IN THE FLORIDA SUPREME COURT

IRA MARTIN AMAZON,

Appellant,

v. CASE NO. 64,117

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

Ira Amazon's trial counsel, Barry Cohen and Richard Pippinger, filed a pretrial motion on July 14, 1982, for a jury view of the murder scene in this case. (R 75) They also stipulated with Assistant State Attorney Paul Meissner that the view would include "a trip around the neighborhood." (R 689, 693)

On the day Joy Chapin and Jennifer Chapin were murdered, December 1, 1981, Detective Michael Coachman of the Pinellas County Sheriff's Office made video tapes of the crime scene. Those tapes were provided to Amazon's counsel in discovery. (R 685, 686)

At the State's request, Detective Coachman electronically edited the video tapes into a single tape for possible use at trial. Amazon's counsel viewed a copy of that tape on November 14, 1982. (R 681, 684, 686)

On November 15, 1982, Amazon's counsel met with Assistant State Attorneys Paul Meissner, James Dobson, and Marie King, Detective Coachman, and the trial judge, the Honorable Thomas E. Penick, Jr., to discuss whether the "edited tape" should be admitted into evidence and viewed by the jury at the crime scene. (R 681-683)

After viewing the video tape which was narrated by Detective Coachman, and after hearing argument of counsel, Judge Penick ruled that the tape could be viewed by the jury. (R 702) That Amazon's counsel understood that the tape was to

be viewed at the crime scene and that it would be narrated there by Detective Coachman is evidenced by Mr. Pippinger's remark, "I understood because of the logistics problem of actually viewing the video tape at the crime scene, I assume there will be a Court Reporter there." (R 713)

After Judge Penick ruled, the following transpired:

> MR. COHEN: ...Let me, before we adjourn, Judge, two matters—
>
> THE COURT: For the record.
>
> MR. COHEN: Well, one of them I want to discuss with them, naturally, this scene will be part of the trial, and our client has the right to be present.
>
> THE COURT: Okay. That is a good point.
>
> MR. COHEN: ...I need to speak to Mr. Pippinger so we can discuss with Mr. Amazon whether he wants to be present, or whether he is willing to waive his presence for that. I will probably recommend to him he waive his presence, but the decision will have to be his. (Emphasis supplied)(R 703)
>
> * * *
>
> THE COURT: Okay. I am now concerned about security. State, do you want to address that? Assume he wants to go.
>
> MR. MEISSNER: Assume he wants to go, he has a right to go there, and security, as unobtrusively as possible will be provided.
>
> MR. COHEN: Rather than take five minutes of everybody's time to discuss it, it may well be moot. I recommend we wait and see what his position is on that. (Emphasis supplied) (R 703, 704)

On November 16, 1982, the following occurred:

> MR. MEISSNER: We had a...hearing yesterday, on a motion to exclude a video tape of the crime scene, that was made by Detective

Coachman....[I]t has been ruled by the Court, that tape is going to be admitted into evidence. What I would propose to do, gentlemen, with the concurrence of the defense, is to place Detective Coachman on the stand, go through the normal proferring questions, with regard to the video tape, formally admit into evidence prior to showing it out at the scene.

THE COURT: You say proffering, you mean presence, in front of the jury?

MR. MEISSNER: Yes, sir, I am sorry, but just introduce it into evidence so when we go to the scene to show the tape, it has been introduced into evidence. Any problem?

MR. COHEN: No problem.

RM. MEISSNER: All right. In addition, Deputy Romanosky and his trusty dog, Thor, were at the scene the night of the incident. As you know, Detective Romanosky has testimony concerning the track of that dog that night. We can proceed in one of two fashions depending on how you wish to proceed. Mr. Pippinger, I can have Deputy Romanosky offer the testimony in the courtroom and then be present at the jury view, simply to point out those locations he previously testified to, or we can swear Deputy Romanosky, and allow him to point it out at the scene. Do you have any difficulty with that?

MR. PIPPINGER: Let me ask you, Paul, I think this is probably a good time to get this for our planning purposes. Who all do you want to testify at the scene? Coachman?

MR. MEISSNER: Coachman to narrate the video tape, Levy to point out the location where physical evidence and other objects of importance were in the actual house, and Romanosky and his trusty dog, Thor, to talk about the track and the nature of the track, and directions.

* * *

MR. PIPPINGER: Mrs. Doherty, and Mr. Calder, are going on before we go out there?

MR. MEISSNER: Yes, sir. If you want me to, I will put Detective Coachman on briefly here. I can do it out there, if you agree to it.

MR. PIPPINGER: Let's qualify the tape here. If he is going to be here....

MR. MEISSNER: After that, you want Romanosky here, or there?

MR. PIPPINGER: As long as we understand we are going to be allowing this thing out there to proceed as much as possible, from one central location so we don't have the Court Reporter wandering all over three blocks.

