IN THE SUPREME COURT

OF FLORIDA

BARRY HOFFMAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO: 63,295

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

By indictment filed October 28, 1981, appellant was charged with the first degree murder of Frank Ihlenfeld and Linda Sue Parrish. (R 1-3) The Public Defender of the Fourth Judicial Circuit had previously been appointed to represent appellant but withdrew due to a conflict and private counsel Richard D. Nichols was appointed. (T 5-6) Appellant was arrainged on the indictment, stood mute, and the Court directed the entry of a not guilty plea on his behalf. (T 6-7)

On November 3, 1981 the State filed motions to compel blood samples and to compel hair specimens. (R 8, 10) The Court granted the motions. (T 12) On March 22, 1982 appeallant waived speedy trial. (R 20)

On June 25, 1982 counsel filed a motion to suppress all confessions and/or admissions made by appellant. (R 38-39) On the same day appellant filed pro se motions to dismiss counsel. (R 41-43) Both of these motions were denied by the Court. (R 40, 47)

Appellant, through his counsel, and pursuant to plea negotiations, withdrew his not guilty plea and entered a plea of guilty to two (2) counts of first degree murder on June 28, 1982. (T 76) The plea negotiations were that appellant would receive concurrent life sentences and the State would drop the remaining charge against him. Appellant was also to testify truthfully for the State in the prosecution of a co-defendant, Leonard Mazzara. (T 76-77)

Appellant filed a pro se motion to withdraw his guilty plea on September 17, 1982. (R 50) The Court granted the motion. (R 52) On October 4, 1982 counsel filed a motion to withdraw as counsel for appellant, which the Court granted. (R 53-56)

The Court appointed Jack C. Harris as counsel for appellant. (R 56) Counsel filed a motion for statement of aggravating circumstances (R 57), motion

to dismiss indictment or declare that death is not a possible penalty (R 59), motion to declare Florida Statute 921.141 unconstitutional (R 61-62), motion for individual and sequestered voire dire (R 63), motion in limine (R 64-66), motion to declare that death is not a possible penalty (R67-68), motion to produce photographs (R 81-82), demand for discovery of penalty phase evidence (R 83-84), motion for additional peremptory challenges (R 85-86), motion to suppress (R 92), and motion for change of venue. (R 105) All of these motions, except the motion to produce photographs, were denied. (R 93-101, 111, 117)

The cases proceeded to jury trial on January 10-14, 1983, and at the conclusion thereof appellant was found guilty of one (1) count of murder in the first degree, one (1) count of murder in the second degree, and conspiracy to commit first degree murder. (R 120-121)

Penalty phase proceedings were held on January 20, 1983, and at the conclusion thereof the jury returned a death recommendation as to the murder in the first degree conviction (R 122). Counsel filed a motion for new trial (R 123), which was denied. (R 124) The Court adjudicated appellant guilty and imposed the death sentence. (R 126-128, 131)

On February 17, 1983 a timely notice of appeal was filed. (R 144-145) On February 17, 1983 the Public Defender of the Fourth Judicial Circuit was appointed to represent appellant. (R 143) On March 2, 1983 the Public Defender of the Fourth Judicial Circuit filed a suggestion of conflict on appeal. (R 155-156) The trial court denied the motion. (R 158-162) After the Supreme Court received the record on appeal the Public Defender renewed its suggestion of conflict on appeal. The Supreme Court granted the Public Defender's request to withdraw from further representation of appellant and directed the trial court to appoint substitute appellate counsel. The Court appointed John B. Monroe to represent appellant.

This is the appeal of the trial court's denial of appellant's Motion for New Trial.

STATEMENT OF THE FACTS

The trial of this cause began on January 10, 1983. (Tr. 455) The three (3) charges -- two (2) counts of murder in the first degree, and conspiracy to commit murder in the first degree -- were tried together. (Tr. 464)

David Paul Honrath was the first witness called by the State. (Tr. 482) On September 7, 1980, the date of the subject crimes, Mr. Honrath was employed at the Ramada Inn in Jacksonville Beach, Florida. (Tr. 482-83) While passing Room 205 where the murders occurred, Mr. Honrath looked through the window and saw a man's body and blood. (Tr. 485) He then summoned the motel's owner and they both entered the room. (Tr. 486) Upon opening the door, they saw the body of a man and woman. (Tr. 486) They then called the police. (Tr. 486).

Wayne P. Sweat was the second witness called by the prosecution. (Tr. 500) He was a patrol sargent for the Jacksonville Beach Police Department on the date of the subject crimes. (Tr. 500-501) He was notified over the police radio that someone appeared to be injured at the hotel. (Tr. 501) Officer Sweat and another policeman went to the room where the victims were located. (Tr. 501) The officers discovered the bodies of a male and a female at approximately 10:00 A. M. (Tr. 502)

The next witness called by the prosecution was Detective Roy F. Dorn. (Tr. 508) He was an investigator for the City of Jacksonville Beach at the time of the subject crimes. (Tr. 509) He was called to the scene and arrived at approximately 10:15 A. M. or 10:20 A. M. (Tr. 509) He saw the two (2) bodies and stated that the room was bloody and in disarray. (Tr. 510-511) The State's exhibits numbered one (1) through six (6), which were photographs of the murder scene, were introduced into evidence. (Tr. 512-517). The photographs were published

to the jury. (Tr. 517-520)

Detective Dorn testified that he interviewed a woman named Cathy Taylor during the course of his investigation. (Tr. 667) He also testified that he obtained Barry Hoffman's fingerprints from the traffic records of Duval County. (Tr. 667) The fingerprint record was introduced into evidence. (Tr. 673-674) During the course of the investigation, James White, Barry Hoffman's co-defendant, was arrested in Ponte Vedra Beach, Florida. (Tr. 669-670) As a result of an interview with James White, a man names George Marshall was arrested. (Tr. 670) George Marshall testified that he was arrested in January, 1981, in connection with the investigation of the subject murders. (Tr. 680-681) He testified further that he had gotten Barry Hoffman and James White to do "collections" for Leonard "Lennie" Mazzara. (Tr. 681) George Marshall was subsequently indicted for first degree murder. (Tr. 682-683). Mr. Marshall received immunity from prosecution in exchange for his testimony. (Tr. 683-684)

