IN THE SUPREME COURT OF FLORIDA

RAYMOND LEON KOON,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs	)	Case No. 63,322
	)	
STATE OF FLORIDA,	)	
	)	
Respondent/Appellee	)	

ON APPEAL FROM THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA IN AND FOR COLLIER COUNTY

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This is a mandatory appeal per Fla. R. App. P. 9.030 (a)(1)(A)(i) and §921.141(4), Fla. Stat. (1981) by Raymond Leon Koon, from a judgment of the Circuit Court of the Twentieth Judicial Circuit of Florida. (R 138)

Appellant was first indicted along with his nephew, Joseph Lester Koon, on October 5, 1981 by the United States of America and tried in the United States District Court, Southern District of Florida, on November 18, 1981, (State's Exb. 1 October 5, 1982 Hearing; R 195-196) before the Honorable William M. Hoeveler, United States District Judge. The charges material here were:

Count I: Conspiracy to threaten a citizen of the United States of America of the right and privilege to be a witness in a judicial proceeding resulting in the death of Joseph Dino on or about November 21, 1979 in violation of 18 U.S.C. 241,

Count II: Endeavoring by force and violence to intimidate a witness, Joseph Dino, in a Court of the United States, in violation of 18 U.S.C. 1503 and 2.

The appellant, on November 19, 1981 changed his plea to guilty. (Excerpt of Proceedings, page 37) Judge Hoeveler on December 31, 1981, entered judgment accordingly and sentenced the appellant to seventy five years on Count I and five years on Count II, to run consecutively. (State's Exb. 1, October 5, 1982 Hearing; R 195-196)

Appellant was indicted by the State of Florida on February

16, 1982 charging him with murder in the first degree of one Joseph Dino on or about November 21, 1979, by shooting him with a fire arm in violation of §782.04(1)(a) Fla. Stat. (1981) (R 1). The jury returned a verdict of guilty of first degree murder (R 126) and rendered an advisory sentence of death on November 22, 1982 (R 130). The Honorable Charles T. Carlton, Circuit Judge, entered judgment on January 28, 1983 (R 138) and sentenced the appellant to be executed in accordance with the laws of the State of Florida (R 140).

The facts are alleged to be that on November 21, 1979, Joseph Dino was abducted in a Big Daddy's parking lot, located on West 49th Street in Hialeah, Florida. He was allegedly placed in a red Plymouth Duster, owned by Joseph Lester Koon, and driven west on the Tamiami Trail, U.S. 41, into Collier County, Florida. He was then taken to a rock pit known as Burn's Lake, where he was allegedly shot and killed.

Additional facts pertinent to the case will be set out along with each individual issue presented herein.

The references above and throughout this brief are:

Record on Appeal: (R _____)

Appendex (A _____)

Exhibit: (State's Exb _____)

Excerpt of Proceedings in United States District Court: (Excerpt of Proceedings) (These proceedings are those referred to and attached to Request for Judicial Notice of Excerpt of Proceedings on November 19, 1981 in the United States District Court for the Southern District of Florida, dated August 11, 1983).

The appendix pages are numbered at the bottom center of the page.

ARGUMENT

I. DOUBLE JEOPARDY

Issue: Did the indictment and retrial of appellant for the murder of Joseph Dino violate United States Constitutional guarantee against Double Jeopardy?

Appellant moved to dismiss the State's charges against him on the grounds that the State prosecution after the Federal prosecution violated the Double Jeopardy clauses of the United States and Florida Constitutions (R 47). The motion was denied by the trial court (R 214).

The trial attorney for appellant filed a motion for a writ of prohibition with this court asking for a writ prohibiting the trial of the cause based on the Doctrine of Double Jeopardy (R 114 et seq.) The petition was denied without hearing by order dated November 15, 1982 (R 131).

Appellant was indicted by the United States in 1981, charging that he conspired with another to injure, oppress, threaten and intimidate Joseph Dino, resulting in the death of Joseph Dino. A second count in the indictment charged him with endeavoring through the use of force and violence to influence, intimidate and impede Joseph Dino as a witness in another Federal prosecution (State's Exb. 1, October 5, 1982 Hearing). Appellant was brought to trial on that indictment. Neil G. Taylor, Assistant United States Attorney, was prosecutor in that trial. During the course of the

trial on November 19, 1979, appellant decided to change his plea to those charges from not guilty to guilty. In the colloquy between the court and appellant, prior to acceptance of the plea, appellant was required to admit to killing Joseph Dino (Excerpt of Proceedings, page 27-28) as follows:

Q Listen to me, please sir. Did you take Joseph Dino out to the rockpit that these gentlemen have talked about and shoot him with a shotgun, and kill him?

A I'm guilty.

Q Did you do that?

A I'm guilty, your Honor, yes.

Q Well, is your answer to that yes?

A Yes.

Q You did do that?

A I'm guilty, yes.

Q You are guilty of that charge?

A Yes.

Q And the same charge is made in Count Two, that you intimidated Joseph Dino because he was going to testify against you, and you killed him. Did you do that?

A Yes, sir.

Based upon his plea, he was found guilty and sentenced to seventy five years imprisonment as to the First Count and five years as to the Second Count, with the sentences to run consecutively. Sentence was pronounced on December 30, 1981 (State's

Exb. 1, October 5, 1982 Hearing).

Thereafter, on February 16, 1982, appellant was indicted in Collier County, Florida for the murder of Joseph Dino, the same person he had been convicted of killing in the Federal prosecution (R 1). On March 4, 1982, Neil G. Taylor, Assistant United States Attorney, was appointed to prosecute the State charge (R 13). Appellant was arraigned on the State indictment on March 10, 1982 and plead not guilty.

Agent Klare, a United States Custom Officer, was the lead agent in the investigation of the Federal charges and was indentified as the lead investigator with respect to the State charges. The State sought to have him excepted from the witness exclusionary rule at the trial under Spencer vs State, 133 So. 2nd 729 (Fla. 1961) (R553-554) (A 14-15).

In response to appellant's request for disclosure (R 7-8), the State listed a number of persons, which might have information relevant to the offense or to any defense. This list contained the names of fourteen people not related to the appellant or not a member of a law enforcement agency. Of these fourteen persons, the address given for nine of them was in care of Special Agent Frederick Klare. It was thus necessary for the defense to go through the federal agent in order to make contact with these people.

Assistant United States Attorney Neil G. Taylor prosecuted the State charges in the trial court. Among other things, he argued the pretrial issues and examined all witnesses on behalf of the State at the hearing before the trial court on October 5, 1982, as well as during the remainder of the trial of appellant through

the date upon which appellant was sentenced to death. He conducted the voir dire of the jury panel (R 292-534); made the opening statement on behalf of the State (R 556-561); presented the State's witnesses and cross examined the defense witnesses (R 565-1059) (except for four witnesses, who were presented by an Assistant State Attorney, whose testimony in total amounted to only twenty seven pages of the four hundred and ninety two pages of testimony in the trial transcript); made closing argument on behalf of the State (R 1077-1091, 1126-1127); and argued all issues on behalf of the State during the trial. During the course of the trial, he on behalf of the office of the United States Attorney for the Southern District of Florida, granted immunity to two witnesses, with respect to their testimony (R 922, 937-938) (A 23, 28-29).

During the sentencing phase of the trial, he argued all issues before the court; made opening statement on behalf of the State; presented the State's evidence; and made closing argument on behalf of the State (R 1154-1197),

At sentence hearing, at which appellant was sentenced to death, Assistant United States Attorney, Neil G. Taylor, argued on behalf of the State and immediately after sentence was pronounced, representing the office of the United States Attorney for the Southern District of Florida, while the hearing was still in session, delivered to appellant, a copy of a motion to relinguish custody from the Federal authorities to the State authorities so that the State sentence of death could be executed and delivered an order of the United States District Court for the Southern District of Florida transferring custody of appellant to

the State authorities for execution of the State's sentence (R 1212-1225).

Appellant's trial in the circuit court, Twentieth Judicial Circuit, Collier County, Florida was a retrial for the same crime (as argued by the State at the trial (R 548) (A 13)) to which he plead guilty and was convicted in the Federal court. The trial of the case was dominated by Assistant United States Attorney Taylor; Taylor, not only represented the State in the trial but at the same time, represented the Office of the Assistant United States Attorney for the Southern District of Florida. The investigation of the State charges was led by Federal Agent Klare. The Office of United States Attorney, not satisfied with the eighty year sentence assessed by the United States District Court, seized upon another forum to try the same crime for which appellant had been sentenced to eighty years in prison in order to obtain a harsher sentence than that meted out by the United States District Court.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;..."

The Fourteenth Amendment provides:

> "...nor shall any State deprive any person of life, liberty,or property,without due process of law;..."

Article I, Section 9 of the Constitution of the State of Florida provides that no person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense.

Since Benton vs Maryland, 395 U.S. 784, 23 L Ed 2nd 707, 89 S Ct 2056 (1969) it is quite clear that both the Fifth and Fourteenth Amendments to the Constitution of the United States guarantees each citizen that he shall not be twice put in jeopardy with respect to the same crime or offense, either by State authorities or by the United States Government. Thus, neither the United States nor the State of Florida could have prosecuted each of these actions.

