case No. 60, 790, opinion filed July 28, 1983). Chandler requires that only those jurors who express an "unyielding conviction and rigidity of opinion regarding the death penalty" may be excused under Witherspoon v. Illinois, 391 U.S. 510 (1968). ___ So.2d, at ___. [3/]

Here the court excluded over objection juror Ladd who merely stated there was "alot to overcome" before she could vote for death. (T. 747-8, 749). This exclusion was clearly error -- the death penalty may not now be imposed.

### B. Death May Not Be Imposed Where The Court Excluded Mitigating Character Evidence That The Statutory Alternative To Death Would Be Fulfilled By the Defendant's Incarceration As A Model Rehabilitated Prisoner.

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[3/] Chandler also answers the state's contention that wrongful exclusion of juror Ladd is rendered harmless because the prosecution did not consume all his peremptory challenges. The Chandler Court rejected this very argument.

The state contends that excluded evidence demonstrating the defendant's rehabilitative chances as a prisoner was "irrelevant and not competent," as well as "cumulative". (Brief of Appellee, p. 76). The state also claims that the issue is whether the trial judge erred in failing to afford the excluded evidence "any weight". (Brief of Appellee, p. 79). Turning aside the inherent inconsistency of the state's position, it is apparent that the state misconceives the entire body of capital sentencing law relating to the admission of character evidence.

As demonstrated in the defendant's brief, the rule of Lockett v. Ohio, 438 U.S. 586 (1978), prohibiting exclusion of mitigating character evidence in captial cases, is one of admissibility, not weight. See Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 876 (1982) (captial sentencers "may not give [mitigating character testimony] no weight by excluding such evidence from their consideration"). In this instance, both judge and jury were precluded from considering mitigating character testimony because the judge ruled that this "charade" would be excluded. (T. 1508-9). [4/]

The state claims that the excluded testimony was entitled to be "disregarded" because:

1. Mr. Buckley, a correction expert,

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[4/] The state misrepresents the defendant's argument by implying that the excluded character evidence included the testimony of Mr. Digriazia, a witness who would have testified that the defendant's execution would provide no deterrent to others contemplating police killings. (Brief of Appellee, p. 76). The defendant made no such argument in his initial brief and does not now.

> met the defendant for only 3½ hours and only read Officer Spell's deposition before concluding the defendant was not violent and would be an excellent inmate. (Brief of Appellee, p. 77).
>
> 2. Mr. McClendon, a prison administrator, only concluded that the defendant would be a model prisoner and, therefore, offered no testimony relevant to rehabilitation. (Brief of Appellee, p. 79).
>
> 3. Dr. Fisher, a correctional psychologist who believed the defendant was under the influence of extreme mental and emotional disturbance at the time of the incident and would not be a violent prisoner, only offered cumulative evidence which was irrelevant to rehabilitation. (Brief of Appelle, p. 79-80).

The state's myopic interpretation of rehabilitation evidence cannot withstand constitutional scrutiny. In Simmons v. State, 419 So.2d 316, 320 (Fla. 1982), this Court held that any evidence "reasonably related" to rehabilitation must be admitted. It can not be denied that an inmate's predicted behavior during a twenty-five year minimum mandatory prison term is reasonably related to rehabilitation. In fact, given the twenty-five year prison term, it is difficult to imagine what evidence would be more relevant to determination of the defendant's rehabilitation upon his release into society.

The state's other contentions are even less compelling. First, whether Mr. Buckley even met the defendant before rendering his opinion is an inquiry irrelevant to the admissibility question. See Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383 (1983) (psychiatrist who never examined accused may testify in capital case regarding future dangerousness). Second,

since the trial court found "a total absence of any non-statutory mitigating circumstances" (R. 1049), it cannot be said that the defendant's character evidence was cumulative and that, therefore, exclusion was harmless. [5/] Accordingly, the trial court's exclusion of mitigating character evidence is unjustified and renders imposition of the death penalty impossible.

### C. Death May Not Be Imposed Where The Essential Safeguard Of A Valid Jury Recommendation Made In Conformity With Constitutional Law Was Nulified Because Erroneous Prejudicial Aggravating Evidence Was Admitted, Buttressed By Inflamatory Prosecutorial Argument, And Not Limited By Proper Instructions

In his initial brief the defendant stressed that the admission of non-statutory aggravating coidence, the prosecutor's penalty arguments, and inadequate instructions from the trial court in combination tainted the jury recomendation so as to render it, and the entire sentencing phase, invalid. The state contends that each specific occurence was in fact not error, but were in any event harmless since the jury's recomendation is non-binding. (Brief of Appellee, n. 26). The state's contentions regarding the specific errors are addressed in the defendant's initial brief. The state's last contention that a tainted jury recommendation is harmless has been recently been rejected by this Court, on two occassions.

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[5/] In fact, the defendant is unaware of <u>any</u> capital case where mitigating evidence was properly excluded because it was cumulative.