Mr. Marshall testified that he " . . . procured James White and Barry Hoffman for Leonard Mazzara to do collections and to burn someone, which was to kill someone." (Tr. 684) Marshall testified that his wife owed Mazzara Ten Thousand Dollars ($10,000.00) on an illegal drug debt. (Tr. 686-691) Due to these asserted drug debts, Marshall and Mazzara developed a relationship and eventually Mazzara asked Marshall in July or August, 1980, to find "crazies." (Tr. 691-693) According to Marshall, Mazzara wanted Frank Ihlenfeld, one of the victims, killed due to a debt. (Tr. 694) Again, according to Marshall, he introduced a man named Wayne Merrill and defendant Barry Hoffman to Mazzara. (Tr. 695-696) Marshall also testified that Mazzara told him defendant Barry Hoffman was going to kill someone. (Tr. 698-699) Marshall said he obtained James White to assist Barry Hoffman. (Tr. 699) Marshall testified that he became involved in the scheme in hopes of having his wife's drug debts satisfied in exchange for his involvement. (Tr. 701)

Marshall testified that on September 7, 1980, Mazzara telephoned him at home and told him that he (Mazzara) would come by Marshall's home to pick him up and that the two of them would take Barry Hoffman to the airport. (Tr. 703) Barry Hoffman and Mazzara arrived at Marshall's home on the morning of September 7, 1980, and the three of them went to the airport. (Tr. 703-704) Marshall testified that while en route to the airport, Barry Hoffman admitted his involvement in and participation in the murders. (Tr. 706-708) Marshall said that Barry Hoffman was taken to the airport and that Barry Hoffman said he was going to New Orleans. (Tr. 709)

On cross examination, Marshall testified that the $10,000.00 drug debt owed by his wife was forgiven due to his involvement in procuring people to commit the subject murders. (Tr. 721)

Steve Platt, the chief of the Jacksonville Regional Crime Laboratory, Florida Department of Law Enforcement, was called next by the prosecution. (Tr. 526) Mr. Platt arrived at the crime scene at approximately 12:30 P. M. (Tr. 529) He too testified as to the condition of the crime scene. (Tr. 529-567)

Dr. Bonifacio Floro, a forensic pathologist and the Deputy Chief Medical Examiner for the City of Jacksonville, testified for the prosecution. (Tr. 596) He was called to the crime scene to examine the bodies of the two people in the hotel room. (Tr. 600) He arrived at approximately 11:30 A. M., examined them, and determined that the two people were dead. (Tr. 600-601) He described injuries suffered by Mr. Ihlenfeld, one of the victims. (Tr. 602-610) Dr. Floro determined the cause of Mr. Ihlenfeld's death to be "multiple stab wounds of the neck and slash wounds of the neck." (Tr. 611) He classified the death as homicidal. (Tr. 611)

Dr. Peter Lipkovic, the Chief Medical Examiner for Jacksonville, testified as to the autopsy performed by him on Linda Parrish, the female victim. (Tr. 621) He testified as to the fatal wounds suffered by Ms. Parrish. (Tr. 625-638) Dr. Lipkovic testified that the cause of death was homicide. (Tr. 628-629)

Gregory Stejskal, a Special Agent with the Federal Bureau of Investigation (FBI), testified that he participated in the arrest of Barry Hoffman in Jackson, Michigan, on October 16, 1981. (Tr. 743-746)

Earl G. Poleski, who was a Special Agent with the Federal Bureau of Investigation at the time, testified that he participated in the arrest of Barry Hoffman on October 12, 1981, in Jackson, Michigan. (Tr. 752-753) Barry Hoffman was taken by the FBI agents to the Michigan State Police Post in Jackson, Michigan. (Tr. 754) Agent Poleski testified that Barry Hoffman was advised of his Miranda rights while en route to the police station. (Tr. 755) Agent Poleski testified that Barry Hoffman was interviewed by him while in custody and in the presence of three other law enforcement agents. Agent poleski testified that Barry Hoffman was again advised of his Miranda rights. (Tr. 756) A document, marked State's Exhibit 30, was introduced into evidence, over an objection by the defense, which contained Miranda rights and the document was signed by Barry Hoffman. (Tr. 757-760)

According to Agent Poleski, Barry Hoffman admitted his involvement in the murders. (Tr. 764-765)

Stanley Lukepas, another Special Agent with the FBI, testified that he also participated in the arrest of Barry Hoffman in Jackson, Michigan. (Tr. 776-778) According to Agent Lukepas, Barry Hoffman acknowledged his involvement in the murders. (Tr. 782-783) Agent Lukepas testified that Detectives Dorn and Maxwell, members of the Jacksonville Beach, Florida Police Department, came to Jackson, Michigan, the day Barry Hoffman was arrested and they interviewed him concerning the murders. (Tr. 787) Barry Hoffman signed another Miranda rights card, State's Exhibit No. 31, when detectives Dorn and Maxwell arrived. (Tr. 788-789) Agent Lukepas testified that Barry Hoffman admitted his participation in the murders. (Tr. 796-802)

Detective Roy Dorn was recalled as a witness on behalf of the State. (Tr. 830) He testified that he and Detective Maxwell left Jacksonville, Florida

the day Barry Hoffman was arrested and arrived in Jackson, Michigan, at about 11:00 P. M. or 11:30 P. M. (Tr. 836) Barry Hoffman was interviewed then in the Jackson County Jail. (Tr. 836) According to Detective Dorn, Barry Hoffman signed a form stating he understood his Miranda rights before the interview. (Tr. 837-841) According to Detective Dorn, Barry Hoffman admitted his guilt as to the murders. (Tr. 842-848) Detective Dorn testified that Barry Hoffman said he was paid Five Thousand Dollars ($5,000.00) to commit the murders. (Tr. 843) The alleged confession was never put in writing. (Tr. 875-876)