This court has recently declined to modify its dual sovereignty doctrine in Booth vs State, reported at page 197, The Florida Law Weekly, June 10, 1983. The court recognized that the dual sovereignty doctrine was created by this court. This court should not allow its doctrine to be used as a cloak of respectability by the Federal Government to do what it could not do under the Fifth Amendment to the United States Constitution. In Bartkus vs Illinois, 359 U.S. 121, 3 L Ed 2nd 684, 70 S Ct 676, Reh Den 360 U.S. 907, 3 L Ed 2nd, 1258 79 S Ct 1283 (1959), the dissent by Brennan, J. joined by Warren, Ch. J. and Douglas, J. specifically condemned the practice employed in this case (with substantially less Federal involvment than in this instance), finding that the State prosecution was so dominated by Federal officers as to be, in actuality, a second Federal prosecution. The majority in that case while finding that the conduct of Federal authorities was significantly less than in this case, at least by inference, condemned the same practice.

In this case, the United States Attorney entered the prosecution from the very beginning. It is clear that the prosecution and the investigation of the instant case were controlled by the

Federal Government and that Assistant United States Attorney, Neil G. Taylor, represented the Federal Government in the trial of the matter. The transfer of custody pre-engineered by the Assistant United States Attorney, so that appellant could be executed, at the sentence hearing where he acted ostensibly for the State and in his role as Assistant United States Attorney adds validity to the fact that the predominant prosecutorial interests involved were the Federal authority's. Participation by State authorities was pro forma and minimal. The State prosecution was a sham to veil actions by the Federal authorities to evade constitutional proscription.

It is clear that the State and Federal interests were substantially similiar. The gravamen of the Federal indictment was that appellant violated the civil rights of Joseph Dino by killing him (State's Exb. 1, October 5th hearing); while the indictment by the State of Florida charged the appellant with the murder of Joseph Dino (R 1). Further, the sentence in the Federal trial was for eighty years (State's Exb. 1, October 5th hearing) while the possible sentence in the State trial for a capital felony is life, or death by execution. Essentially, an eighty year sentence for a fifty year old man, as is appellant, is a life sentence. Therefore, the penalties are substantially the same.

This court should not allow the Federal authorities to use the courts of the State to accomplish aims which are illegal and prohibited to it under the Fifth Amendment to the United States Constitution. The court should not put its seal of approval on this action. It should not invoke its doctrine of dual sovereignty in this action. It should not allow its doctrine of dual sovereignty

to be utilized by the Federal government to accomplish its illegal aims. This court should find that the trial in the State court in this case consitutes double jeopardy prohibited by the United States Constitution and dismiss the charges herein against appellant.

II. MOTION FOR CONTINUANCE

Issue: Did the court err in denying appellant's motion for continuance based on the failure to receive reports of court appointed physicians prior to trial?

Defendant filed his motion for appointment of expert for psychiatric examination (R 67). Pursuant to that motion, the court appointed Drs. Wald, Lombillo and Collins to examine the appellant and to render written reports to the court and to the attorneys. The doctors were ordered to evaluate the appellant to determine his mental competency and in paragraph 4 of said order were asked to determine

> "...whether there was an absence of an exercise of independent judgment and volition on the part of the accused in consuming an intoxicant at the time of the unlawful act...." (R 79)

By letter dated October 18, 1982, Dr. Wald expressed a need for examination by neurologists and psychologists (R 90) (A 1). Dr. Ertag, a neurologist, was appointed to examine the appellant (R 91).

On November 15th, the day before the trial, appellant moved

for continuance because results of the examination ordered by the court had not been received and that even if such results were received during the trial, appellant's counsel would not have sufficient time to analyze the contents of the reports and formulate a plan for the implementation of the results of the examination (R 112).

As the court convened the next day, for the trial of the case, appellant's motion for continuance was argued to the court (R 286-290) (A 6-10). At that time, Dr. Lombillo's report had been received the night before. Dr. Collins' report had also been recieved and he opined that appellant was competent to stand trial. He diagnosed appellant as "acute and chronic alcoholism and anti-social personality". He did not address himself to the question of impairment of judgment because of intoxication at the time of the alleged act, as required by the court's order nor did he refer to the neurological examination. Dr. Lombillo indicated "...it is possible that through excessive and long continued use of intoxicants, his judgment might have been impaired and this would have an influence on his actions...." Dr. Lombillo stated that he did not have the results of the neurological evaluation and that "...I feel that this evaluation should be an integral part of his complete evaluation...." He did not render a diagnosis. Dr. Wald's report was not received until several days into the trial. It is dated November 17, 1982. Dr. Wald found the appellant competent to stand trial but did not address himself to the question whether or not appellant's judgment was impaired by consumption of an intoxicant at the time of the unlawful act, as ordered by the court.

His diagnosis was alcoholism and possible mild organic brain syndrome secondary to excessive alcoholism. Dr. Ertag's report was not received during the course of the trial.

On the day of the alleged murder, appellant and two others bought three fifths of liquor and a couple of six-packs of beer, all consumed before the day was out (R 760). In addition, on the way home, appellant had two beers (R 764). At the time appellant and J.L. Koon were alleged to have left home to meet the deceased, Joseph Dino, they were both feeling "really high" (R 767).

Witness George Burton, appellant's step-son, testified that appellant drinks "very lot" and that he was drinking that morning and after he came home from work in the evening; that he was pretty drunk and staggering at the time appellant left home in the company of J.L. Koon (When appellant and J.L. Koon were alleged to have gone to meet the deceased, Joseph Dino) (R 931-932) (A 25-26).

Appellant's wife, Peggy Koon, testified that appellant had drank at least a quart of whiskey a day for thirteen years, sometimes supplemented by a couple of half pints and maybe a few beers (R 1005) (A 44). About five years prior to trial, under a threat of divorce, appellant quit drinking for about four months and then started back again, "except more" (R 1008); that he kept a quart of whiskey in his truck and another on the end of the drain board; that she met him at the intersection of Krome Avenue and Highway 41 (the same evening and after he is alleged to have killed Joseph Dino); that she had never seen him drunker than he was at that time; he was weaving when he walked, his speech was slurry and he was mumbling to himself (R 1008-1009) (A 47-48). She further testified

that when he is drunk, he repeats himself and doesn't remember things and related three specific examples of loss of memory (R 1005-1007) (A 44-46).

Under Florida Law, voluntary intoxication is not insanity and thus not a complete defense to homicide, however, it is a defense available to negate specific intent "...such as the element of premeditation essential in first degree murder...." Cirack vs State, 201 So. 2nd 706, 709 (Fla. 1967) In Garner vs State, 28 Fla. 113, 9 So. 835 (1891) the court stated at page 845 of the Southern Reporter:

> "Whenever, however, a specific or particular intent is an essential or constituent element of the offense, intoxication, though voluntary, becomes a matter for consideration, or is relevant evidence, with reference to the capacity or ability of the accused to form or entertain the particular intent, or upon the question whether the accused was in such a condition of mind as to form a premeditated design. Where a party is too drunk to entertain or be capable of forming the essential particular intent, such intent can, of course, not exist, and no offense, of which such intent is a necessary ingredient, can be perpetrated...."
>
> * * *
>
> " '...But where murder is divided by statute into two degrees, and to constitute it in the first degree there must be the specific intent to take life, this specific intent does not in fact exist; and the murder is not in this degree where one, not meaning to commit a homicide, becomes so drunk as to be incapable of intending to do it, and then, in this condition, kills a man. In such case the court holds that the offense of murder is only in the second degree ...." (p. 845)

Therefore, voluntary intoxication is available as a defense to the issue of intent required by a charge of murder in the first degree.

The court had previously determined that it was necessary to have expert evaluation with respect to intoxication and its affect on impairment of appellant's ability to form the intent necessary to justify a finding of murder in the first degree. The court had also determined that a neurological examination was necessary and had appointed Dr. Ertag for that purpose. Sometime between filing appellant's motion for continuance and the commencement of the trial the following morning, the written reports of Dr. Collins and Dr. Lombillo were delivered. Dr. Collins, while finding appellant competent did not address himself to the issue addressed in the court's order as stated above and presented here. Dr. Lombillo, while finding him competent to stand trial, reported that it was possible through excessive and long continued use of intoxicants, his judgment might have been impaired and this would have an influence on his actions. He also stated that the neurological evaluation should be an integral part of his evaluation of appellant.

Appellant's trial counsel pointed out to the court that voluntary intoxication as it related to ability to form intent is a defense to murder in the first degree (R 287) (A1); stated that he was unprepared to go to trial because there was no way that he could respond, evaluate or implement anything the doctors had said, or might report during the trial and asked the court for additional time to do so (R 288) (A 8). The court had been made aware of the possibility of this meritorious defense as set out in Dr. Lombillo's report and that Dr. Lombillo felt it necessary to have the neurologist's report as part of his evaluation of appellant. The court was aware that the reports of the other physicians, including the

neurologist's report, were not available. The court denied the motion for continuance (R 290).

