IN THE SUPREME COURT OF FLORIDA

CASE NO.: 63,700

ROBERT LACY PARKER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the brief of Appellee will be by this sumbol: S.B. (State's Brief). Reference to the parties will be as they appeared in the lower court.

ARGUMENT I

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY UPON THE LAW OF INDEPENDENT ACT UNDER THE FELONY-MURDER DOCTRINE PREVENTED THE DEFENDANT FROM EFFECTIVELY DEFENDING AGAINST THE CAPITAL HOMICIDES IN COUNTS I AND III OF THE INDICTMENT, AND PREVENTED THE JURY FROM CONSIDERING HIS DEFENSE TO THOSE CHARGES, IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY, AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 22 OF THE FLORIDA CONSTITUTION.

The State first urges that the failure of the lower court to instruct the jury on the independent act defense to felony murder in accord with Defense Requested Jury Instructions No. 36, 37, and 38, was not properly preserved for appellate review. Under Fla. R. Crim.P. 3.390(d), when the trial court denies a written instruction, counsel must object before the jury retires, "stating distinctly the matter to which he objects and the grounds of his objection." Here, counsel complied with the requirements of the rule. Counsel submitted not one, but three written instructions regarding the independent act defense to felony-murder, to give the court the option of choosing among them. To be certain that the grounds were adequately preserved for appellate review, counsel cited the relevant legal authority in support of his request on the written instructions themselves. (R. 361, 362, 363). Counsel orally expressed his belief that the jury needed to be instructed on the "independent intervening act" defense to felony-murder at the charge conference. (T. 2090-2091). Counsel renewed his objections to the denial of his requested instructions prior to summation, (T. 2119-2123), and after the jury was instructed. (T. 2305-2306). The requirements of the rule were satisfied.

It is important to note that the charge conference in which

these instructions were requested began at 2:30 P.M. on March 8, 1983, and did not conclude until 5:00 P.M. (T. 2048-2118). The procedure that the trial court followed was to read the requested instruction into the record and ask for comment from counsel (T. 2061-2091). However, when the trial court read Defense Requested Jury Instruction No. 36 into the record, he denied the instruction without asking for comment, went directly into Defense Requested Jury Instruction No. 37, and also denied that instruction without asking for comment. (T. 2090). Defense counsel at that point interrupted the court and called attention to the fact that these instructions related to the independent act defense to felony murder and should be given. (T. 2090). The trial judge simply continued, and read Defense Requested Jury Instruction No. 38. (T. 2091). Defense counsel re-iterated that this instruction was "similar to the previous two instructions" (No. 36 and 37), and that some such instruction should be given. (T. 2091).

When considered in the context of the trial proceedings, the error was certainly properly preserved. An objection need only be specific enough "to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal". Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). Magic words are not needed to make a proper objection. Williams v. State, 414 So. 2d 509, 512 (Fla. 1982). In Williams v. State, 395 So. 2d 1236 (Fla. 4th D.C.A. 1981), at the charge conference, the following coloquy occurred:

> THE COURT: I have not changed my mind. You may file an objection at this point,but I am not satisfied that the instruction as far as alibi would be properly given, and I am not planning to give it. You may speak to this.

> DEFENSE COUNSEL: Your Honor, for the record, I would ask that the instruction on alibi be given based on the testimony that was elicited from the witness stand. I believe that the testimony from the stand does qualify as an alibi and would respectfully request that instruction .....
>
> THE COURT: I am not going to give it. I just wanted to give each of you the opportunity to speak to it.
>
> Id., at 1237.

Even though counsel did not object during the charge conference or after the jury retired, the appellate court ruled that the failure of the trial court to instruct on the defense of alibi had been preserved for review. In Austin v. State, 406 So. 2d (Fla. 4th D.C.A. 1981), the following statement was ruled to be sufficient to preserve a point for appeallate review:

> Judge, we have submitted to the Court, we have requested the Court read two special instructions. The first instruction has to do with penalties. Our basis for that is Murray v. State, 378 So. 2d 111; Rule 3.390, Florida Rules of Criminal Procedure.
>
> Id., at 1129

On re-hearing the District Court detailed the proper application of Fla. R. Crim. P. 3.390(d):

> The difficulty we have explaining the proper application of Rule 3.390(d) results in part from the fact that while the rule treats the refusal to give an instruction on the same basis as the giving of an instruction which is objectionable, the mechanics of communicating disagreement to the trial court will necessarily vary depending upon which aspect of the problem is involved and the precise circumstances of the situation.
>
> The rule is to be applied literally where the trial court expresses an intention to give an instruction which counsel believes should not be given. This would most often occur at a separate charge conference or, more often, at the side bar conference. Counsel is obligated to object and to state the specific grounds for objection. If objection is lodged in the appropriate manner it would be superfluous to require that the objection be repeated after the offending charge has been given to the jury. Such a redundancy would be in the nature of taking an exception which the rule specifically abolishes.