Ernest Duane Hamm, a crime lab analyst with the Jacksonville Regional Laboratory of the Florida Department of Law Enforcement, testified that a Marlboro cigarette package found in the room where the two bodies were recovered contained the left thumb print of Barry Hoffman. (Tr. 884; 892-893)

The State rested its case upon the conclusion of Mr. Hamm's testimony. (Tr. 899)

The defense then moved for judgment of acquittal. (Tr. 901) The motion was based on the contention that the State had failed to establish a prima facie case. (Tr. 901)

Lillian Hoffman had been called by the defense out of turn. (Tr. 639) She testified that she was the defendant's wife. (Tr. 640) She was living in Kenner, Louisianna at the time of the commission of the subject crimes. (Tr. 640) She testified that Barry Hoffman visited her in Louisianna on a Monday in the early part of September, 1980. (Tr. 642) She further testified that Barry Hoffman made a long distance telephone call in her presence from Louisianna and that he reacted with surprise upon learning that two people he knew had been murdered the day or night before. (Tr. 644)

Cathy Taylor was the second defense witness. (Tr. 902) She testified that she was living with Barry Hoffman at the time the subject murders were committed.

(Tr. 905) She testified that Barry Hoffman and James White picked her up from work between 3:00 A. M., and 4:00 P.M., on the day the murders occurred (Tr. 907) and that the three of them spent the night prior to the day of the subject murders at her home. (Tr. 908) She further testified that Barry Hoffman was at her home around 10:00 A. M., when she left for a ball game. (Tr. 911) Barry Hoffman did not go to the ball game with her. (Tr. 923)

Barry Hoffman testified in his defense. (Tr. 935) He testified that he, James White, and Cathy Taylor spent the night prior to the murders together at the house being rented by Cathy Taylor. (Tr. 949-950) He informed Cathy Taylor around 10:00 A. M., on September 7, 1980, that he was going to New Orleans to visit his family. (Tr. 950-951) Leonard Mazzara took him to the airport around 1:00 P. M. (Tr. 951), and he arrived in New Orleans around 10:00 P. M., or 11:00 P. M. (Tr. 951) Barry Hoffman denied that he was involved in the subject murders. (Tr. 953) He testified that when he was arrested in Jackson, Michigan, he was under the influence of illegal drugs (Tr. 962-968; 971; 990) and that he did not recall being advised of his Miranda rights. (Tr. 965) He thought that he reserved his right to remain silent by signing a document concerning his Miranda rights. (Tr. 965) He denied giving oral confessions to the police officers. (Tr. 973) He also denied killing Frank Ihlenfeld or Linda Parrish. (Tr. 973-974)

The defense rested after the testimony of Barry Hoffman. (Tr. 1006)

The State then offered rebuttal testimony from Detective Dorn. (Tr. 1006) His testimony was first proffered at the request of the defense. (Tr. 1006; 1007-1010) Detective Dorn then testified in rebuttal that Cathy Taylor had told him during an interview on March 4, 1981 or March 5, 1981, that Barry Hoffman and James White spent the night prior to the murders at her residence because the two of them had to go to the Ramada Inn the next day to watch a man named "Frank." (Tr. 1012) Detective Dorn testified that Cathy Taylor had told him during that in-

terview that Barry Hoffman and James White left together on the morning of September 7, 1980. (Tr. 1013)

The evidentiary portion of the trial concluded with the rebuttal testimony of Detective Dorn. (Tr. 1021)

The jury returned verdicts of guilty of murder in the first degree as to Frank Ihlenfeld, guilty of murder in the second degree as to Linda Sue Parrish, and guilty of conspiracy to commit murder in the first degree. (Tr. 1138-1139)

The sentencing phase of the trial began on January 20, 1983. (Tr. 1150) Counsel for the State and defense stipulated that Barry Hoffman did not have a significant criminal history and that Leonard Mazzara and James White, the two other men convicted for their involvement in this case, both received consecutive life sentences. (Tr. 1150-1151; 1179)

At the sentencing phase of the trial, the only evidence presented was testimony by Barry Hoffman. (Tr. 1180) He denied committing the crimes. (Tr. 1180-1181) The jury, by a vote of nine to three, recommended that the Court impose the death penalty for the death of Frank Ihlenfeld. (Tr. 1201-1202)

Sentencing was done on February 11, 1983. (Tr. 1210) The defendant's motion for new trial was denied prior to sentencing. (Tr. 1213-1214) Barry Hoffman again denied his guilt at the sentencing hearing. (Tr. 1225) The trial court announced its findings at the conclusion of arguments by counsel. (Tr. 1227-1234) The trial court imposed the death penalty as to the first degree murder conviction (Tr. 1235), 100 years as to the second degree murder conviction (Tr. 1236), and 30 years as to the conspiracy to commit murder in the first degree conviction. (Tr. 1236) The sentences were ordered to run consecutively. (Tr. 1237)

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS CONFESSIONS AND ADMISSIONS AND ADMITTING SAME AT TRIAL, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At pretrial, appellant moved to suppress statements made to FBI agents Earl Poleski and Stanley Lukepas, and Detectives Roy Dorn and Tommy Maxwell, on the ground that the statements were not freely and voluntarily made. After being given Miranda warnings, appellant requested permission to make some telephone calls. (Tr. 183) The substance of appellant's phone call was to seek assistance in obtaining a lawyer. (Tr. 207-208) Appellant also stated that he asked Agent Lukepas about obtaining a lawyer and he responded that appellant should wait and see what happens when the detectives arrive. (Tr. 239) Appellant contends that the trial court erroneously denied his motion to suppress because the State failed to meet its heavy burden of establishing that appellant knowingly and intelligently waived his right to counsel.