In Teffeteller v. State, ___ So.2d___ (Fla. 1983) (Case No. 60,337, opinion filed August 25, 1983), the prosecutor argued that the defendant would kill again upon his parole if given a life sentence. This Court found these remarks improper and prejudicial, and unequivocally held that a new sentencing hearing was required because the jury's death recommendation was tainted. Richardson v. State, ___ So.2d ___ (Fla. 1983) (Case No. 61,924, opinion filed September 1, 1983), involved unusual facts becuase the jury was empanelled after the guilty verdict and the penalty phase begun with both defendant and prosecutor freely offering sentencing evidence. However, the trial court later discounted the jury's life recommendation because of its belated entry into the proceedings and imposed death upon six aggravating and no mitigating circumstances. This Court vacated the death sentence, required conformity with the jury's recommendation, and held:

> We cannot condone a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating and mitigating factors . . . .___ So.2d, at ___.

Teffeteller and Richardson thus provide continuing support for a valid jury recommendation as a prerequiste to this Court's constitutionally mandated sentence review. As demonstrated in the defendant's initial brief, review in this case is not possible because of the procedural errors which irrevocably tainted the jury's recommendation.

Subsequent to the defendant's filing of his initial brief this Court decided Herzog v. State, ___ So.2d ___ (Fla. 1983) (Case No. 61, 513, opinion filed September 22, 1983), which

resolves any apparent differences between Menendez v. State, 368 So.2d 1278, 1281 (Fla. 1979) and Riley v. State, 365 So.2d 19, 21 (Fla. 1979) (lack of remorse held not permissible aggravating circumstance), with Sireci v. State, 399 So.2d 964, 971-2 (Fla. 1981) (lack of remorse relevant to especially heinous, atrocious, or cruel circumstance). Herzog makes clear only "an affirmative statement by the defendant indicating his lack of remorse" is admissible under Sireci. Since it is unquestionably evident from the record in this case that the defendant made no such statement (T. 1393-4), the admission and subsequent argument of lack of remorse "evidence" [6]

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[6] The entirety of the state's lack of remorse "evidence" is:

Q. For the record, state your name again?
A. Richard Wolf.
Q. Detective Wolf, drawing your attention to April 4, 1978 when you first came into contact with the defendant and up until right now, in the last three and a half years, has the defendant at any time which you have come into contact with him ever shown or said anything with respect to being sorry for what he had did?
[Defense Counsel]: Objection. Could we have a brief side bar?
THE COURT: Overruled. No, no may not.
A. No, sir.
Q. Did the defendant at any time ask you how Gary Spell was doing?
A. No, sir.
Q. Did he ever ask you how Officer Pena's wife and children were doing?
A. No, sir.
Q. Did he at any time indicate anything at all either by an act or by words that would have shown even the slightest amount of remorse for what had happened in 1978?
[Defense Counsel]: Objection.
THE COURT: Overruled.
A. No.
[The Prosecutor]: I have no further questions.
(T. 1393-4).

tainted the jury's recommendation. [7] Accordingly, a new sentencing hearing must now be afforded.

### D. Death Is A Disproportionate Sentence In This Case.

The defendant argued in his initial brief that the sudden shooting of Officer Pena was not especially heinous, atrocious, or cruel. The state met this argument with the contention that even though the defendant intended no torture or pain, the victim's suffering for up to fifteen minutes after being shot and before death rendered the defendant's act "conscienceless, premeditated, and viciously carried out . . . ." (Brief of Appellee, p. 94). Regardless of the relevance of the state's characterization of the defendant's mental state to a (5)(h) determination, recent authorities from this Court demonstrate that this crime was not, under the test of State v. Dixon, 283 So.2d 1 (Fla. 1973), especially heinous, atrocious, or cruel.

In Teffeteller v. State, supra, the victim died several hours after receiving a sudden shotgun wound during an encounter with two strangers who had stopped their automobile to ask the victim for money. This Court held:

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[7] Other arguments advanced by the defendant in his initial brief have been since received favorably by federal authorities. In Hance v. Zant, 696 F.2d 940, 951-53 (11th Cir. 1983), the Eleventh Circuit held that a prosecutor's emotional plea for death, made to a Georgia jury, was fundamentally unfair and unconstitutional. In Proffit v. Wainwright, 685 F.2d 1227, 1261-65 (11th Cir. 1982), the same court held that use of the especially heinous, atrocious, or cruel aggravating circumstance without judicial limitation was "uncontrolled discretion" condemned by Godfrey v. Georgia, 446 U.S. 420 (1980).

> The criminal act that ultimately caused death was a single sudden shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

___ So.2d, at ___.

Further guidance in applying the Dixon test appears in Routly v. State, ___ So.2d ___ (Fla. 1983) (Case No. 60,066, opinion filed September 22, 1983). Routly forced his bound victim in a car's trunk, took him to a deserted area in the middle of the night, and then killed him by firing three shots. In analyzing these facts, this Court expressly rejected resort to the fact that the victim may have lived for a few minutes after the shooting. Instead, Routly's crime was found especially henious, atrocious, and cruel solely upon the victim's suffering caused by the defendant's acts before the shooting.

With the difference between Teffeteller and Routly in mind it is easy to see that the defendant's sudden shooting of Officer Pena is not "accompanied by such additional acts as to set the crime apart from the norm of capital felonies". State v. Dixon, supra, at 9. The state's attention to the unintended suffering of Officer Pena before his death is misplaced -- Dixon requires focus upon the defendant's acts. Upon such analysis, the defendant's crime cannot be considered especially henious, atrocious, or cruel.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was furnished to Penny H. Brill, Assistant Attorney General, 401 N.W. 2nd Avenue, #820, Miami, Florida 33128 by mail on this 17 day of October, 1983.

Respectfully submitted,

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