> On the other hand, when the trial court misreads an instruction to the jury, fails to give a charge that had been agreed upon or gives a charge that was not agreed upon, strict compliance by way of objection with specific grounds, is required.
>
> The situation is somewhat different, however, when a formal written request for a particular instruction, stating the legal basis for the request, is presented to and rejected by the trial court. Under such circumstances error is preserved, in the absence of some indication in the record of subsequent waiver. To require objection to rejection of the instruction would in essence be requiring an exception to the court's ruling which, as previously noted, the rule specifically excuses. In our view, objection to the failure to give a requested instruction is implied in the request itself. Id., at 1131-1132

In Thomas v. State, 419 So. 2d 634 (Fla. 1982), this Court approved the Fourth District decisions in Williams, supra, and Austin, supra. See also, Saavedra v. State, 421 So. 2d 725, 726 (Fla. 4th D.C.A. 1982).

The fact that defense counsel did not make an argument as extensive as that in his brief hardly means that the point was waived. The trial court had already announced his intention not to give the instruction. "A lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless." Brown v. State, 206 So. 2d 377, 384 (Fla. 1968).

On the merits of the issue, the State attempts to distinguish Bryant v. State, 412 So. 2d 347 (Fla. 1982) from the instant case on the basis that, in Bryant, supra, there was evidence that the murder occurred during an independent felony committed by the co-defendant. However, there is no requirement that the "independent act" be a different felony in order for the act to be a defense to felony murder. The State's simplistic interpretation of the felony-murder rule, that a felon is liable for the acts of his

co-felons without qualification, is fallacious. The qualification is that "this liability is circumscribed by the limitation that the lethal act must be in furtherance or prosecution of the common design or unlawful act the parties set out to accomplish. (Citations omitted)" Bryant, supra, at 350.

Here, as to Count I, the felony in which the defendant participated with Tommy Groover was either false imprisonment or kidnapping. (The jury, by their verdict, apparently felt that the underlying felony was kidnapping, not false imprisonment). Regardless of whether the felony was false imprisonment or kidnapping, if the jury believed that Groover killed Padgett for personal reasons, unrelated to any common design between Groover and Parker, then the jury would have to find the defendant not guilty as to Count I. The only "criminal conspiracy" that the defendant acknowledged his participation in was the plan to take Padgett out into the woods and leave him there alive. (T. 1494, 1844).

The felony murder rule does not embrace every killing incidentally coincident with a felony, only those committed by one of the felons in the attempted execution of the unlawful end. Although the homicide itself need not be within the common design, the act which results in death must be in furtherance of the unlawful purpose. People v. Wood, 201 N.Y.S. 2d 328, 167 N.E. 2d 736, 738 N.Y. 2d 48, (Ct. App. 1960). When a felon kills someone during the felony in a separate and distinct act to satisfy his own end, his co-felon is not guilty of felony murder. Id. at 739. However, if the lethal act is in furtherance of their common purpose, the co-felon is guilty even if there was an express agreement not to kill, and even if he actually tries to prevent the homicide.

Id. See also, People v. Asher, 78 Cal. Rptr. 885 (Ct.App. 1969), where the defendant asserted an independent act defense to robbery-murder, and the appellate court approved an instruction given by the trial court. Id. at 892, footnote 2.

The issue of whether or not the lethal act was outside of or foreign to the common design is, of course, a question of fact for the jury. Bryant, supra. However, the jury must be properly instructed in order to render an intelligent verdict. Without an independent act instruction, the simplistic view of the felony-murder rule urged by the State (S.B. 3-4) was all the jury heard. (T. 2287-2294). For this very reason, defense counsel was unable to argue for an acquittal as to Count I and was compelled to choose a different defense, which was that the defendant was only guilty of third-degree felony murder. (T. 2241-2242). Because the jury obviously predicated the defendant's liability for the murder of Jody Dalton on a felony murder theory(T. 2307, R. 392), the independent act instruction would have been relevant for the jury's consideration as to Count III, as well. The Standard Jury Instructions are often inadequate. Cole v. State, 353 So. 2d. 952 (Fla. 2 D.C.A. 1978). A defendant is entitled to have the jury instructed on the law applicable to his theory of defense if there is any evidence to support the instruction, however disdainfully the prosecutor or trial judge may feel about the merits of such defense from a factual standpoint. Laythe v. State, 330 So. 2d 113 (Fla. 3rd D.C.A. 1976); Williams v. State, 395 So. 2d 1236 (Fla. 4th D.C.A. 1981); Bryant, supra. This was not done. The remedy is a new trial as to Counts I and III.