In Shephard vs State, 46 So. 2nd 880 (Fla. 1950), this court recognized that established law required that no person accused of a serious crime should be forced into trial without opportunity to properly prepare his defense. In United States vs Chavis, 486 F. 2nd 1290 (D.C. Cir. 1973) the Court of Appeals held that adequate psychiatric assistance in preparing a defense was necessary, holding in that case that defendant was entitled to his own psychiatrist to assist in preparing his defense. While that issue is not in this case, and while competent physicians were appointed by the trial court to assist in preparation of an adequate defense, the reports of those physicians were not made available to the appellant in a manner timely enough to allow the information therein to be used in formulating a highly possible meritorious defense. For all intents and purposes, with respect to the intoxication defense, it is as if the court refused to make the appointments in the first instance.

As stated earlier, of the two reports available at the commencement of trial, one did not address itself to the issue and the other report stated that appellant's judgment may have well been affected by intoxicants but that additional examination was necessary for such evaluation. In United States vs Walker, 537 F. 2nd 1192 (4th Cir. 1976), where psychiatrists had been appointed to determine both competence to stand trial and capacity to commit the offense alleged, but reported only as to his competency to stand trial and where such report was received by the defense counsel only shortly

before trial, the denial of a motion for continuance was error stating "...It is altogether possible that if a proper psychiatric report had been furnished to counsel in the course of his preparation for trial he might have been able to develop a meritorious defense...." (p. 1195)

In United States vs Fessel, 531 F. 2nd 1275 (5th Cir. 1976) appellant contended that the failure of his attorney to prepare an insanity defense by showing as probable, incompetence at the time of the offense, violated his Sixth Amendment right to effective assistance of counsel, specifically by his attorney's failure to move for a court appointed psychiatrist to assist in the preparation of the insanity defense. The court held such a failure to be a denial of minimally effective representation guaranteed by the Sixth Amendment. In this case, appellant's attorney did move for the appointment of the necessary physicians for preparing the defense but the absence of the reports of their evaluations prior to the commencement of trial effectively prevented such a defense from being prepared based upon such evaluations and thus the Court's failure to grant the continuance is contrary to due process guarantees of the United States and Florida Consitutions. If counsel was derelict in not causing said reports to be produced in a timely fashion, appellant was denied effective assistance of counsel as required by both the Florida and United States Constitutions.

The right to counsel guaranteed by the Sixth Amendment means the effective assistance of counsel and effective assistance requires time for preparation. Due process within the meaning of the Fourteenth Amendment also requires it. Powell vs Alabama,

287 U.S. 45, 53 S Ct 55, 77 L Ed 158 (1932).

> "...Time for preparation, where mental competency is in question and there is a fair factual basis as here for the question, would at least include a reasonable time within which to have a defendant examined, and for preparation of such defense as might be based on the facts developed by the examination...." Hintz vs Beto, 379 F. 2nd 937, 941 (5th Cir. 1967)

In that case, a psychiatrist was appointed and reported the results of his examination to the prosecutor's office on Wednesday or Thursday prior to commencement of the trial on the following Monday, stating that the appellant was sane. Such was reported to defense counsel on Thursday or Friday. The report of the psychiatrist was put in written form on Friday and filed with the court on Monday, as the trial was about to commence. Defense counsel filed a written motion for continuance on the ground that he had not had opportunity to examine or study the results of the examination by the psychiatrist. The motion was overruled. The Fifth Circuit held that the denial of the motion for continuance was error, as a denial of effective assistance of counsel guaranteed by the Sixth Amendment.

In this case, failure of the trial court to grant the motion for continuance, especially in light of:

> (1) The reports of two of the four physicians appointed by the court had been received either the evening before or the morning of the commencement of trial. The reports of the two other physicians had not been received.
>
> (2) Dr. Wald's report had not been received and when received later in the trial, did not address itself to that portion of the evaluation ordered by the court which may have established

a meritorious defense to the charge of first degree murder and was thus not available to appellant.

(3) Dr. Ertag's report was not available to the defense at any time during the trial which Dr. Lombillo had specifically stated was necessary for his evaluation.

(4) One of the two reports received (Collins' report) did not address itself to a part of the evaluation ordered by the court, which said evaluation may have revealed a meritorious defense to the change of first degree murder.

(5) The other report (Lombillo) received by the court clearly indicated the likelihood of a meritorious defense to the charge of first degree murder but that additional testing was necessary.

The failure of the trial court to grant appellant's motion for continuance was clearly an abuse of discretion and violated appellants constitutional guarantees provided in the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and further provided by Article I, Section 9 and Section 16 of the Constitution of the State of Florida.

This error requires that the verdict and judgment of guilt be reversed and this case be remanded to the trial court for a new trial.

III. WITHERSPOON ISSUE

Issue: Did the dismissal of prospective juror Astling for cause violate the rule established by the United States Supreme Court in Witherspoon vs Illinois?

On voir dire, the Assistant United States Attorney examined the Venirewoman as follows: (commencing at R 474)

MR. TAYLOR: All right. Specifically, let me ask you, Mr. Hedley, and you, Mrs. Astling, if the two of you can consider rendering the imposition of the death penalty? Do you have any problems with that, Mrs. Astling?

MS. ASTLING: At this point in my life, yes, I do. I just -- I wouldn't want that responsibility.

MR. TAYLOR: All right. Let me ask you then, are you reconcilably [sic] committed to vote against the death penalty regardless of the circumstances? I need you to think carefully. These are very important questions.

MS. ASTLING: I have been thinking about it, yes.

MR. TAYLOR: The only thing I ask is that answer candidly. Nobody is ever punished for your truthful answers.

MS. ASTLING: Right now, I don't think I could.

MR. TAYLOR: Do you feel, Mrs. Astling, that as a result of your reluctance to impose the death penalty, knowing that there's two phases of the trial; the guilt phase and the sentencing phase, that your reluctance to impose a death penalty might influence your verdict with regard to the guilt phase of the trial knowing that were you to return a verdict of guilty and then might carry over to a position where you would be called upon to make a recommendation as to the death sentence?

MS. ASTLING: No, that wouldn't affect it.

MR. TAYLOR: Would you, as the way you feel right now at this phase in your life, never vote to impose the death penalty under any set of circumstances?

MS. ASTLING: I didn't say that. I don't know what I'm going to feel like in the future, but right now, all I can say is what I feel now.

MR. TAYLOR: And right now you could not vote to impose it?

MS. ASTLING: Right On. (R 474-476)

Defense counsel then interrogated Venirewoman Astling as follows:

Ms. Astling, I want to talk about that capital punishment. Ask you this, if there is a finding of guilt as to the crime in the first phase, and after that, if you're asked to deliberate as to whether the death penalty should be imposed, would you automatically vote against the imposition of capital punishment regardless of what the evidence said?

MS. ASTLING: Well, I would not want to say that I automatically, because I haven't heard the evidence. I guess I just have to make up my mind then, but I wouldn't want -- I wouldn't want to make that decision, okay?

MR. McDONNELL: Right. Now, would your attitude toward the death penalty prevent you from making a finding of innocence or guilt in this case?

MS. ASTLING: I don't think that would affect that, no (R 480).

There followed a bench conference at which the Assistant United States Attorney moved to challenge Ms. Astling for cause, stating that she had answered that at this stage of her life she could not vote to impose the death penalty under any conceivable set of circumstances and because of that feeling, could not consider the death penalty in this case (R 481) (A 11). The defense objected to her dismissal. The bench conference was concluded and the court addressed the following questions to Venirewoman Astling:

"THE COURT: Now, let me ask you this question. You stated that in your stage of life that more or less that you are opposed to capital punishment. Is that correct?

MS. ASTLING: Yes, it is.

THE COURT: All right. In the second phase of the trial, would that mean regardless of facts and circumstances involved in this case, that you are, so to speak, going to say or recommend or vote to recommend to the court that the death penalty not be imposed?

MS. ASTLING: Yes. I think that's --

THE COURT: So that would be your answer in the second phase? You would <u>almost</u> automatically recommend to me through your vote that it should be imposed? Is that right? (emphasis supplied)

MS. ASTLING: It would influence me, yes.

THE COURT: All right, fine. Then that being the case, you may step down and thank you very much,..." (R 482-484)

It is clear that the dismissal of Ms. Astling violates the rule of <u>Witherspoon vs Illinois</u>, 391 U.S. 510, 88 S Ct 1770, 20 L Ed 2nd 776 (1968) and this court's most recent opinion in <u>Chandler vs State</u>, Case No. 60,790, July 28, 1983. Clearly her feelings with respect to the death penalty would not affect her ability to return a verdict of guilty, if such a verdict were warranted by the evidence. When asked directly whether or not she would automatically vote against the imposition of capital punishment regardless of the evidence, she said that she could not do so automatically because "...I haven't heard the evidence. I guess I just have

to make up my mind then,..." In response to questions by the court, she stated that in that stage of her life, she was more or less opposed to capital punishment. The court then asked her whether she would recommend against the death penalty, regardless of the facts and circumstances in the case; her answer was incomplete, as she was cut off by the court. The court then asked her if you would "almost automatically" recommend against the death penalty. She answered, "It would influence me, yes."

In Chandler, this court quoted the last paragraph of note 21 to the opinion in Witherspoon:

> " '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 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.' " (Emphasis in Witherspoon opinion)

As in Chandler, Ms. Astling did not express the unyielding conviction and rigidity of opinion regarding the death penalty necessary for exclusion under Witherspoon. It can not be said that she made unmistakably clear that she would automatically vote against the death penalty. The sum total of her testimony was that she would have to hear the evidence and then decide whether or not she could vote for a recommendation to impose the death penalty. The court's interrogation of her did not reveal such unyielding conviction and rigidity of opinion. Remember that the court asked her if she would, "almost automatically" vote against

a recommendation of the death penalty, to which she responded, "It would influence me, yes...."