MR. MEISSNER: So the record is crystal clear, there will be a full complement of court personnel there, we will be holding court at that location.

* * *

MR. MEISSNER: Also, Judge, we need a formal waiver of the presence of the Defendant there.

MR. COHEN: Yes, I will give you that now.

THE COURT: Are you going to do that? Have you discussed it with your client?

MR. COHEN: Yes, Judge.

THE COURT: You make your record.

MR. COHEN: Judge, Mr. Pippinger and I discussed this with Ira Amazon after our hearing yesterday morning, when the subject first came up. We discussed it with him in detail. We recommended to him he waive his presence, and he has authorized me to enter a waiver of his presence on his behalf, at the scene during that portion of the trial of this case. (Emphasis supplied)

THE COURT: All right. That eliminates that problem. (R 1040-1044)

At trial, Detective Coachman testified concerning the video tape he made at the murder scene, and how an abbreviated version had been prepared for showing to the jury. The tape was admitted into evidence, and Judge Penick instructed

Detective Coachman to take the tape to the crime scene so it would be "available for presentation at the scene." (R 1148) (Emphasis supplied)

Also at trial, before the jury proceeded to the crime scene, Deputy Romanosky testified how his tracking dog, Thor, followed a scent from the Chapins' home to Ira Amazon's home, and how Thor reacted when Amazon came into his presence. At the conclusion of his testimony, Judge Penick instructed Romanosky to be present when the jury viewed the crime scene. (R 1149-1159)

At the crime scene, Technician Daniel Levy described what he observed at the Chapins' home on the morning of the murders. (R 1180-95, 1205) Defense counsel informed the court that they had no objection to the state leading the witness so long as there was no testimony as to ultimate facts. (R 1184, 1185) Technician Levy was allowed only to point out the location of various items as they had been found at the scene.

Deputy Romanosky also testified at the murder scene. He pointed out Thor's tracking route and where Thor reacted aggressively when confronted by Amazon. Defense counsel stipulated to that location. Detective Romanosky's testimony at the scene was merely cumulative of his earlier courtroom testimony. (R 1196-1204)

At the murder scene, Detective Coachman narrated the soundless video tape for the jury, indicating where he was while filming and the objects appearing in the film. Stipu-

lations that had previously been agreed upon were related at various times [that candles and a candlestick holder appearing in the film had been moved by emergency medical persons or others, (R 1212); that Jennifer Chapin's body had been altered at the scene by emergency medical personnel, (R 1213)].

The jurors were permitted to walk through the Chapin's house at their leisure for a few minutes, to make their own observations, and were then transported back to the courtroom. (R 1223)

Back in the courtroom, Technician Levy was recalled as a witness. Before he testified again, Judge Penick said:

> Mr. Dodson, one thing I would like the record to also reflect and let it be clear, Technician Levy did testify at the crime scene yesterday. He was sworn at that time, and as the Bailiff indicated, he is still under oath, the continuing oath that he took yesterday. Proceed. (R 1352)(Emphasis supplied)

Technician Levy identified for admission into evidence photographs of the items and scenes he had pointed out to the jury at the crime scene. The only thing that differed from his earlier testimony at the view was his estimate of the distance from Amazon's house to where the stolen purse was found. (R 1205, 1352)

Neither Amazon nor his counsel ever objected to the fact that witnesses testified at the crime scene or that the video tape was played there. In Amazon's motion for a new trial, no mention was made of Amazon's absence at the crime scene proceedings.

On December 11, 1984, this Court temporarily relinquished jurisdiction in this case to the circuit court for the purpose of conducting an evidentiary hearing to determine whether Ira Amazon knowingly and intelligently waived his right to be present at the jury view of the crime scene. This Court was concerned with "the adequacy of notice and advice by counsel, and also the scope of the authority Amazon gave his counsel to waive his presence." (R 3236-37)

Judge Penick conducted an evidentiary hearing pursuant to this court's order on January 23, 1985. (R 3260-3321) Ira Amazon and his trial lawyers, Barry Cohen and Richard Pippinger, testified.

Barry Cohen testified that Amazon did not attend the jury view primarily because he decided that Amazon should not attend, along with Mr. Pippinger's concurrence. He said (all emphasis hereafter is supplied by appellee):

> ...that was a calculated decision I made based on what my objectives in the case were. My objective in that case was to hopefully get the jury to either reach a verdict of second degree murder or, if they convicted him, to recommend life.
>
> I felt that the presence of Ira Amazon at that scene, ...knowing what was going to be happening at that scene, particularly the jury viewing the video tape, having viewed that video tape, ...I knew the emotions that would be felt by the jury at the scene, and I knew the animosity that could easily and would easily, naturally be transferred to Ira at that scene. I knew that, frankly, that Ira had a — a nervous habit, a manifestation that when he got very stressed out, very nervous, that Ira had a habit of grinning.