ARGUMENT II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT DURESS IS NOT A DEFENSE TO HOMICIDE, WITHOUT REGARD TO WHETHER THE ACCUSED WAS AN AIDER AND ABETTOR AS OPPOSED TO A PRINCIPAL, AND WITHOUT REGARD TO WHETHER THE HOMICIDE WAS A PREMEDITATED OR A FELONY MURDER, IN VIOLATION OF THE RIGHT OF AN ACCUSED TO HAVE THE JURY INSTRUCTED IN ACCORD WITH HIS DEFENSE, AND HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

The State argues in its brief that it was not error for the trial court to grant State's Requested Jury Instruction No. 4 (R. 320) because it was "premised upon a truthful statement of law," (S.B. 5), based on Cawthon v. State, 382 So. 2d (Fla. 1st D.C.A. 1980). However, the State then concedes that, under Goodwin v. State, 405 So. 2d 170 (Fla. 1981), duress is not a defense to felony-murder (S.B. 6). This concession admits the point, which is that the jury was improperly instructed on an issue that was critical to their verdict as to Count II. The jury was told that duress is not a defense to murder, "period." (T. 2147). The instruction as given permitted the prosecutor to argue that, even if the defendant's own testimony were to be believed, "he admitted first degree murder." (T. 2147-2148). The jury was therefore prevented from considering duress at all.

The State also urges that it was not error for the trial judge to tell the jury that duress is not a defense to murder, even though in some cases it is, because there was insufficient evidence to support a duress instruction. (S.B. 6-8). First, even if there was insufficient evidence to justify giving a duress instruction, that fact can hardly justify giving an instruction which mistates the law. Secondly, despite the State's allegations that there was insufficient evidence to justify a duress instruction, it is

obvious that both the prosecutor and judge in the trial court thought that there was ample evidence of duress presented by the defendant. (T. 2096; 2121-2122). Indeed, that was the reason the prosecutor submitted the Cawthon instruction, and that was the reason the trial judge granted it. (T. 2121-2122). Where there is any evidence to support the theory of defense, an appropriate instruction must be given. Smith v. State, 424 So. 2d 726, 732 (Fla. 1982). Because the State in its brief concedes that duress is at least a defense to felony murder, and because both the prosecutor and the trial court found that there was evidence of duress, the failure to properly instruct the jury on the duress defense was error. See also, Hawkins v. State, 426 So.2d 44, 46 (Fla. 1983).

The State infers that the defense did not properly preserve these issues at trial, but this is refuted by the trial record. (T. 2087-2090; 2093-2096; 2119-2122; 2305-2306). Whether or not the defendant's actions were due to fear or coercion was a question of fact for the jury to consider. The instruction given by the trial court effectively precluded the jury from considering this issue in the guilt phase of the trial. A new trial as to Count II is mandated.

ARGUMENT III

THE TRIAL COURT ERRED IN ALLOWING THE PROSECTUION TO PRESENT, IN ITS CASE IN CHIEF AND IN CROSS-EXAMINATION OF THE DEFENDANT, COLLATERAL CRIMINAL ACTS AND ATTACKS ON THE DEFENDANT'S CHARACTER WHICH WERE WHOLLY IRRELEVANT TO THE CRIMES CHARGES AND WHOSE SOLE EFFECT WAS TO DEMONSTRATE A PROPENSITY TO COMMIT CRIME, IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The State argues that this issue was not properly preserved

for appeal and should not be considered. (S.B. 8-9, 13). However, the defendant filed a written "Motion In Limine Re: Evidence of Other Crimes, Wrongs, or Acts," (R. 247-248), that was argued and denied prior to trial. (R. 256, T. 284-297). Immediately prior to jury selection, defense counsel made an oral objection to the specific acts of misconduct contained in the State's Fifth Notice of Intent to Offer Evidence of Other Crimes, Wrongs, or Acts, which was late in being filed. (R. 273; T. 350-354). After the commencement of trial, but prior the introduction of such evidence, defense counsel renewed his objections and argument was heard. (T. 1069-1076; 1081-1082; 1083; 1085-1086). During the testimony of each offending witness, defense counsel again renewed his objections to evidence of other acts of misconduct. (T. 1122-1123; 1128; 1147-1148; 1180; 1230-1234; 1244; 1258; 1599; 1629). At the close of the State's case, counsel moved for a mistrial because of the collateral crimes evidence. (T. 1668-1669). Defense counsel hardly "opened the door" to inquiry into collateral crimes by cross-examining about events a witness had previously testified about on direct. (Compare T. 1131 and 1141; 1181-1182 and 1210-1212). During the cross-examination of the defendant, counsel did make a number of objections about improper cross into collateral acts of misconduct. (T. 1885; 1888; 1889; 1891; 1930-1931; 1963-1966; 1984). Even had objections been made to every impropriety and curative instructions given, the cumulative effect of the evidence of collateral crimes and improper cross-examination of the defendant "resulted in fundamental prejudice and denied the defendant his right to be prosecuted only for the crime charged in a fair trial before an impartial jury." See Albright v. State, 378 So. 2d 1234, 1235 (Fla. 2nd D.C.A. 1980).