Witherspoon and Chandler are dispositive of this issue. The death sentence can not stand.

IV. HUSBAND - WIFE PRIVILEGE

Issue: May a wife be required to testify against her husband over the objections of her husband, with regard to communications between the two of them while they were husband and wife?

Section 90.504, Fla. Stat. (1981) provides in pertinent part as follows:

> (1) A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.
>
> (2) The privilege may be claimed by either spouse...."

Peggy Koon, the wife of appellant, was required to testify with respect to communications between she and her husband, after the privilege granted by the Statute had been invoked by both of them (R 938, 940) (A 29, 30). The court ordered that her testimony be proffered out of the hearing of the jury. The Assistant United States Attorney called her as a witness and made the proffer of her testimony (R 932-959).

The United States Attorney had previously called appellant's mother-in-law (Lois Purvis) as a witness against him (R 914). She

testified that she lived next door to her son-in-law and daughter and that several days after Thanksgiving a conversation took place between her and appellant in appellant's truck parked in his driveway; that appellant was drunk at the time; that during the course of the conversation she asked appellant if he killed Joe Dino; that he put his head down on the steering wheel and confessed to her that he had done so (R 915-917 (A 18-20). She stated that she was blind in her left eye (R 913) (A 17), had hearing problems, and was on strong medication at the time of the conversation (R 918) (A 21). She apparently was unsure of her hearing and further testified that later while sitting on the patio of appellant's home, with appellant, at a time when he was sober, she asked him if he had told her that he had killed Dino. He denied having done so (R 920) (A 22).

George Burton testified upon the call of the Assistant United States Attorney (R 923-936). He stated that appellant was his step-father and that he had been with him for about thirteen years since appellant married his mother and that he was three or four years old when the marriage took place. He stated that he loved appellant and that he considered appellant to be his father. He further stated that a conversation took place on a ride in his father's car on or about August 13th (R 927) (A 24); that his father had been drinking; was pretty drunk; had been on a two week binge; and his speech was real slurry (R 934) (A 27); that during the course of the ride, his father told him that he had to kill Joseph Dino because he was going to turn State's evidence on him and that he took him to the Everglades and blew his head off (R 927) (A 24).

Both Lois Purvis and George Burton had testified prior to the proffer of Peggy Koon's testimony. After hearing the proffer, the court initially ruled that she could not testify about communications between her and appellant (R 967-969) (A 31-33) and that his statements to Lois Purvis and George Burton were made with a reasonable expectation of privacy.

Section 90.507 Fla. Stat. (1981) states in part:

> "A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if he,... voluntarily discloses or makes the communication when he does not have a reasonable expectation of privacy,..."

After subsequent argument, the court reversed itself and required Peggy Koon to testify concerning such communications (R 982-983) (A 34-35) based upon this court's decision in Proffitt vs State, 315 So. 2nd 461 (Fla. 1975). She was required to testify to communications between her and her husband in a telephone call on the evening of November 21st (R 993); and about communications between the two of them, later that night, wherein appellant was alleged to have admitted murdering Dino (R 995-997, 999-1000, 1003, 1004).

The trial court was in error in its reliance upon Proffitt. However, the Proffitt case does stand for the proposition that the privilege attaches to the conversation or communication itself and protects it from exposure and use as evidence (p. 464). See also Mercer vs State, 40 Fla. 216, 24 So. 154 (1898) and Schetter vs Schetter, 239 So. 2nd 51 (Fla. 4th DCA, 1970)

The question presented here is whether or not the alleged conversations between appellant and Lois Purvis, his mother-in-law,

and he and his son, George Burton, constitutes a waiver of spousal privilege, with respect to communications between appellant and his wife, Peggy Koon, and depends upon the language of the statute.

The appropriate words of the statute are "...he,...voluntarily discloses...the communication when he does not have a reasonable expectation of privacy,..." There is no evidence in the record that appellant at any time disclosed to anyone any communication between he and his wife, which under the plain language of the statute would seem to be necessary in order for there to have been a valid waiver on his part, inasmuch as the privilege attaches to the conversation or communication itself under Proffitt, Mercer, and Schetter supra.

Before the trial court, the State took the position that the conversations testified to by Purvis and Burton, required a finding by the trial court that the spousal privilege had been waived by appellant because he voluntarily disclosed to each of them, matters regarding the same subject matter. There is no question here, that the conversations with his mother-in-law, Purvis, and his son, Burton, were voluntary. As stated above, neither of said conversations had anything to do with communications between appellant and Peggy Koon, his wife. The State's contention, however, does bring into focus whether or not there was a "reasonable expectation of privacy" with respect to the Purvis and Burton conversations.

Appellant does not contend that the testimony of either Purvis or Burton should have been excluded on the basis of privilege but surely if such conversations were made as the testimony indicates, such conversation with members of his family were made with a rea-

sonable expectation of privacy, as contemplated by §90.507, Fla. Stat. (1981).

In Griswold vs Connecticut, 381 U.S. 479, 14 L Ed 2nd 510, 85 S Ct 1678 (1965) the Supreme Court discussed a number of cases wherein rights of privacy arose out of the First Amendment, Fourth Amendment, Fifth Amendment, Ninth Amendment and the Fourteenth Amendment. The cases discussed therein dealt with rights of privacy, not specifically mentioned in the Constitution but all coming within the penumbra of rights necessary to give meaning to the rights specifically enumerated in those constitutional provisions. Later in Moore vs City of East Cleveland, 431 U.S. 494, 52 L Ed 2nd 531, 97 S Ct 1932, (1977) the plurality opinion states:

> "...Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural...." (p. 503-504).

In Smith vs Organization of Foster Families for Equality and Reform, 431 U.S. 816, 53 L Ed 2nd 14, 97 S Ct 2094 (1977) the court recognized that the protection of the sanctity of the family was not dependent upon a biological relationship as it had previously recognized in Moore supra.

In some jurisdictions, the courts have found a privilege prohibiting disclosure of parent-child communications even though without statutory law to support such privilege. See In Re Agosto, 553 F. Supp. 1298 (D.C. Nev. 1983) holding that an adult-child could not be compelled to testify against his parent with respect

to communications between them; Application of A and M, 403 N.Y. S. 2nd 375(Sup. Ct. App. 1978) refusing to compel a parent to testify with respect to communications between parent and child.

If it be urged that the conversations between appellant and his son and between he and his mother-in-law, could form the basis of a waiver of privilege with respect to the communications between appellant and his wife, the sanctity of the familial relationship necessitates the holding that such conversations were with persons and under circumstances which demonstrate that a reasonable expectation of privacy was present.

The compelling of Peggy Koon's testimony with respect to communications between her and appellant, was prejudicial. The State's star witness was J.L. Koon. The defense was predicated upon the fact that J.L. Koon had himself on three occasions told three different people, two of whom were his step-brothers, that he had blown Joe Dino's head off as a result of drug and counterfeit money dealings with Dino (R 1045, 1051-1052, 1056-1057) (A 50, 51-52, 53-54). Appellant, an alcoholic, during a time when he was drunk is alleged to have made a statement to Purvis saying that he had killed Dino. Purvis, an elderly woman, blind in her left eye, having hearing difficulties, and being under the influence of medications, apparently was not convinced that she had heard his statement and subsequently asked him if he had told her that, which he denied. When appellant allegedly made the statement to Burton, he had been on a two week binge, was drinking heavily and was drunk. Appellant suffered black outs and memory loss, secondary to alcohol abuse. The compelled testimony of his wife with respect to communications between the two of them was devastating to the defense.

V. DENIAL OF ASSISTANCE OF COUNSEL

Issue: Was appellant deprived of effective assistance of counsel guaranteed by the Federal and State Constitutions?

After appellant was indicted and before arraignment, he was found to be indigent and an order of indigency was entered. The Public Defender was appointed to defend appellant (R 6). A motion to dismiss counsel was forwarded to the Judge and received by him on October 1, 1982 (R 74-77). Appellant alleged that counsel was adverse and hostile to appellant and that he was deprived of the effective assistance of counsel. The matter was scheduled for trial on October 5, 1982 (R 185). Those motions were brought for hearing at the commencement of the trial on that date. At the same time, an attorney in private practice was retained by appellant's family as additional counsel in the case to assist the Public Defender in the trial (R 66, 185). Appellant's motion to dismiss the Public Defender was abandoned and withdrawn (R 193). Appellant stated to the court that he was under extreme pressure when he filed the motion and that he had called the public defender's office and asked that it be disregarded (R 194) (A 5). Additional counsel made it clear to the court that he was hired by the family to assist the Public Defender, "not to take over the case" (R 188) (A 4). Both the State and additional counsel objected to the release of the Public Defender. Nevertheless, the court dismissed the Public Defender.

On the second day of the four day trial, the court was advised of conflict between appellant and his attorney and dissatisfaction which had been expressed (R 657) (A 16). Evidence of conflict also appears in the record beginning at the commencement of the fourth day of trial (R 1026) (A 49).