As stated in North Carolina v. Butler, 441 U.S. 369, at 373 (1979):

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably . . . sufficient to establish waiver.

Rather, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Miranda v. Arizona, 384 U.S. at 475. Edwards v. Arizona, 451 U.S. 477 (1981).

Appellant asserts that the State failed to establish a knowing and intelligent waiver of the right to retained or appointed counsel because appellant's phone calls relative to obtaining the assistance of an attorney constituted at least an equivocal assertion of his right to counsel, which the agent was required

to clarify prior to further questioning, and demonstrated a misunderstanding of the warnings previously given.

In Nash v. Estelle, 597 F. 2d 513, 517 (5th Cir. 1978) (en banc), Cert. denied 444 U.S. 981 (1979), the Court held that where a suspect equivocally expresses both a desire for counsel and a desire to continue the interview without counsel, "it is sound and fully constitutional police practice to clarify the course the suspect elects to chose." To establish a waiver of counsel following an equivocal request, it is incumbent upon the interrogating officer "to clarify the course the suspect elects to choose." United States v. Grullon, 496 F. Supp. 991 (E.D. Pa. 1979); United States v. Chansriharaj, 446 F. Supp. 107 (S.D. N.Y. 1978).

Appellant submits that his phone call relative to obtaining an attorney constituted an arguable assertion of his right to counsel. Agent Lukepas was required to inquire further as to whether appellant wanted an attorney. Here, there was no clarification of appellant's desire. In the absence of clarification, an adequate demonstration of waiver of right to counsel has not been made.

Because the appellant was denied the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution and mandated by Miranda, his conviction must be reversed for a new trial.

ARGUMENT II

THE TRIAL COURT ERRED BY FAILING TO FIND THAT APPELLANT'S CONFESSION WAS VOLUNTARILY MADE PRIOR TO ITS ADMISSION INTO EVIDENCE.

On June 25, 1982 a motion to suppress confessions or admissions was filed by appellant. (R 38-39) A hearing on the motion was held on June 25, 1982. (Tr. 49-66) Appellant testified that Detective Dorn threatened him with the electric chair if he didn't cooperate. (T57, 60); that Dorn also offered appellant a deal in return for his statement. (Tr. 57-58, 60) At the conclusion of the hearing, the Court stated that it heard dozens of motions to suppress and stated "I will deny the motion." (T 65-66) The Court subsequently entered a form order denying the motion. (R 40)

Substitute trial counsel for appellant filed a motion to rehear the motion to suppress previously filed on June 25, 1982 under the impression that the motion had not been fully heard. (R 91) The motion was granted. (R 102-103) Another hearing was held on January 10, 1983 (Tr. 171-251) Appellant testified that Detective Dorn told him that he was going to burn. (Tr. 238) At the conclusion of this hearing, the Court stated that "the motion to suppress statements of the defendant . . . . will be denied. (Tr. 251)

It is axiomatic that a criminal defendant is entitled to a separate hearing on whether a confession is voluntary and admissable. Jackson v. Denno, 378 U. S. 368, 84 S. Ct., 1774, 12 L. Ed. 2d 908 (1964). When the question of voluntariness of a confession is being considered by the Court any conclusion that the confession is voluntary "must appear from the record with unmistakable clarity." Sims v. Georgia, 385 U. S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593 (1967). In McDole v. State, 283 So. 2d 553 (Fla. 1973) an issue was whether the trial

court adequately determined that the defendant's confession was voluntarily made where, after a hearing on the motion to suppress the confession, the Court stated that the motion to suppress confessions "will be denied." The Supreme Court, citing Sims v. Georgia, supra., held that the trial court's statement did not sufficiently indicate that the Court had made the required determination that the confessions were voluntarily given before allowing them to be considered by the jury. The McDole rule was narrowed in Peterson v. State, 372 So. 2d 1017, (Fla. 2nd DCA 1979). The Court considered the question of whether McDole required a specific recitation by the trial court finding a defendant's statement to be voluntary at least where coercion was alleged. The Court held that "the trial judge need not recite a finding of voluntariness if his having made such a finding is apparant from the record. Id. at 1020. The district court certified the question to the Florida Supreme Court, Peterson v. State, 382 So. 2d 701 (Fla. 1980), which adopted the ruling of the district court and further stated:

> When the trial judge admits into evidence a statement or confession to which there has been an objection on review the record must reflect with unmistakable clarity that he found the statement or confession was, by the prepondence of the evidence, voluntary and made in accordance with Miranda. If independent review of the record fails to disclose with unmistakable clarity that the trial judge found that the statement was voluntary and in accordance with orther constitutional requirements . . . . it is reversible error.

In the instant case there is nothing in the record to reflect that the trial court complied with the requirements of the unmistakable clarity test as set forth in Sims v. Georgia, supra.; McDole, supra., and Peterson, supra. As stated previously hearings on appellant's motion to suppress were held by the Court on June 25, 1982 and January 10, 1983 and at the conclusion of each hearing the Court denied the motion without any indication that it found the confession to have been voluntarily made or that the Court understood and fulfilled its responsibility

to determine the admissibility of the challanged evidence. (Tr. 65-66, Tr, 251) Although Peterson, supra., does not require that the Court use any specific language when concluding that a confession has been voluntarily made and therefore admissible as evidence, when no clear wording is used "the record must reflect with unmistakable clairty that he (trial judge) found that the statement or confession was, by the preponderance of the evidence voluntary and made in accordance with Miranda. Peterson, supra.