The State's heavy reliance on Washington v. State, 432 So. 2d 44 (Fla. 1983), is misplaced. Only by the most strained and convoluted of reasoning can the collateral crimes introduced in this case be deemed logically probative of any fact in issue. The evidence was only relevent to show criminal propensity. See, also, Ziegler v. State, 404 So. 2d 861 (Fla. 1st D.C.A. 1981); Smith v. State, 424 So. 2d 726, 731 (Fla. 1982); Bennett v. State, 316 So. 2d 41, 43-44 (Fla. 1975). Because the collateral acts of misconduct were so numerous, this case is much more similar to Coler v. State, 418 So. 2d 238 (Fla. 1982), and reversal is required.

ARGUMENT IV

THE TRIAL COURT ERRED IN THE MANNER IT CONDUCTED VOIR DIRE, REBUKING AND REPRIMANDING DEFENSE COUNSEL IN THE PRESENCE OF THE JURY, IN COMMENTING ON THE CREDIBILITY OF WITNESSES, AND IN PERMITTING THE PROSECUTOR TO ATTEMPT TO EXPLAIN AND JUSTIFY PLEA BARGAINING WITH THEIR WITNESSES DURING THE JURY SELECTION PROCESS, SO AS TO DENY THE DEFENDANT A FAIR TRIAL BY AN IMPARTIAL JURY, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION.

The State urges that no error occurred because the defense had one peremptory challenge remaining. (S.B. 17). However ,the State and defense had each used fourteen of fifteen peremptory challenges. (T. 871). The defense renewed its previous motion for additional peremptory challenges and its previous motions and objections to the jury selection process before choosing to exercise no more challenges; acceptance of the panel was made subject to those objections. (T. 871-872). Since the entire venire was present throughout voir dire, use of additional challenges could have done little to change the prejudicial effect of the conduct of the prosecutors and trial judge. Reversible error did occur.

ARGUMENT V

THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL DUE TO THE IMPROPER, PREJUDICIAL, AND INFLAMATORY REMARKS OF THE PROSECUTORS IN THEIR CLOSING ARGUMENTS. THE CUMULATIVE EFFECT OF THESE COMMENTS SERVED TO DEPRIVE THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

The State says that the prosecutor made no comments to the effect that the defendant would commit future crimes if acquitted, and says that this argument by the defendant "stretches the record." (S.B. 22). However, the context of the prosecutor's argument clearly shows the prosecutor telling the jury that the defendant would have a "license to kill" if he were acquitted. (T. 2183-2184).

The State infers that defense counsel somehow invited the prejudicial remarks of the State in rebuttal, (S.B. 21) and that defense counsel was guilty of name-calling, as well. (S.B. 20). It is important to note that the defense comment that Tommy Groover was a "rabid dog" was simply a repetition of identical comments by the prosecutor in his first summation. (T. 2130). Defense counsel's reference to "Saint Joan" Bennett was a rebuttal to the prosecutor's attempt to analogize his witnesses to Biblical disciples in order to explain the inconsistencies of their testimony. (T. 2151).

The State further argues that the prosecutor's argument that there were "lots of guns," "guns everywhere before and after," (T. 2150), was directed toward the "contradictory nature of the testimony." (S.B. 22). However, in the instant case, the evidence was undisputed that there were only two guns used. No witness presented any testimony but that the gun given to the defendant by Michael Green was used to kill Richard Padgett and melted down,

and that Elaine Parker's gun was used to kill Jody Dalton and Nancy Sheppard. There was absolutely no evidence of any other guns in the possession of any of the parties during the homicides. A prosecutor may not comment on matters unsupported by the evidence adduced at trial. Huff v. State, 437 So. 2d 1087 (Fla. 1983); Glassman v. State, 377 So. 2d 208 (Fla. 3rd D.C.A. 1979). The State's reliance on Hance v. Zant, 696 F. 2d 940 (11th Cir. 1983), is misplaced. A close reading of Hance shows that the remarks cited by the State (S.B. 23) were a penalty phase argument. The Eleventh Circuit also disapproved of much less egregious comments in the guilt phase summation. Id. at 951 and footnote 10. See, generally, Dyson v. U.S., 418 A. 2d 127 (D.C. 1980).

The presumption that jurors will not be led astray by impassioned eloquence is overcome when, as here, the eloquence was combined with (1) evidence of irrelevant collateral crimes; (2) personal attacks upon defense counsel with the support of the trial judge; and (3) expressions of personal belief by the elected State Attorney and his Chief Assistant. The prejudice is obvious and calls for a new trial.

ARGUMENT VI

THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL WHERE IT WAS SHOWN THAT THE PROSECUTION HAD FAILED TO DISCLOSE FAVORABLE EVIDENCE TO THE DEFENSE, IN VIOLATION OF THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION.