At the end of the third day, the State rested its case against appellant. At 9:00 a.m. on the fourth day of trial, court convened for the defense presentation of its case. After some preliminaries, the defense case commenced (R 1022 et seq). At 9:58 a.m. a short recess was taken. After the recess, counsel for appellant announced that the defense rested (R 1060) (A 55). Thus, the defense case took up less than 58 minutes of trial time.

Another recess was taken for a charge conference and upon reconvening of court, appellant caused counsel to hand to the court a hand written letter dismissing the defense attorney alleging as reason therefore ineffective assistance of counsel, stating: That his attorney had never explained in what directions or way the defense would go; the failure to explain any and all questions asked of him; failure to explain his reasons, and why; appellant was constantly advised to be quiet and not to worry about it; counsel threatened to quit if appellant didn't stop asking questions; not keeping appellant informed of what happens in his case; failure to produce eye witness to the kidnapping; failing to call witnesses that would be helpful in defense; never having attorney-client conferences, although they had been promised several times, latest being November 12th and November 15, 1982 (R 124-125, 1065) (A 2-3, 56).

A recess was taken for the court to confer with counsel in

chambers. Upon reconvening, appellant told the court: (commencing R 1067)

"THE DEFENDANT: Your Honor, if you and Mr. McDonnell and Mr. Taylor go in there with me for about five minutes, maybe we can straighten this out. There's something in there before it should be brought.

THE COURT: Let's do this procedure first, Mr. Koon. First of all, you made a request to discharge your counsel and take over the case management yourself. Is that correct?

THE DEFENDANT: I did not say I'd take it over (R 1067) myself. I say if we go, might -- five minutes, we might work it out.

THE COURT: Why don't we work it out right here in the courtroom?

THE DEFENDANT: I'd like to know if Mr. Neil Taylor has seen anything like this? I'll give you my date in a minute.

MR. McDONNELL: Your Honor, may I request that we have the Court's ruling on my status for Mr. Koon to proceed?

THE COURT: Do you want Mr. McDonnell to proceed or not, Mr. Koon?

THE DEFENDANT: If we can go in there and have a five-minute recess, maybe, yes. Right now, no.

MR. McDONNELL: Your Honor, in that time his petition is on the record, I would ask that the Court -- ask that the Court ask on his petition and request the Court grant it.

THE COURT: We're at the position the trial is just about over with. I've got to know whether you want him to be your counsel.

If not, you're going to have to represent yourself, because we're not going to start over again on a trial (R 1068).

Appellant then alleged several acts of prosecutorial misconduct. Appellant's requests to work things out were ignored.

"...I haven't had a meeting with this man since I hired him, five and ten minutes. He's supposed to be in last Friday. I haven't seen him. He's supposed to last Monday. I haven't seen him.

THE COURT: Again, the decision is up to you. Do you want Mr. McDonnell.

THE DEFENDANT: No, sir.

THE COURT: All right. You'll have to proceed (R 1069) representing yourself.

All right. I'm going to ask some questions to understand what you're doing, you are doing. What you're asking is a very serious thing.

At this time Court recommends that you do not represent yourself. I at least explained to you on two occasions how experienced and well thought of trial lawyer Mr. McDonnell is.

Secondly, I would recommend against discharging Mr. McDonnell and you taking over the case and managing it yourself. In order for me to allow you to do that, I'm going to ask you some questions, make sure you do know what you're doing.

You do have a Constitutional right to represent yourself if you want to. That's why I'm going to let you do so. So, I'm going to ask you these questions here at this time.

* * *

All right, sir. How old are you, please? (R 1070)

THE DEFENDANT: 50.

THE COURT: All right, sir. You're still married, is that right?

THE DEFENDANT: Happily.

THE COURT: What's your education, sir?

THE DEFENDANT: Fourth grade.

THE COURT: Can you read and write?

THE DEFENDANT: Some.

THE COURT: All right. What type of work do you do?

THE DEFENDANT: Concreting.

THE COURT: Have you done this all of your life?

THE DEFENDANT: Last 27 years.

THE COURT: All right, sir. Have you ever been treated for any mental illness and mental disorder?

THE DEFENDANT: Yes, sir.

THE COURT: Will you tell me about that, please?

THE DEFENDANT: All in front of these people? No, sir.

THE COURT: I don't -- I'm afraid -- would you mind telling me about it?

THE DEFENDANT: I have been treated (R 1071).

THE COURT: Have you ever been declared incompetent?

THE DEFENDANT: Not to the best of my knowledge, no.

THE COURT: Have you ever been in a mental institution?

THE DEFENDANT: No, sir.

THE COURT: All right. sir. At this time are you under the influence of drugs or intoxicating beverages?

THE DEFENDANT: Some drugs.

THE COURT: What type of drugs, sir?

THE DEFENDANT: What they prescribe in the jail, what we can get to the officers.

THE COURT: All right. Are these medications from the doctors?

THE DEFENDANT: Well, they passed them around up there. I suppose they're from the doctors.

THE COURT: All right. Would these drugs have anything to to do affect your judgment?

THE DEFENDANT: I have no idea. Yesterday at twelve o'clock I went down to see the doctor and I told him I had things in my ears. I had headaches, dizzy. Took my blood pressure. It was a hundred sixty-two and a hundred four, and (R 1072) he still not prescribing nothing.

THE COURT: All right, sir. Has these drugs affected your thinking in any way?

THE DEFENDANT: I have no idea.

THE COURT: All right, sir. Now, as I stated before, while we had the recess, we checked the law and you do have the Constitutional right to proceed. And out of an abundance of caution, I'm going to ask Mr. McDonnell to aid you anytime you want him for any legal advice, either on the law involved with this case and/or with any of the factual situations that have been presented to the jury. He will be able to advise you at any time you wish to ask him for his -- as far as his --

THE DEFENDANT: I have no use for him.

THE COURT: All right. Any other suggestions now, gentlemen?

* * *

THE COURT: All right, sir.

Mr. Koon, the only thing that needs to be (R 1073) done to complete your case is for the attorneys to give their final arguments and again --

THE DEFENDANT: I'm not interested in that.

THE COURT: All right. Do you desire to give the final argument yourself?

THE DEFENDANT: How about me just taking over and starting from the beginning like I get for him to do? Witness out there he didn't call, very important eyewitness.

THE COURT: Well, it's too late for that now, sir.

THE DEFENDANT: Well, you do what in the hell you want to then.

THE COURT: All right, sir. We'll proceed. Any other precautionary remarks, gentlemen?

MR. TAYLOR: The only other thing that remains, your Honor, is an inquiry by the Court with regard to the defense proof.

THE COURT: What is that now?

MR. TAYLOR: The inquiry by the Court with regard to the defense's decision to rest at the time that it rests; that is to say, specifically, your Honor, that the defendant's decision not to testify.

THE COURT: Well, I assume that you did not (R 1074) want to testify, is that correct, sir?

THE DEFENDANT: At this point, how can I?

MR. McDONNELL: Your Honor, I would like to state the defendant has indicated he doesn't want me here.

THE DEFENDANT: No, sir.

MR. McDONNELL: I don't want to be here, Judge.

THE DEFENDANT: You're through. Go.

THE COURT: I understand and feel for you, Mr. McDonnell, but there may be a change in the heart in the future, and I'd like you available for your legal advice as he desires.

MR. McDONNELL: Yes, sir.

THE DEFENDANT: Not for me. He can go.

THE COURT: All right, sir. Well, you don't have to ask him any questions unless you desire to.

All right. Well, the thing that needs to be done now is for the final arguments, and the way the case has been presented, the State will have the opportunity to go first, and then you will have the second opportunity and then the State will have a chance for rebuttal.

And with that in mind, gentlemen, anything you (R 1075) can think of before we need the jury?

MR. TAYLOR: State's ready.

THE COURT: Mr. Koon, are you ready, sir?

THE DEFENDANT: I don't know. I don't have an attorney. (R 1076)

Thereafter, the Assistant United States Attorney made closing argument on behalf of the State; and appellant made closing argument on his own behalf.

From the foregoing, it is clear that appellant discharged his attorney and stated on three occasions that the disagreements leading to said discharge could be resolved with a five minute recess. Each time, his statement of possible resolution was ignored by the court. It is clear that appellant's statements as for the reason for discharge were allegations of ineffective assistance of counsel. It is clear that the Court failed to make inquiry with respect to the allegations of ineffective assistance of counsel. It is clear that there are no expressions by appellant that he wanted or desired to act in proper person.

The right of a citizen to have the assistance of counsel for his defense is unassailable since Gideon vs Wainwright, 372 U.S. 335, 9 L Ed 2nd 799, 83 S Ct 792 (1963). The right to assistance means the effective assistance of counsel, Powell vs Alabama, supra.

The courts have uniformly held that the State has the responsibility to protect this right and to afford effective assistance of counsel to those defendants found to be indigent. To protect that right and to ensure that the State fulfills its responsibility, Florida Courts have held that the trial court has an obligation to conduct an inquiry to determine whether there was reasonable cause to believe that counsel was not rendering effective assistance upon allegations of such being made by an indigent defendant. Parker vs State, 423 So. 2nd 553 (Fla. 1st DCA, 1982), Nelson vs State, 274 So. 2nd 256 (Fla. 4th DCA, 1973). As stated earlier, appellant was found by the trial court to be indigent. No change in his indigency status occured during the course of the trial and he remains indigent to this date. The State's duty arises under

the Fourteenth and Sixth Amendments to the Constitution of the United States because of his indigency as well as Article I, Section 16 of the Florida Constitution. There is no indication in the cases that the doctrine of Parker and Nelson is not dependent upon that status, even though in those cases, the allegations of ineffective assistance of counsel had to do with court appointed counsel.