Several district courts have dealt with the unmistakable clarity test as delineated in Peterson, supra. Daizi v. State, 396 So. 2d 1160 (Fla. 3rd DCA 1981); Tuff v. State, 408 So. 2d 724 (Fla. 1st DCA 1982); Dino v. State, 405 So. 2d 724 (Fla. 3rd DCA 1981). In each of the cited cases there was some action by the trial court on the record which one could arguably interpret as a finding of voluntariness of a challenged confession. The only action taken by the trial court on appellant's motion to suppress was to hold a hearing and deny the motion. As Judge Pearson stated in his dissenting opinion in Dino, supra:

> The unmistakable clarity test is not satisfied by the trial court conducting a voluntariness hearing and announcing at the conclusion that the motion to suppress the statement or confession is denied. If mere hearing and denial were enough to show that the trial court understood and fulfilled its responsibility to determine the admission of the challanged evidence, there would be no reason for an unmistakable clarity test, and the rule of Peterson would simply be that the record must show that a hearing was held and the challanged evidence admitted. But that is not, and constisutionally cannot be, the Peterson rule.

Because the record does not disclose with unmistakable clarity that the trial court found the appellant's confession voluntary his conviction must be reversed for a new trial.

ARGUMENT III

APPELLANT WAS DENIED HIS RIGHTS TO AN IMPARTIAL JURY AND DUE PROCESS OF LAW AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE IMPROPER EXCLUSION OF THREE VENIREMEN DUE TO THEIR VIEWS ON CAPITAL PUNISHMENT, DENYING HIM A JURY SELECTED FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY.

During jury selection the Court, over objection, excused for cause veniremen Towns, Shuler and Brown due to their views on capital punishment. (Tr. 410-412, 310, 331) Because their exclusion was on a basis broader than that authorized under Witherspoon v. Illinois, 391 U.S. 510 (1968), appellant submits his conviction must be reversed.

The exclusion of veniremen because of their views on capital punishment is controlled by Witherspoon:

> [Veniremen] cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he is willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

391 U.S. at 521, N. 21. Accord, Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishops, 398 U.S. 262 (1970). The Court recognized that the State might have power to exclude jurors on more narrow grounds:

> [N]othing 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 unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without

> regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

See also, Adams v. Texas, 448 U.S. 38 (1980). However, the improper exclusion of even one juror in violation of Witherspoon constitutes per se reversible error. Davis v. Georgia, 429 U.S. 122 (1976); Moore v. Estelle, 670 F. 2d 56 (5th Cir. 1982).

The exclusion of veniremen Towns, Shuler and Brown violates Witherspoon and its progeny because the questioning and their responses fail to establish unequivocally that they were irrevocably committed to automatically vote against the death penalty. Ms. Towns indicated that she did not know if she could recommend the death penalty if the facts justified it. (Tr. 411-412) Ms. Brown indicated under questioning that she did not think that she could recommend the death penalty under any circumstances. (Tr. 331) Mr. Shuler was likewise equivocal in his responses to questions about recommending the death penalty. (Tr. 310). The responses given by Ms. Towns, Ms. Brown and Mr. Shuler fail to demonstrate unambiguously that they were irrevocably committed to vote against the penalty of death.

Anagolous is Granviel v. Estelle, 655 F. 2d 673 (5th Cir. 1981). During voir dire, venireman Harrison was questioned, and responded as follows:

> Q: (By Prosecutor) The defendant in this case is charged with capital murder. There are only two punishments for the offense of capital murder and that is either death or life in the penitentiary.
>
> Now, do you have conscientious scruples against the infliction of the death penalty as a punishment for crime?
>
> A: I don't know what that means.
>
> Q: Let me ask you if you, personally sitting as a juror, could ever vote so as to inflict the death penalty?
>
> A: No, I don't think I could.

Q: That is a definite prejudice or feeling that you have that you would not change? You just don't feel like you would be entitled to take another person's life in that fashion.

A: (Venireman nods).

Q: Okay, you could not?

A: No, I could not.

Id. at 684. The Fifth Circuit vacated the death sentence imposed upon Granviel finding that Harrison was improperly excused for cause for merely voicing conscientious scruples against the death penalty. The Court stated that "[t]hese questions and answers fall far short of an affirmation by Harrison that he would automatically vote against the death denalty regardless of the evidence. Id at 677.

Also analogous is Allen v. State, 286 S.E. 2d 3 (Ga. 1982). In concluding that the exclusion of Venireman Freeman[1] was erroneous, the Court stated:

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[1]The voir dire examination of Mrs. Freeman was as follows:

"THE COURT: Mrs. Freeman . . . are you conscientiously opposed to capital punishment?

"JUROR: Yeah, I think I am. I tell you the way I feel about it. I could kill somebody in self-defense; but to just kill somebody, I don't believe I could.

" . . .

"THE COURT: All right. And is there . . . any set of circumstances or facts or evidence where you could impose capital punishment on trial of a case? That is the death penalty.

"JUROR: No, I don't think so.

"THE COURT: Could you consider fairly and fully the death penalty as one of the penalties provided by the laws of Georgia as punishment for those found guilty of certain offenses and then to vote to impose it should the facts and circumstances of a case so warrant it?

"JUROR: No, I don't think so."

* * *

"JUROR: Well, I might consider death in some circumstances, but I don't know.

"The Court: But you're not certain of that?

"JUROR: No, I'm not certain of that. This is the first time I've ever been confronted with this murder business."

Id. at 6-7.

> [I]n order to be disqualified [under Witherspoon] a prospective juror . . . must make it "unmistakably clear" that he . . . would automatically vote against the death penalty in any and all cases. Unless a venireman states "unambiguously" that he . . . would automatically vote against imposition of capital punishment no matter what the trial might reveal, the juror is not disqualified. Witherspoon v. Illinois, supra, 391 U.S. at 516, n.9, 522, n.21 . . . . This record does not support the requisite finding that Mrs. Freeman made it "unmistakably clear" that she "would automatically vote against" the death penalty.

(Emphasis supplied). Id at 7.

Since Ms. Towns', Mr. Shuler's and Ms. Brown's responses "fall far short of an affirmation . . . that they would automatically vote against the death penalty," their exclusion violates the Sixth and Fourteenth Amendments to the United States Constitution.