The State argues that defense counsel did not make a specific request for the impeaching information that was not revealed. (S.B. 25). While it is true that counsel did not ask

the prosecution to reveal the sums of money it paid to each witness, a review of the record reveals that counsel made every effort to be as specific as possible that information of this type would be disclosed. The first Motion for Production of Favorable Evidence was filed March 3, 1982, (R. 44-45) and contained the following request in paragraph 4:

> 4. Any information or material which tends to establish the accused's innocence, to mitigate punishment, or to impeach the credit or contradict the testimony of any witness whom the State will call at the trial of the cause. Napue v. Illinois, 79 S. Ct. 1173 (1959); Giglio v. U.S., 92 S. Ct. 763 (1972); Antone v. State, 355 So. 2d 777 (Fla. 1978).

At the hearing on the motion, defense counsel made clear that he was trying to be as specific as possible, while the prosecutor objected to the motion as "totally unnecessary." (T. 90-92).

On August 18, 1982, the defense filed a Motion to Compel Discovery, (R. 156-158), which included this request:

> 3. The existence and substance, and the manner of execution or fulfillment of any promises, agreements, understandings or arrangements either verbal or written between the State of Florida and any co-defendants, prosecution witness, his attorney or representative, or other persons involved in this case, where in the State has agreed:
> (f) to make any other recommendations of benefit or to give any other consideration to him or her. (emphasis supplied).
> See Giglio v. U.S., 405 U.S. 150 (1972); Greene v. State, 376 So. 2d 396 (3 D.C.A. 1979); Antone v. State, 382 So. 2d 1205 (Fla. 1980).

The State mistakenly asks this Court to apply the test of materiality from U.S. v. Agurs, 427 U.S. 97, 112-113 (1976). (S.B. 26). This standard is to be applied when no request has been made, or when only a general request for favorable evidence has been made. Id., 106-107. A different standard should be applied in the case at bar:

> If the requested evidence is withheld by the prosecution following a specific request and the evidence is material - meaning that it might have affected the outcome of the trial - then a new trial must be ordered. Antone v. State, 382 So. 2d 1205, 1215 (Fla. 1980). (emphasis supplied). See also, Arango v. State,437 So.2d 1099(Fla. 1983).

For the reasons stated in Appellant's Brief (A.B. 49), evidence that the prosecutors were paying witnesses in cash, in excess of statutory witness fees, obviously might have affected the outcome of the trial. The evidence must be considered in the context of the over-all trial itself. A new trial is necessary.

ARGUMENT VII

> THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTORS TO REPEATEDLY ADVISE THE JURY THAT CO-DEFENDANT ELAINE PARKER HAD PLEADED GUILTY AND HAD BEEN GIVEN A PLEA BARGAIN IN EXCHANGE FOR HER TESTIMONY AGAINST THE DEFENDANT, WHERE THE CO-DEFENDANT WAS NOT CALLED AS A WITNESS DURING THE TRIAL, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

The cases cited by the State are easily distinguished from the case at bar and from the cases the defendant relies upon: Thomas v. State, 202 So. 2d 883 (Fla. 3rd D.C.A. 1967) and Moore v. State, 186 So. 2d 56 (Fla. 3rd D.C.A. 1966). In Loudd v. State, 358 So. 2d 188 (Fla. 4th D.C.A. 1978), Bocanegra v. State, 303 So. 2d 429 (Fla. 2nd D.C.A. 1974), and Lowery v. State, 177 So. 2d 855 (Fla. 1st D.C.A. 1965), the co-defendant was a witness for the prosecution who testified that he had pled guilty. In Grisette v. State, 152 So. 2d 498 (Fla. 1st D.C.A. 1963), Vitiello v. State, 167 So. 2d 629 (Fla. 3rd D.C.A. 1964), and Walters v. State, 217 So. 2d 615 (Fla. 2nd D.C.A. 1969), no objection was made and the point was not preserved. See discussion in Walters, supra, at 616-617. These cases tend to support, rather than to

undermine, the defendant's contention.

The State argues that the prosecution acted "in good faith" and "fully intended to call Elaine Parker at trial." (S.B. 28). This overlooks the fact that the State had every opportunity to call her as a witness, even in rebuttal, and did not. See Britton v. State, 414 So. 2d 638 (Fla. 5th D.C.A. 1982). It is obvious that the State chose not to call Elaine Parker because her testimony would have supported and re-inforced that of the defendant. (T. 2053-2054). Indeed, her testimony would have been detrimental to the State's presentation if it corroborated the defendant's testimony "right down the line." (T. 2053). The prosecutors wanted to call the defendant a liar in summation, and would have had a difficult time in doing so if one of the witnesses with whom they made "deals" supported the defendant's version of the homicides. The prejudice is obvious and a new trial is required.

ARGUMENT IX

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE, OVER OBJECTION, THE TESTIMONY OF A WITNESS WHERE THE STATE BREACHED ITS DUTY TO DISCLOSE HIS NAME AND ADDRESS AS REQUIRED BY FLA. R. CRIM. P. 3.220(a)(1)(i), AND THE COURT FAILED TO CONDUCT AN INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DISCOVERY BREACH.