Persuasive on this issue, is the decision of the Supreme Court in Townsend vs Sain, 372 U.S. 293, 9 L Ed 2nd 770, 83 S Ct 745 (1963). There, the Supreme Court set out the standards to be used in determining whether or not a defendant was entitled to an evidentiary hearing on a habeas corpus petition from a State court conviction. Among other things, it held that an evidentiary hearing must be granted when merits of the factual dispute were not resolved in the State hearing. The factual dispute here in the appellant's allegations was that his counsel was rendering ineffective assistance. No inquiry of any kind was made by the trial court.

The specific facts of this case are that after appointment of counsel, the family of appellant retained private counsel to assist the Public Defender in the defense, not to take over the case. The Court's release of the Public Defender from its obligations to the defense forced additional counsel to take over the case and begin its preparation anew with less than six weeks to prepare for a trial of first degree murder. There was an apparent lack of communication between attorney and client, resulting in dissatisfaction expressed early on in the trial.

The appellant made it clear to the court that his decision to dispense with the services of his attorney at the trial was because of what he felt to be ineffective assistance of counsel. Upon making such allegations in writing (R 124) and orally, it was the duty of the court to conduct an evidentiary hearing or some type of inquiry to determine whether there was reasonable cause to believe that the allegations of appellant were supported by the facts.

On three occasions, appellant stated to the court, that the matter was susceptible to being worked out. In each instance, the court ignored the appellant's statement. The court failed to inquire with respect to the ineffective assistance of counsel allegations as it was required to do by Florida case law. Had it done so, an appropriate course for the remainder of the trial could have been decided upon, which could have protected appellant's rights and allowed the trial to proceed to its conclusion in an orderly fashion. This failure of the trial court permeates this issue as well as other issues following hereafter.

The trial court apparently found that appellant waived his right to counsel upon dismissal of his privately retained attorney. However, such is error because the trial court failed to inquire into the reasonableness of his dissatisfaction upon which the dismissal was based. As in this case, in Keene vs State, 420 So. 2nd 908 (Fla. 1st DCA, 1982) appellant never asserted that he wished to represent himself:

> "...Federal cases following Faretta hold that Faretta requires that a defendant's request to proceed pro se be clear and unequivocal. See, e.g., U.S. vs Bennett, 539 F. 2nd 45 (10th Cir.

1976), cert denied,...; U.S. vs Montgomery, 529 F. 2nd 1404 (10th Cir. 1976), cert denied, ..." (p. 910)

In this case, there was no unequivocal statement by appellant to indicate that he wished to conduct his own defense. Every reasonable presumption against waiver must be indulged. Johnson vs Zerbst, 304 U.S. 458, 82 L Ed 1461, 58 S Ct 1019 (1938); Brookhart vs Janis, 384 U.S. 1, 16 L Ed 2nd 314, 86 S Ct 1245 (1966); Brewer vs Williams, 430 U.S. 387, 51 L Ed 2nd 424, 97 S Ct 1232 (1977).

In this case, the trial court apparently assumed that the right to counsel was waived despite the protestations by appellant. The court ignored the statement on three occasions by appellant that the problem could be worked out, thus allowing him to continue with retained counsel; the court failed to conduct any kind of inquiry to determine the reasonableness of appellant's dissatisfaction with his attorney; thus the court's insistance that he utilize retained counsel or proceed on his own deprived appellant of his constitutionally guaranteed right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and under Article I, Section 16 of the Florida Constitution.

VI. FAILURE TO REOPEN

Issue: Did the Court err in refusing to allow the appellant to reopen the case to produce testimony of an additional witness that discharged defense counsel would not or did not call?

Two of the grounds given by appellant for discharge of counsel were that counsel failed to produce eye witnesses to the kid-

napping and failed to call witnesses that would be helpful in his defense. The failure of the Court to inquire as to the basis for the alleged ineffective assistance of counsel was compounded by the failure of the court to allow appellant, when required to take over his case, to call a very important witness (p.35 , supra, R 1074) (A 57). At the time the request was made, the last thing that had occurred in the progress of the trial was the announcement by the defense that the defense rested. The closing arguments had not been made; the court had not instructed the jury; and the matter had not been submitted to the jury for its consideration.

There's no absolute right to put on a witness after close of evidence but the court has the discretion to allow it. Pitts vs State, 185 So. 2nd 164 (Fla. 1966). The trend is to allow reopening where such can be done without prejudice to the other party. 32 Fla. Jur. Trials, 268. In Pitts, the trial court allowed the State to reopen the case and introduce additional testimony after the matter had been submitted to the jury. The Supreme Court found no error in the trial court allowing such to be done.

In Steffanos vs State, 80 Fla. 309, 86 So. 204 (1920), where the facts were similiar to this case, the State and the defense had rested on Saturday evening and upon reconvening on Monday morning, the motion to reopen was made. The Supreme Court, on appeal, stated:

> "...To preclude one from introducing evidence so material to his defense and persuasive, perhaps, of his innocence, merely because he had said that he had no more testimony to offer, is to enforce a rule of procedure almost to the point of a denial of justice. It is to sacrifice liberty to a mere form of procedure or courtroom usuage, the

> observance of which is to bring about the orderly introduction of evidence by the respective parties....They should be enforced or relaxed in the furtherance of justice. The motion was to reopen the case, but the case was not technically closed. The judge had not charged the jury; the counsel had not begun the arguments; the case had not been submitted. It had only reached that stage where each party announced that it rested;..."
>
> * * *
>
> "...Even if the case had been technically closed, it would have been an abuse of discretion to refuse to open the case and permit the evidence to be introduced, upon the proper showing being made as to why it had been previously omitted....
>
> While the record does not disclose that any showing was made when the motion was submitted, yet the cause had not proceeded so far that the ends of justice would have been defeated, or the orderly processes of the court disturbed, by an admission of the testimony...." (p. 205-206)

The court held that the refusal to allow the evidence was an abuse of discretion.

In two cases from the Third District Court of Appeals, that court held that the refusal by the trial judge to reopen the case and receive additional testimony, where the proposed evidence was proffered or where the trial court exercised due diligence in determining what the additional evidence would disclose was not error. King vs State, 272 So. 2nd 821 (Fla. 3rd DCA, 1973); Sylvia vs State, 210 So. 2nd 286 (Fla. 3rd DCA, 1968). In this case, the court did not provide for a proffer nor did it attempt to determine what the additional evidence would disclose but simply disposed of appellant's request summarily.

After the United States Attorney made closing argument to the

jury, in a bench conference, the following occurred:

"THE DEFENDANT: Can I get this postponed and give me about couple weeks to get my stuff together?

THE COURT: No, sir. We're ready to go.

THE DEFENDANT: But I'm not. I don't have an attorney. I would like you to appoint me one.

THE COURT: I'm afraid I explained to you it's too late now.

THE DEFENDANT: Why is it too late? The man didn't go through my case and do it like it's supposed to.

THE COURT: It's your turn to address the jury at this time and you certainly have that right. Go and exercise that right if you want to.

THE DEFENDANT: But you won't give me two weeks postponement?

THE COURT: No, sir. (R 1091-1092)

* * *

THE DEFENDANT: Your Honor, I do not have an attorney. I don't want Mr. McDonnell to represent me and I don't know how.

THE COURT: All right, sir.

THE DEFENDANT: I want you to appoint me an attorney.

(R 1092)

* * *

THE COURT: Mr. Koon, Mr. McDonnell is right behind you and he's able to give the final argument for you in you want him to do so.

THE DEFENDANT: Your Honor, I asked him to bring a subpoena for the eyewitness of the kidnapping so he can describe who was there. That hasn't been done. He had a map drawn by J.L. Koon

where there was a suitcase of money on north Florida and $400 given to a witness that went up there look for the money. That would tie J.L. Koon in with Dino and wouldn't -- he hadn't got a third of the witness that knows about it.

THE COURT: All right, sir. Again, you're going to have to make that, an election whether or not you want to address the jury.

THE DEFENDANT: I don't want to address the jury and I don't want Mr. McDonnell to do it. I want you to appoint me an attorney (R 1093).

Then Mr. Koon addressed the jury on his own behalf.

The foregoing excerpt shows the appellant again complaining about the failure to produce witnesses, one of whom was an eye witness to the kidnapping, with his description of who was there. Such a witness could have disputed the testimony of the State's star witness, J.L. Koon and reflected upon his credibility as a witness on behalf of the State and the failure to produce witnesses with respect to the map and suitcase of money could have tied J.L. Koon directly to Dino, further attacking his credibility and the credibility of his testimony. Had the trial court sought to determine the reason for appellant's complaints against counsel, and the extent of the testimony of the eye witnesses that appellant sought to call as the trial court did in Sylvia, then the record would have been complete for this court's consideration of this issue. The trial court's failure is of critical importance in light of the fact that appellant complained of ineffective assistance of counsel who had announced to the court that the defense rested; was fifty years old, with minimal education; and cannot in

any way be considered skilled in the technical niceties of courtroom and trial procedures.