ARGUMENT IV

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY ON THE APPELLANT.

The trial court imposed the death penalty on Barry Hoffman based on his conviction of the first degree murder of Frank Ihlenfeld. (R 132) The jury, by a vote of nine to three, recommended that the Court impose the death penalty. (R 122) The trial court issued its "Findings Supporting Sentence" on February 11, 1983. (R 132) It is respectfully submitted that the trial court erred in imposing the death penalty.

Prior to starting the penalty phase of the trial, the parties stipulated that Barry Hoffman had no prior criminal record. (Tr. 1150) Thus, the mitigating factor set forth under 921.141(6)(a), i.e, "[t]he defendant has no significant history of prior criminal activity," was established. The parties also stipulated, as another mitigating factor, that two other men involved in the murders, Leonard Mazzara and James Robert White, received life sentences for their roles in the crimes. (Tr. 1150) The jury was instructed in accordance with the stipulation. (Tr. 1179)

During the conference with the attorneys prior to the commencement of the penalty phase of the trial, the court announced that it would not instruct the jury to consider the following aggravating circumstances:

> 1. The crime for which (the appellant) is to be sentenced was committed while he was under sentence of imprisonment. (Tr. 1158);
>
> 2. The defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons (Tr. 1160);
>
> 3. The crime for which the defendant is to be sentenced was committed while he was
>
> [engaged]

[an accomplice]

in

[the commission of]
[an attempt to commit]
[flight after committing or attempting to commit]

the crime of

[robbery]
[sexual battery]
[arson]
[burglary]
[kidnapping]
[aircraft piracy]
[the unlawful throwing, placing or discharging of a destructive device or bomb] (Tr. 1160);

4. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (Tr. 1160);

5. The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws (Tr.1160-61); and

6. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel (Tr. 1163).

The Court stated that it would instruct the jury as to the following possible aggravating circumstances:

1. The defendant has been previously convicted of another capital offense or of a felony involving the [use][threat] of violence to some persons (Tr. 1163-64);

2. The crime for which the defendant is to be sentenced was committed for financial gain (Tr. 1163-64);

3. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (Tr. 1163-64).

As to possible mitigating factors, the court stated that it would instruct the jury on the following factors:

1. The appellant has no significant history of prior criminal activity (Tr. 1164);

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (Tr. 1164); and

3. Any other aspect of the defendant's character or record, and any other circumstance of the offense (Tr. 1164).

A. The Death Penalty Is Improper Due To The Impermissable Argument By The Attorney For The State At the Penalty Phase.

During arguments to the jury, the attorney for the State argued that the jury should consider the three aggravating factors which the court had announced it would instruct the jury on. (Tr. 1181-1191) However, he impermissably argued matters as aggravating circumstances which the court had NOT stated could be or would be considered as aggravating circumstances.

The attorney for the State argued that " . . . it's more likely that [Barry Hoffman] was the man who actually killed Linda Sue Parrish by cutting her throat." (Tr. 1185) This was done despite the fact that James Robert White had been prosecuted and convicted of killing Ms. Parrish.

The attorney for the State further argued that Barry Hoffman killed or aided in the killing of Ms. Parrish " . . . to cover up the murder of Mr. Ihlenfeld, to prevent her from being a witness." (Tr. 1185) Florida Statutes Section 921.151(5)(e) or Section 921.141(5)(g) allow this argument when there is evidence to support it, but the trial court determined that there was no evidence to support the argument when it stated it would not instruct the jury as to those possible aggravating factors. Additionally, the attorney for the State did not request that the jury be allowed to consider the death of Ms. Parrish. The net effect of the argument

by the attorney for the State was to urge the jury to assume for puroses of its advisory verdict that Barry Hoffman actually killed Ms. Parrish despite the fact that the jury could only make its recommendation based on its verdict which found Barry Hoffman guilty of the first degree murder of Frank Ihlenfeld.

The attorney for the State continued with his impermissable argument by arguing, under the pretext of showing that the crime for which Barry Hoffman was convicted was done in a "cold, calculated, and premeditated manner," that:

> That woman's life was snuffed out for the mere simple purpose to keep her mouth shut so she couldn't go to the police. She couldn't identify Hoffman and White. As the old story of the late show goes, dead pigeons don't talk (Tr. 1189).

The attorney for the State concluded his impermissable comments by stating that:

> . . . the legislature and Courts have determined that certain murders are worse than others. We don't think it makes any difference to the deceased, but to society certain murderers are worse than others. In certain cases society has a right to extract from -- from the perpetrators of these, the especially heinous murderers, the ultimate penalty.

Tr. at 1190 The reference to "especially heinous murders" was especially improper in light of the fact that the Court had informed the attorneys that the aggravating factor of "heinous" murders would not be given and the attorney for the State had specially stated that "I will not request it [the factor of heinous murders]." Tr. at 1161-163

The effect of the argument by the attorney for the State was to unduly focus on the death of Ms. Parrish. This is understandable from the State's perspective since Frank Ihlenfeld was an unsavory illegal drug dealer. The jury might not have recommended the death penalty soley for his death. By devoting his argument to the murder of Ms. Parrish, the attorney for the State argued that Barry

Hoffman should be sentenced to death for the murder of Ms. Parrish.

For the reason that the argument of the attorney for the State during the penalty phase was improper and prejudicial, the jury's recommendation was not rendered in accordance with Florida Statutes Section 921.141(2). Accordingly the death sentence should be vacated. This is especially true in this case since the trial court stated that if the jury recommended a life sentence, it would follow that recommendation when the court stated that:

> If they recommend life I probably will go ahead and sentence him today, unless you want a pre-sentence investigation done (Tr. 1173).

In view of the great weight to be given the jury's recommendation, Norris v. State, 429 So. 2d 688, 690 (Fla. 1983), improper arguments to the jury at the penalty phase by the prosecutor requires that a death penalty imposed pursuant to the jury's recommendation be vacated.