The State argues in its brief: (1) no discovery violation occurred (S.B. 32); (2) if there was a discovery violation, there was no prejudice (S.B. 33); (3) the defendant's objection was insufficient (S.B. 34); and (4) the discovery violation was harmless error. (S.B. 35).

It is clear, however, that the prosecutor in the trial court realized that there was a discovery violation and that defense counsel was objecting on that basis, since the prosecutor himself brought the matter to the court's attention. (T. 2013-2014). The

prosecutor only mentioned the discovery violation; defense counsel agreed that he did have such an objection, and that he had another basis to object to the testimony, as well (T. 2014). The trial court held a proffer of Detective Mittleman's testimony and, as its conclusion, defense counsel objected "on the previously stated grounds". (T. 2036-2037). The court then asked for argument addressed solely to the reputation issue. (T. 2037). Counsel made no additional argument about the discovery violation because the court did not ask for any.

The State's argument that a hearing was held is belied by the record. (T. 2013-2014). The State's arguments that the discovery violation was harmless error and did not prejudice the defense ignore the purpose of the hearing required by Richardson v. State, 246 So. 2d 771 (Fla. 1971), which is to determine prejudice and sanctions, if any. It is precisely because no hearing was conducted that the determination of prejudice cannot be made. The discovery violation issue was preserved by objection during trial and in the Motion for New Trial. (T. 2013-2014, R. 440-446, paragraph 35). The remedy is a new trial.

ARGUMENT X

THE TRIAL COURT ERRED IN ALLOWING A POLICE DETECTIVE TO TESTIFY AS TO THE REPUTATION OF DEFENSE WITNESS RICHARD ELLWOOD FOR TRUTH AND VERACITY,IN VIOLATION OF SECTION 90.609 FLA. STAT. (1981), ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The State's contention that Detective Mittleman was a proper reputation witness because no other witnesses were available (S.B. 36) overlooks the testimony of Mittleman himself, who stated that some friends and neighbors of the witness were still living in the Jacksonville community. (T. 2033-2034). No excuse was given

for not bringing in one of these persons despite counsel's objection on that basis. (T. 2038). The authorities cited in appellant's brief require a new trial.

ARGUMENT XI

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO QUESTION DEFENSE WITNESS RICHARD ELLWOOD ABOUT SPECIFIC PRIOR CONVICTIONS AND GETTING THE WITNESS TO CLAIM HIS FIFTH AMENDMENT PRIVILEGE, IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL, AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

The State argues that defense counsel was in error in arguing that the nature of charges pending against a defense witness is inadmissible except in very limited circumstances. (S.B. 39). The State overlooks this Court's decision in Fulton v. State, 335 So. 2d 280 (Fla. 1976). The prejudicial effect of the improper cross-examination requires a new trial. Id., at 285.

ARGUMENT XII

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ELICIT FROM DEFENSE WITNESS RICHARD ELLWOOD THAT THE DEFENDANT REMAINED SILENT AND DID NOT DISCUSS HIS CASE WHILE IN JAIL AWAITING TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

The State submits that, because this cross-examination was conducted of a defense witness instead of the defendant, there was no violation of the defendant's constitutional rights. (S.B. 42). This argument ignores this Court's ruling in Clark v. State, 363 So. 2d 331 (Fla. 1978), wherein this Court stated:

> 1. Reversible error occurs in a jury trial when a prosecutor improperly comments upon or elicits an improper comment from a witness concerning the defendant's exercise of his right to remain silent. Likewise, reversible error occurs when any state, defense or court witness in a jury

> trial spontaneously volunteers testimony concerning the defendant's exercise of his right to remain silent. Id., at 334

The cross-examination herein was used by the prosecutor to infer guilty knowledge on the part of the defendant due to his failure to discuss his defense with the witness or with Billy Long. (T. 1786-1788). Florida courts have consistently held that the failure of a defendant to discuss his defense with anyone other than his lawyer, after the defendant has been arrested, taken into custody and charged with a crime, is not admissible evidence because the prejudicial effect outweighs the probative value. See Simmons v. State, 139 Fla. 645, 190 So. 756 (1939); Bennett v. State, 316 So. 2d 41 (Fla. 1975); Clark, supra. The fact that such silence was in response to an accusation by a civilian does not make evidence of such silence admissible when the defendant is in custody, charged with a crime. Jones v. State, 200 So. 2d 574 (Fla. 3rd D.C.A. 1967). The fact that the silence of the defendant was not in response to Miranda warnings is also not significant. Webb v. State, 347 So. 2d 1054 (Fla. 4th D.C.A. 1977).