The failure of the court to allow appellant to call additional witnesses for testimony, in light of the circumstances in this case, is an abuse of discretion. See Steffanos, supra. The verdict and judgment rendered in this case should be overturned and the case remanded to the lower court for retrial.

VII. SENTENCE PHASE OF TRIAL

The right to counsel is fundamental and guaranteed by both the United States and Florida Constitutions.

After the receipt of the guilty verdict on Friday, November 19th, the court continued the matter for the sentence phase of the trial until Monday, November 22nd. When the court reconvened, Mr. Koon asked that an attorney be appointed for him (R 1154-1155) (A 58-59). He also stated that he had not been able to make a telephone call until 8:30 the previous evening and that he had visited with his wife; she was supposed to see an attorney and asked for a chance to confer with her, to determine the outcome of her efforts. The court would not allow such (R 1156) (A 60).

The court again encouraged appellant to use Mr. McDonnell, whom he had discharged the preceding Friday, which he refused to do, and Mr. McDonnell was released for any responsibility with respect to the defense (R 1167).

Appellant filed a handwritten motion for mistrial (R 127-129, 1156-1157).

The Assistant United States Attorney made opening argument to the jury with respect to the sentence phase of the trial (R 1181-1183) (A 61-63). Appellant refused to participate without an attorney (R 1183). No witnesses were called and the State offered Exhibits 21 and 22. Again, appellant refused to participate without an attorney (R 1184) (A 64). Exhibits 21 and 22 were received and published to the jury (R 1184). Again, appellant asked to speak with his wife about "legal work in Miami", which was denied by the court (R 1184). The State rested its case again, appellant refused to participate "without an attorney" (R 1185) (A 65). The court asked appellant for his response to the proposed instructions, he replied by stating that he didn't understand the instructions (R 1186) (A 66).

During the proceedings outside the presence of the jury, the Assistance United States Attorney, with the approval of the court, removed from Exhibits 21 and 22, termination of probation sheets not relevant to crime charged by exhibit 21 and pages from exhibit 22, which according to State were not relevant and were prejudicial to appellant (R 1187-1188) (A 67-68). These documents had already been examined by the jury (R 1184) (A 64). These documents are not a part of the record.

The Assistant United States Attorney made final argument, with respect to the sentence phase of the trial (R 1189-1197). Again, appellant refused to participate without an attorney (R 1197) (A 70). The jury returned with a recommendation that the death penalty be assessed by a 12-0 vote (R 1206).

Issue: Did the court err in failing to continue the sentencing phase of the trial in order to allow

appellant to obtain counsel or in the alternative appoint an attorney for him?

Section 921.141(1) Fla. Stat. (1981) provides that the court shall conduct a separate sentencing procedure to receive a recommendation with respect to sentence "as soon as practicable". It further provides that should it be impossible or the court be unable to conduct the proceeding before the trial jury that another jury may be empaneled for the purpose of the statute.

There is nothing in the record to indicate that it was necessary that the matter be brought before the trial jury on Monday morning following its verdict of guilty of Friday afternoon. The right to effective assistance of counsel is fundamental. The State has the responsibility to protect that fundamental right. The failure of the court to allow defendant to confer with his wife, with respect to obtaining additional counsel and the insistence by the court upon proceeding without delay, left appellant with the choice of being represented by counsel, whom he had previously dismissed because of the alleged ineffective assistance of that counsel, which issue had not been inquired into, heard, or determined, or attempt to represent himself or to not participate in the proceedings. Appellant chose the latter. The effect of the court's actions deprived appellant of his right to effective assistance of counsel and further deprived the proceedings of the elemental fairness necessary to afford due process, especially in light of there being no reason why it was impractical to grant a continuance for a short period of time to determine the availability of privately acquired counsel and if so, when such counsel might have been available.

Issue: Did the court err in allowing introduction of exhibit 21, which was ambiguous on its face into evidence?

Section 921.141(5) Fla. Stat. (1981) sets out the aggravating circumstances which may be considered by the jury in rendering its recommendation or by the court in sentencing. The aforementioned statutory provision is designed to limit the unbridled exercise of judicial discretion where the penalty of death is possible. One of the aggravating circumstances, which may be considered, is whether the appellant was previously convicted of a felony involving the use or threat of violence to the person. Pursuant to that provision, the trial court allowed exhibit 21 into evidence. Such evidence is limited to convictions. Charges of commission of crimes are excluded. Provence vs State, 337 So. 2nd 783 (Fla. 1976).

Exhibit 21 arose out of a criminal proceeding in the criminal court of record, Dade County, Florida, in 1971. Appellant and another were charged with two counts of assault with intent to commit murder.

Exhibit 21 consists of copies of the Bench Docket, Probation Form 3-F and the Information. The Bench Docket explicitly states that appellant plead nolo contendere to aggravated assault, not to assault with intent to commit murder. Probation Form 3-F indicates that he plead nolo contendere to aggravated assault with intent to commit murder and reflects that he was placed on probation for a period of three years. If, as the Bench Docket indicates, appellant plead nolo contendere to aggravated assault, then allowing the Probation Form 3-F and the Information charging appellant assault "with" intent to commit murder, was error. Those charges were never

resolved by a plea, trial or otherwise and the presumption of innocence attached to those charges remains in effect. Odum vs State, 403 So. 2nd 936 (Fla. 1981); Perry vs State, 395 So. 2nd 170 (Fla. 1980); Spaziano vs State, 393 So. 2nd 1119 (Fla. 1981)

This case must be distinguished from Elledge vs State, 346 So. 2nd 998 (Fla. 1977) and Morgan vs State, 415 So. 2nd 6 (Fla. 1982). In both of those cases, appellant was convicted and the court allowed testimony concerning the offense which resulted in the conviction. However, here appellant was never convicted of aggravated assault to commit murder and evidence of such was error and should not have been admitted. Therefore, the sentence must be overturned.

Further, appellant's failure to object to the introduction of exhibit 21 is not material here inasmuch as defendant was denied effective assistance of counsel as argued supra.

Issue: Did the court err in allowing the Assistant United States Attorney to argue that appellant had been previously convicted of assault with intent to commit murder?

Issue: Was it error for the court to instruct the jury with respect to assault with intent to commit murder?

In closing argument, the Assistant United States Attorney argued that appellant had previously been convicted of assault with intent to commit murder (R 1191) (A 69). In its instructions to the jury, the court charged the jury with respect to the crime of assault to commit murder (R 1199) (A 71). The questions posed by these issues must be answered in the affirmative in light of the argument and authorities heretofore cited. The sentence must be overturned.

VIII. SENTENCE HEARING

By petition dated November 29, 1983 and received by the trial judge on December 1, 1982, appellant petitioned the court for appointment of counsel (R 132). On December 6, 1982, appellant filed a petition asking for the registration visit record of the Collier County Jail from October 2, 1982, specifically with respect to visits by the additional attorney retained by his family for consultation with appellant. The court responded to the first petition on December 20, 1982, by appointing the Public Defender's office to represent appellant. The record does not reflect any response by the court to the second petition mentioned above until the sentence hearing on January 28, 1983, when it was denied (R 1213). The second petition goes to appellant's contention, made during the fourth day of trial at the time he dismissed the attorney, that said attorney's assistance was ineffective and would show that there was an absence of out of court consultation between said attorney and appellant from October 25th to the time of his discharge during the fourth day of trial.

At the commencement of the sentence hearing, as Assistant Public Defender was present. He stated, at appellant's request, that appellant had not seen an attorney since his conviction and that further, he had not had any consultation with an attorney and that he thinks that's wrong (R 1213). Appellant renewed his petition for the registration visit record of the Collier County Jail, specifically pertaining to visits by his attorney for consultation with him (R 1213). Appellant then stated:

"THE DEFENDANT: Yes, sir. If you'd appoint -- I've asked you to appoint me attorney for today. That's way over a month. I haven't heard an answer from you. I haven't heard an answer from Mr. Osteen. I've sent a question down by Corporal Greene in the jail. I've called the Public Defender's. I've had not response and no visits." (R 1215-1216)

The foregoing statements by appellant are not controverted in any way.

The court then advised appellant that it was his right to discharge Mr. Osteen, which he did (R 1217).

The appellant then denied certain allegations contained in the Presentence Investigation Report (R 157-163) two of which are material here in that they were relied upon by the court and are set out in paragraphs 1. A. and B. of the court's Findings In Support of Sentence of Death (R 144-145). Appellant's denials of those factual allegations are set out at pages 1219 and 1220 of the record. Appellant invited the court to inquire of his wife and mother-in-law, who were present in the courtroom, with respect to those matters set out in paragraph 1 B. The court refused to do so (R 1220).

Appellant asked for a sixty day extension and than a thirty day extension to allow his wife to contact attorneys to "finish up what's been started". The court denied the motion (R 1223).

The court then sentenced appellant to be executed (R 1224).

Issue: Did the court err in failing to provide for effective assistance of counsel to appellant prior to and at the sentence hearing?