B. The Death Penalty Is Improper Due to The Fact That The Trial Court Considered The Appellant's Conviction Of Second Degree Murder As A Prior Conviction Of A Violent Felony.

The trial court considered the appellant's conviction of the second degree murder of Linda Sue Parrish as a prior conviction of a violent felony. (R 134) This was improper under the facts of this case.

Florida Statutes Section 921.141(5)(b) states that an aggravating circumstances is that:

> The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The evidence in this case is that James White actually killed Linda Parrish. The jury must have accepted this as being true because Barry Hoffman was found guilty of second degree murder regarding Linda Parrish.

The aggravating circumstance of a conviction of a prior violent has only

been applied where the evidence shows that the defendant being sentenced actually committed the violent felony. See, e.g., Daugherty v. State, 419 So. 2d 1067 (Fla. 1982); Ruffin v. State, 397 So. 2d 277 (Fla. 1981); Elledge v. State, 346 So. 2d 998 (Fla. 1977). This is so because "[p]ropensity to commit violent crimes surely must be a valid consideration for the jury and the judge." Elledge v. State, supra., at 1001 (emphasis added). Thus, the trial court erred in using as an aggravating circumstance the fact that Barry Hoffman had been convicted of the second degree murder of Ms. Parrish because he did not "commit" the murder of Ms. Parrish.

For the above reason, the death penalty should be vacated as required by Elledge v. State, supra., where this court stated:

> . . . regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

Id. at 1003.

C. The Death Penalty Is Improper Because The Trial Court Considered The Death Of Linda Parrish And The Manner Of Her Death As An Aggravating Circumstance.

The trial court included in its "Findings Supporting Sentence" the following aggravating circumstance in support of the death penalty imposed on Barry Hoffman:

> 7. Following Mr. Ihlenfeld's expiration, the Defendant Barry Hoffman and James White for Linda Sue Parrish's return. When she arrived, Barry Hoffman struck her in the face with his fist, knocking her down to the floor in a dazed condition. He then instructed James White that "this one is yours," whereupon a re-enactment of the previous bloody scene took place, with James White struggling to kill Linda Sue Parrish and Barry Hoffman joining in to assist. Linda Sue Parrish's throat was eventually cut in a similar fashion to Mr. Idlenfeld's. She received multiple wounds (R 133); and

9. The conviction of the Defendant Barry Hoffman for second degree murder in the homicide of Linda Sue Parrish constitutes another conviction of a felony involving the use of violence to a person. The extremely violent, gratuitous, and apparently unnecessary murder of Linda Sue Parrish exhibits a propensity on the part of Barry Hoffman to commit violent crimes. F.S. 921.141(5)(b); Elledge v. State, 346 So. 2d 998 (Fla. 1977); Lucas v. State, 376 So. 2d 1149 (Fla. 1979); King v. State, 390 So. 2d 215 (Fla. 1980, cert. denied (R 134).

The above findings clearly evidence the fact that the trial court, like the prosecutor during his argument in the penalty phase, impermissably focused on the death of Ms. Parrish. The appellant could not be sentenced to death based on the murder of Ms. Parrish by James White.

The trial court also considered as an aggravating factor that Ms. Parrish's death was "extremely violent." This is another way of saying the murder was heinous. The trial court had stated that it would not consider the manner of Mr. Ihlenfeld's death as an aggravating circumstance. (Tr. at 1163) This being so, it certainly could not consider the manner of Ms. Parrish death as an aggravated circumstance.

In essence, the trial court considered non-statutory, and hence unauthorized aggravating circumstances in imposing the death penalty. Thus, under the dictates of Moody v. State, 418 So. 2d 989, 995 (Fla. 1982) and Lucas v. State, 376 So. 2d 1149,1153 (Fla. 1979), the death sentence should be vacated.

D. The death penalty is improper because the trial court considered, as an aggravating circumstance, the manner of the death of Frank Ihlenfeld after ruling that it would not do so.

At the conference between the Court and the attorneys which was held immediately before the penalty phase of the trial, the Court stated that the aggravating circumstance set forth in Florida Statutes Section 921.141(5)(h), and as set forth in the standard jury instructions under Florida Statutes 921.141(5)(8), would not be considered as an aggravating circumstance. (Tr. 1161-1163)

Florida Statutes Section 921.141(5)(h) states that the following may constitute an aggravating circumstance: "The capital felony was especially heinous, atrocious, or cruel." The standard jury instructions modifies that language by stating that an aggravating circumstance exists where: "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel."

The trial court, consistent with its statements to the attorneys, and consistent with the statement by the prosecutor that "I will not request it [the subject aggravating circumstance]," (Tr. 1163), did not instruct the jury that it could consider the nature of the crime in arriving at its recommendation. (Tr. 1196-1197)

The trial court made the following finding in its Findings Supporting Sentence:

> 10. The victim herein was killed in a manner designed to render him helpless by a blow to the head, and then, while he was in a position to perceive the imminence of his death, to stab him to death through the throat in a slow, cruel, and painful manner. The evidence indicated the Defendant told the victim, who was prostrate, bleeding, and beaten, that he had stolen

> from the wrong person this time, meaning his employer. The actions of the Defendant evidence a desire to inflict mental and physical pain and suffering upon his victim, as an additional form of taunting punishment beyond merely causing his death. Therefore, the Court finds that the capital felony herein was especially heinous, atrocious, and cruel. (R 134)

It is respectfully submitted that the trial court's decision to impose the death sentence is rendered totally invalid by its above stated finding that " . . . the capital felony herein was especially heinous, atrocious, and cruel" in view of its earlier ruling, which was agreed upon by both parties, that such matters would not be considered in arriving at the sentence to be imposed. This finding by the court under these circumstances violated the appellant's basic due process rights. Elledge v. State, 346 So.2d 998 (Fla. 1977), requires that the death penalty imposed on Barry Hoffman be vacated.