It is important to note that even the dissenters in Doyle v. Ohio, 426 U.S. 610 (1976), questioned the probative value of the failure of an accused to discuss his defense with other than his lawyer:

> Althought I have no doubt concerning the propriety of the cross-examination about petitioner's failure to mention the purported "frame" at the time of their arrest, a more difficult question is presented by their objection to the questioning about their failure to testify at the preliminary hearing and their failure generally to mention the "frame" before trial. Unlike the failure to make the kind of

> spontaneous comment that discovery of a "frame" would be expected to prompt, there is no significant inconsistency between petitioners' trial testimony and their adherence to counsel's advise not to take the stand at the preliminary hearing; moreover, the decision not to divulge their defense prior to trial is probably attributable to counsel rather than petitioners. Nevertheless, unless and until this Court overrules Raffel v. United States, 271 U.S. 494, 46 S. Ct. 566, 70 L. Ed. 1054, I think a state court is free to regard the defendant's decision to take the stand as a waiver of his objection to the use of his failure to testify at an earlier proceeding or his failure to offer his version of the events prior to trial. Id., at 629-633 - dissent of Justice Stevens.

The Supreme Court has since made it clear that each state is free to place greater restrictions on the use of post-arrest silence than federal due process requires, just as the Supreme Court itself imposed greater restrictions on federal trials in U.S. v. Hale, 422 U.S. 171 (1975). See Fletcher v. Weir, 102 S. Ct. 1309 (1982). Florida courts have, consequently, provided the citizens of Florida with greater protection against misuse of the right to remain silent. See Webb, supra; Cooper v. State, 413 So. 2d 1244 (Fla. 1st D.C.A. 1982); Lee v. State, 422 So. 2d 928 (Fla. 3rd D.C.A. 1982). Evidence of the failure of the defendant to offer his version of the events while in custody was improperly brought before the jury. A new trial is required.

ARGUMENT XV

> THE TRIAL COURT ERRED IN PERMITTING THE STATE TO USE THE DEFENDANT'S STATEMENTS MADE AT HIS ARREST FOR AN UNRELATED OFFENSE AS EVIDENCE OF GUILT, AND IN SO INSTRUCTING THE JURY, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The State argues that State Requested Jury Instruction No. 7 (R. 323) was properly granted because it was premised upon a

truthful statement of the law. However, it is not a standard jury instruction in criminal cases. It emphasized evidence of marginal probative value. It was an impermissible comment on the evidence, the effect of which was to invade the province of the jury by singling out and emphasizing specific parts of the evidence to be considered without reference to the other parts. See Baldwin v. State, 46 Fla. 115, 35 So. 220 (1903). The instruction was an argument more appropriately argued by counsel. In a case where the evidence was contradictory and the witnesses of questionable credibility, such an instruction could well have tipped the balance of judgment against the defendant.

ARGUMENT XVII

THE TRIAL COURT ERRED IN OVER-RULING DEFENSE OBJECTIONS AND FAILING TO DECLARE A MISTRIAL WHEN THE PROSECUTION INTRODUCED EVIDENCE OF PRIOR CONSISTENT STATEMENTS BY WITNESS BILLY LONG BEFORE THE WITNESS'S CREDIBILITY HAD BEEN ATTACKED, IN VIOLATION OF SECTION 90.801(2)(b), FLA. STAT. (1981), AND THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The State admits that Billy Long's prior consistent statements could not be introduced to shore up his testimony unless and until an effort was made to impeach his testimony, but argues that the error was harmless. (S.B. 52-53). This Court applied the harmless error rule to this issue in Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), because two other prosecution witnesses presented almost identical testimony to that of the improperly rehabilitated witness. Id. at 843. Here, however, Billy Long was alone in pointing the accusing finger at the defendant in Count II of the indictment. The jury obviously gave Joan Bennett's testimony little weight, because they returned a verdict of third degree murder as to Count III.

Despite the State's assertion to the contrary, the evidence of guilt was disputed, contradictory, inconsistent, and uncorroborated. Because Long's credibility was such an important issue in the trial, the error here was far from harmless.

ARGUMENT XIX

THE TRIAL COURT ERRED IN ITS SUMMARY DENIAL OF DEFENDANT'S MOTION IN LIMINE AND IN DENYING DEFENDANT'S REQUEST FOR FUNDS TO CONDUCT AN EVIDENTIARY HEARING ON THE MATTER, WHICH RULING HAD THE EFFECT OF DENYING THE DEFENDANT HIS RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY CONSISTING OF A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, AND HIS RIGHT TO EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 AND 22 OF THE FLORIDA CONSTITUTION.