As stated above, the trial court on December 20, 1982 appointed the Public Defender's office to represent the appellant. The uncontroverted evidence before the court at the sentence hearing was that no attorney had made contact with appellant with regard to the sentence hearing or any other matter since appellant's conviction on November 19, 1982. The presence of Mr. Osteen at the sentence hearing, without prior consultation with appellant and without proper preparation (no preparation is apparent in the record) can not be said to furnish effective assistance of counsel at the sentence hearing. In Gardner vs Florida, 430 U.S. 349, 51 L Ed 2nd 393, 97 S Ct 1197 (1977) in the opinion of Stevens, joined by Stewart and Powell, it is stated that the sentencing process must satisfy the requirements of due process. It is further stated that:

> "...sentencing is a critical stage of the criminal proceeding at which he is entitled to effective assistance of counsel...." (p. 358)

Gideon, Powell, Townsend, Parker, Nelson, supra make it clear that effective assistance of counsel is required by the Sixth and Fourteenth Amendments of the United States Constitution. Here, as at earlier stages of the trial, the court failed to make an inquiry with respect to appellant's plea of ineffective assistance of counsel but simply forged ahead with the sentencing process. Again, had the court heeded appellant's plea, a method could have been devised which would have allowed the court to proceed in an orderly manner and still protect appellant's constitutionally guaranteed rights.

Issue: Did the court err in failing to continue the sentence hearing in order to allow appellant an opportunity to obtain private counsel?

Under the circumstances of this case and upon appellant's continued meritorious pleas of ineffective assistance of counsel, the failure of the court to grant a continuance was error and violated due process of law, as required by the Fifth and Fourteenth Amendments of the United States Constitution and Section 9, Article I of the Florida Constitution.

Issue: Did the court err in basing its judgment ordering the execution of appellant upon portions of the Presentence Investigation Report, which were controverted by appellant?

Aggravating circumstances applicable to the death penalty must be proved beyond a reasonable doubt before being considered by the court. State vs Dixon, 283 So. 2nd 1, 9 (Fla. 1973). Those matters in aggravation relied upon the trial court as set out in paragraph 1 A. of its findings were directly contradicted by appellant except for those matters relating to his conviction in Federal Court of Interstate Transportation of a Stolen Motor Vehicle. The record is devoid of any proof of the remaining matters in said paragraph except for the bare allegations in the Presentence Investigation Report, which were contradicted by appellant. Clearly the proof of such does not meet the standard of this court as enunciated in State vs Dixon.

With respect to those matters set out in paragraph 1 B. appellant not only contradicted the bare allegations of the presentence investigation but also invited the court to interrogate two wit-

nesses who were present with respect to those matters, which the court refused to do. As stated above, in Gardner vs Florida supra, the opinion of Stewart, joined by two others and the opinions of Brennan and Marshall require that the sentencing process must satisfy the requirement of due process. Reliance by the trial court upon those controverted matters violates due process guarantees of the Fifth and Fourteenth Amendments of the United States Consitution and Section 9, Article I of the Florida Constitution.

Issue: Did the court err in finding no mitigating circumstances in the case?

In Section II of this brief, the failure of the court to grant the motion for continuance to allow receipt of the reports from physicians appointed to examine appellant is fully discussed. It is clear that it is highly possible that had such been done, a defense in mitigation based upon those reports would have been available because of appellant's long history of alcohol abuse, organic brain syndrome, and his drunken state upon the day he has alleged to have killed Joseph Dino. Such factors are specifically contemplated in mitigation. State vs Dixon, supra at page 10.

Issue: Was the homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Issue: Was the homicide especially heinous, atrocious and cruel?

Joseph Dino was a counterfeiter who by his admission had transferred approximately $500,000.00 in counterfeit money to appellant (Exb 10 and 11) (R 598-599, 603).

Appellant was a chronic alcoholic and had consumed large quantities of alcoholic beverages on the day and evening that he has alleged to have killed Joseph Dino. The extent of his drunken state according to the unrefuted testimony is set out on pages 12 and 13, supra.

It does not appear from all of the circumstances in this case that the acts of appellant were especially heinous, atrocious or cruel as required by Tedder vs State, 322 So. 2nd 908 (Fla. 1975), nor does the court's finding that the homicide was cold, calculated and premeditated in light of appellant's drunken state, appear to meet the "reasonable doubt" requirement of State vs Dixon, supra.

IX. DENIAL OF DUE PROCESS

Issue: Did the proceedings in the trial court afford appellant fundamental fairness as required by due process?

The actions in the trial court in this matter, in their totality during the pretrial phase, during the guilt phase of the trial, during the sentence phase of the trial and at sentencing, failed to meet the standards of "fundamental fairness" required by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Florida Constitution.

The circumstances in their totality are: The court allowed the Public Defender to withdraw from representation of appellant when appellant's family retained additional counsel to assist the

Public Defender and not to take over the case six weeks before the commencement of the trial thus requiring preparation for the trial to begin anew; failure of the court to grant the motion to continue the trial to allow the receipt and study of appointed physician's reports; the court's excusing for cause venirewoman Astling; the absence of attorney-client conferences in preparation for defense (possibly as a result of the limited amount of time within which to prepare the defense); failure of the court to make any inquiry into appellant's allegations of ineffectiveness of counsel immediately following counsel's announcement that the defense rested; requiring appellant to represent himself at closing argument after the court failed to inquire into appellant's allegations of ineffectiveness of counsel and after appellant's repeated statements that the matter could be worked out, which were ignored by the court; the failure of the court to allow appellant to confer with his wife to determine whether or not she had made progress in obtaining counsel at the commencement of the sentence phase of the trial; the admission of exhibit 21 during the sentence phase of the trial, which because of its ambiguity allowed the jury to believe that appellant had been convicted of two counts of aggravated assault with intent to commit murder [sic]; the admission and publishing to the jury of irrevelant and prejudicial material attached to State's exhibits 21 and 22, which were published to the jury and subsequently detached from said exhibits by the Assistant United States Attorney; allowing the Assistant United States Attorney to argue in closing at the sentence phase of the trial that appellant had been convicted of two counts of assault with the intent to commit

murder; instructing the jury at the close of the sentence phase of the trial with respect to assault with intent to commit murder; failure of the court to inquire into appellant's allegations that even though counsel had been appointed for the sentence hearings, there had been no contact by appointed counsel with appellant prior to sentencing; the failure to grant a continuance at the sentence hearing after failing to inquire into appellant's allegations of ineffective assistance of counsel so that appellant could attempt to obtain private counsel; and the reliance by the court upon controverted information in it's finding upon which the death sentence was based without proof of the truthfulness of said controverted allegations.

The proposition is stated at 14 Fla. Jur. 2nd, Criminal Law, 134 as follows:

> "The essential requirement exacted of the states by the due process clause of the Fourteenth Amendment, as respects the trial of persons accused of crime, is that the trial shall be fair. The United States Supreme Court has said, in this connection, that denial of due process, as applied to a criminal trial, is a failure to observe that fundamental fairness essential to the very concept of justice...."

In Lassiter vs Department of Social Services, 452 U.S. 18, 68 L Ed 2nd 640, 101 S Ct 2153 (1981), the court stated at page 24:

> "For all its consequence, 'due process' has never been, and perhaps can never be, precisely defined. '[U]nlike some legal rules,' this Court has said, due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'...Rather, the phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opague as its importance is lofty...."

In Lisenba vs California, 314 U.S. 219, 86 L Ed 166, 62 S Ct 280 (1941) at page 236, the court stated:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice...."

Spencer vs Texas, 385 U.S. 554, 17 L Ed 2nd 606, 87 S Ct 648 (1967) the court said:

> "...Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial...." (p. 563-564)

The totality of the events and actions set out above, demonstrate that the trial of appellant did not meet the "fundamental fairness" standard of the Fourteenth Amendment to the United States Constitution and requires setting aside the judgment of guilty and sentence of death.

CONCLUSION

The precise relief sought by appellant is as follows:

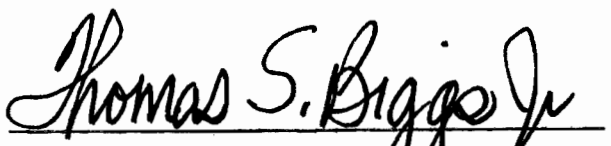
A. With respect to the issue presented in section I of the Brief, a reversal of the judgment and sentence in the trial court and remand to that court with directions to dismiss the indictment against appellant; or in the alternative,

B. With respect to those issues presented in sections II, IV, V, VI and IX of the Brief, reversal of the judgment and sentence in the trial court and remand for a new trial, or in the alternative,

C. With respect to the issues presented in sections III and VII of the Brief, reversal of the sentence in the trial court and remand for a new trial on the sentence phase of the trial, or in the alternative,

D. With respect to those issues presented in section VIII of the Brief, reversal of the sentence of the trial court and remand with directions to enter a sentence of life in prison for appellant, or that a new sentence hearing be held.

Respectfully submitted,



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I HEREBY CERTIFY that a true copy hereof has been furnished to Office of the Attorney General, Park Trammel Building, 8th Floor, 1313 Tampa Street, Tampa, Florida, 33602; Office of the State Attorney, P.O. Box 399, Ft. Myers, Florida, 33902; and appellant, Raymond Leon Koon, #831760, Florida State Prison, P.O. Box 747, Starke, Florida, 32091 by United States mail this 26th day of August, 1983.

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