> E. The death penalty is improper because the State sought the death penalty for punitive reasons aside from the crime for which the appellant was convicted in that the death penalty was sought because the appellant did not give testimony against a co-defendant.

On June 28, 1982, Barry Hoffman withdrew his previously entered plea of not guilty and pursuant to negotiations with the prosecutor, he entered guilty pleas. (R 73-79; Tr. 76) Part of the agreement was that the appellant was to testify against his co-defendant Leonard Mazzara in exchange for concurrent life sentences rather than the death penalty.

On September 15, 1982, the appellant testified at the trial of Leonard Mazzara. (Tr. 89-95) The appellant testified, in essence, that he was not involved in the murders and that he knew nothing about them. Thereupon, the "deal" was withdrawn by the State and this matter proceeded to trial with the result being the imposition of the death penalty.

The present case is distinguishable from cases such as Brown v. State, 367 So.2d 616 (Fla. 1979), where this Court held that " . . . the double jeopardy clause does not bar the reprosecution of an accused who willfully refuses to perform a condition of a guilty plea which has been accepted by the trial court on that basis." 367 So.2d at 616.

The present case is in a posture similar to the facts of Fraley v. State, 426 So.2d 983 (Fla. 3rd DCA 1983), and the cases cited therein, especially United States v. Jackson, 390 U.S. 570 (1968). In Fraley v. State, supra, the Court stated the general rule applicable to this issue as follows:

> When a trial judge imposes a sentence upon a defendant after trial, which is more severe than the plea offer made by the court after it has heard all the evidence, the reasons for the more severe sentence must affirmatively appear in the record so as to assure the absence of vindictiveness. Cf. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Because of the total absence of reasons for the more severe sentence we find the sentence presumptively unlawful.

426 So.2d at 985-986.

The Circuit Judge who accepted the appellant's guilty plea and who agreed to the life sentences had already presided over the trial of the appellant's co-defendant James White. At the time the guilty plea was being entered, the Court stated:

> I would like the record to reflect I have already been through the trial of one defendant and I know the facts backward and forward.

(R 77).

Regarding the plea agreement and the appellant's duty to testify against his co-defendant Leonard Mazzara, the Court stated to the appellant that:

> Your failure to do that will mean the deal is off and you will go to trial and then the chips will fall where they may; Do you understand?

(R 78).

A different Circuit Judge presided at the trial of the appellant and imposed the death penalty. The facts as known to or believed by the Court and State did not change between the time the guilty plea was accepted and the time the death penalty was imposed. There is nothing in the record to indicate that a presentence report was prepared and considered.

Hence, the conclusion is inescapable that the appellant is on death row not due to the nature of the crime for which he stands convicted. Regrettably, the death of Frank Ihlenfeld occurred in a manner no worse than the manner of death of many other victims in Florida whose assailants were not necessarily subjected to the death penalty. See, e.g., Simmons v. State, 419 So.2d 316 (Fla. 1982); and Moody v. State, 418 So.2d 989 (Fla. 1982). The appellant is under a death sentence because he did not give the testimony sought by the prosecutor. This clearly is an impermissable reason for sentencing someone to death. Thus the death penalty should be vacated.

F. The imposition of the death penalty against the appellant is a denial of his right to equal justice under the law in view of the sentences imposed on the other participants in the subject crimes.

In the present case, the evidence at trial showed that there were at least four participants in the subject crimes: Barry Hoffman, James White, Leonard Mazzara, and George "Rocco" Marshall. Briefly summarized, the evidence at trial was that Leonard Mazzara told George Marshall to find someone who would kill Frank Ihlenfeld. George Marshall then inquired of Barry Hoffman as to his willingness to do this. According to Marshall, Barry Hoffman agreed to do so.

Marshall also arranged for James White to "assist" in these efforts. Again, according to the evidence at trial, Barry Hoffman killed Frank Ihlenfeld while James White killed Linda Parrish. Barry Hoffman denies his participation in these crimes.

As was stipulated to at trial, Leonard Mazzara and James White received consecutive life sentences. (Tr. 1179) George Marshall received transactional immunity. (Tr. 683-684)

The above factors bring the present case within the requirement of Slater v. State, 316 So.2d 539 (Fla. 1975), where this Court stated that: "Defendants should not be treated differently upon the same or similar facts." 316 So.2d at 542. Accord, Messer v. State, 330 So.2d 137, 142 (Fla. 1976).

The present case is not within the rule recognized in cases such as Salvatore v. State, 366 So.2d 745 (Fla. 1979), where it was held that it is not always impermissable to impose a death penalty on one co-defendant and a lesser sentence on another. One of the factors which was stated as upholding the death penalty on Salvatore was that he "formulated the plan to kill the victim." 366 So.2d at 752.

In the present case, Leonard Mazzara formulated the plan to kill Frank Ihlenfeld. He is serving life sentences. George Marshall got Barry Hoffman involved in this matter in the first place according to his testimony. He received immunity. James White was convicted of cutting the throat of a helpless, and as far as the record reveals, a totally blameless female. He is serving life sentences. Barry Hoffman was convicted of killing a man who by all accounts was willing participant in the illegal drug trade.

It can be said with some degree of validity that Frank Ihlenfeld "assumed the risk" that he would meet the fate which he encountered though that would by no means justify his death. This does establish, however, that Barry Hoffman's involvement in this inexcusable episode was no worse than that of the other participants. He deserves no harsher punishment than the others received. Accordingly, the death sentence should be vacated.

CONCLUSION

Based upon the preceeding argument and citation of authorities, appellant requests that the judgment and sentence of the trial court be vacated and the cause remanded for a new trial or in the alternative a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded to Clyde M. Collins, Assistant Attorney General, Duval County Courthouse, and Michael Obringer, Assistant State Attorney, Duval County Courthouse, by hand this 12th day of September, 1983.

John B. Monroe
ATTORNEY