The State argues that it was not error to deny the defendant an evidentiary hearing at which he would have the opportunity to prove his allegations because there was no offer of proof. (S.B. 59). This argument, if accepted, would place a defendant in an untenable "Catch-22" posture. If defense counsel had attached an offer of proof to his Motion in Limine, the trial court could have justified his denial of the motion on the basis that the evidence was insufficient. This is precisely what happened in Nettles v. State, 409 So. 2d 85 (Fla. 1st D.C.A. 1982). Counsel learned from Nettles that an offer of proof is inadequate; an evidentiary hearing at which the trial court is given the opportunity to see and hear live witnesses and exhibits is essential to a proper presentation of the issue. The decision in Maggio v. Williams, 104 S.Ct. 311 (1983), is similar to Nettles: the Supreme Court refused to disturb the District Court's ruling that the proffered evidence was "tentative and fragmentary." Id. at 314. Counsel explained this dilemma to the trial court, citing Nettles and Grigsby v. Mabry, 637 F. 2d 525 (8th Cir. 1980). (T. 51). The problem with the

State's position is that without a full evidentiary hearing, it is impossible to convey to the trial court (and to any appellate court) precisely how persuasive the evidence is. The recent decision in Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983) shows that the evidence that a "death-qualified" jury is more prone to convict is compelling, indeed. It is only when the court permits an evidentiary hearing that an intelligent and reliable decision can be reached. If the State desires an offer of proof, the evidence is described in Grigsby v. Mabry, 569 F. Supp. 1273, 1291-1305 (E.D. Ark. 1983).

ARGUMENT XXII

THE TRIAL COURT ERRONEOUSLY SENTENCED THE DEFENDANT TO DEATH ON COUNT II, WHERE THE JURY'S JUDGMENT IN FAVOR OF LIFE WAS WELL-SUPPORTED BOTH IN FACT AND IN LAW.

The State argues that the defendant "quarrels with the weight given the mitigating evidence by the trial court." (S.B. 66), and that "the court was not compelled to find the factors submitted." (S.B. 65). If, as in Quince v. State, 414 So. 2d 185 (Fla. 1982), the defendant had waived a jury advisory sentence, these arguments might have some merit. However, here there was competent substantial evidence to support the statutory and non-statutory mitigating circumstances that were argued to the jury. This is a case in which the jury entered a life recommendation based on evidence of mitigating circumstances, and the trial judge rejected their conclusions. Id., at 187. The jury expressly found that mitigating circumstances did exist and that they outweighed the aggravating circumstances, because a specific jury verdict form was used. (R. 435).

A number of cases are cited by the State in support of the

contention that the trial court was correct in overruling the jury life recommendation. All of them are easily distinguished from this case. In Gardner v. State, 313 So. 2d 675 (Fla. 1975), Douglas v. State, 328 So. 2d 18 (Fla. 1976), Dobbert v. State, 328 So. 2d 433 (Fla. 1976), and McCrae v. State, 395 So. 2d 1145 (Fla.1981), there was no co-defendant. In Sawyer v. State, 313 So. 2d 680 (Fla. 1975), the defendant was the "triggerman"; the defendant's sentence was later mitigated to life by the trial judge. In Hoy v. State, 353 So. 2d 826 (Fla. 1978), the defendant and his co-defendant actively participated in the abduction of a young man and his girlfriend, the rape of the girl, and the shooting of both. Both were sentenced to death, but the co-defendant's conviction was reversed. Hall v. State, 381 So. 2d 683 (Fla. 1979). Both have since been resentenced to life. In Stevens v. State, 419 So. 2d 1058 (Fla. 1982), the defendant and his co-defendant kidnapped a female convenience store clerk during a robbery, raped her, stabbed and strangled her, and sexually mutilated her as she was dying. Both were sentenced to death. See Engle v. State, 438 So. 2d 803 (Fla. 1983). In Barclay v. State, 343 So. 2d 1266 (Fla. 1977), both the defendant and his co-defendant were active participants in the abduction, stabbing and shooting of the victim. Both were sentenced to death, and this court affirmed because "...the facts here do not warrant the dispensation of unequal justice." Id., at 1271. To apply this same principle to this case would require a life sentence. (T. 2491-2495).

In none of the cases cited by the State was the defendant the only one of four co-perpetrators to receive the death penalty

for his role in the murder. In none of the cases cited by the State was the triggerman allowed to plea bargain for second-degree murder. In none of the cases cited by the State did the defendant give an exculpatory version of the crime, that even if believed, could still have resulted in his conviction. "It is well settled that a jury's advisory opinion is entitled to the great weight, reflecting as it does the conscience of the community,and should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983). Here, there was certainly a reasonable basis for the jury recommendation. See, also, Walsh v. State, 418 So. 2d 1000 (Fla. 1982); Herzog v. State, 439 So. 2d 1372 (Fla. 1983).

CONCLUSION

Based upon the foregoing reasons and authorities as well as those previously advanced in Appellant's main brief, the sentence in Count II should be reduced to life imprisonment. The conviction as to each count should be vacated and remanded for a new trial, where death is not a possible penalty.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Barbara Butler, Office of the Attorney General, Duval County Courthouse, Jacksonville, Florida 32202, by mail delivery, this 10 day of February, 1984.

Robert J. Link
ROBERT J. LINK, ESQUIRE