> And I knew that it was not because he thought something was funny, but this was a nervous manifestation, in my judgment, of the stress that he was feeling at the moment. I had been around Ira enough and interviewed him enough to know that.
>
> It was my feeling that Ira would be in a very stressful situation at the scene and that he possibly could react without being able to control that sort of nervous facial gesticulation.... And if any juror believed that he thought that anything was funny that happened at the scene, that there wasn't a snowball's chance in hell that anybody would even think about recommending life to someone who showed no contrition, and that that would be misinterpreted. (R 3269, 3270)

Cohen testified that he and Mr. Pippinger informed Amazon that in their judgment it would not be in his best interest to appear at the murder scene. Said Cohen:

> Since Mr. Pippinger and I were in control of the case, we told him what we thought was the lay of the land.
>
> And his attitude—while I don't have any independent recollection of what he said—but his attitude was: You all are running the case, and whatever you say is okay with me.
>
> Sort of, I would call it, an acquiescence to what we told him. (R 3271, 3272)
>
> And perhaps I said [to Judge Penick] that the decision would have to be his. And I guess, technically, it may have come down to his, but in my mind, since I was running the case, that it was my decision, just as it was that he would take the stand or not, or any other decision to be made in the case. I made it; not Ira Amazon. (R 3272, 3273)

* * *

...I am sure Mr. Pippinger and I did discuss with Ira him going to the scene and him having the view at the scene taking place, what would happen out there. ...I'm sure that we recommended jointly, Mr. Pippinger and I did, because we had spoken about it ourselves out of Ira's presence as to what our recommendation would be. And I know that that was it, that Ira agreed or acquiesced that he would not appear at the scene if that's what his lawyers felt was in his best interest. (R 3273, 3274)

* * *

I don't recall whether I discussed with Ira Amazon, or Mr. Pippinger discussed in my presence with Ira Amazon, what our reasoning process was for...recommending to him that he not go to the scene. (R 3275)

* * *

I don't know that I conveyed the impression to him that he had a choice, because he really didn't as far as I was concerned. (R 3275)

* * *

I can only tell you what I was conveying to him, that he got the impression based on what I said and my attitude about the fact that I didn't want him at the scene, that it wasn't in his best interest.

And Ira Amazon, like most clients, say to you, you know: You're in charge; that's what I hired you for, to make these kinds of decisions, in effect. And that's what he did. (R 3275, 3276)

* * *

...I don't think I instructed him that he had a legal right to be present, in those sort of words....I think it was conveyed to him that he had the right to be there, but that I was deciding that it was not in his best interest and—so that he wouldn't be there. (R 3277)

* * *

I probably told him that they were going to be viewing the physical aspects of the —of the crime, the point of entry. And I'm sure that I told him—I say I am sure. I am not really sure if I told him about the view. I think I probably did—the fact that I'd be viewing the video tape right there. (R 3277, 3278)

Q Did you advise him that there would be witnesses testifying at the crime scene?

A I have no independent recollection of that. I don't know that I knew that... after we had that first meeting...in the State Attorney's Office with Judge Penick present. I don't know whether I learned that later, that one of the deputies was going to testify or not. At any rate, I don't have any recollection of ever advising Ira that there was going to be testimony taken at the scene.

Q Did you ever advise Mr. Amazon that there would be a video tape played at the crime scene....?

A I don't have any independent recollection of that. If I had to speculate, I probably did. But...I can't testify that I did. (R 3278)

Mr. Pippinger testified as follows:

...As Mr. Cohen has testified, we were concerned about a nervous mannerism of Ira Amazon which could be misconstrued. Mr. Cohen and I discussed whether Ira Amazon should be present, and decided that the jury would be uncomfortable if he was present and if they saw this mannerism, that it would be terribly difficult to obtain a recommendation of life or a verdict of second degree. (R 3286)

* * *

...I do feel certain that the following matters were discussed with him:

Number one, that we needed a waiver of his presence. So, obviously, we discussed with him that he had a right to be there.

Number two, that it was our collective judgment, Mr. Cohen's and myself, that he should not be there. And that was our recommendation.

I do not have any independent recollection of actually telling him that witnesses would testify at that viewing. I do have an independent recollection of telling him that the video tape would be played at the scene because we all anticipated that.

Ira — I don't want to use the word "agreed" in the legal sense. Ira was informed of the things that I told you, and went along with our strategic decision in the case, agreed or acquiesced, depending on which word you prefer.

He really didn't have a choice. We made it clear to Ira Amazon that we were making the strategic decisions in the case, and that's why he hired us basically. (R 3286, 3287)

* * *

He raised no objection. He at very least acquiesced in that decision. (R 3287)

Q Do you recall discussing with him the nervous condition he had?

A I don't recall actually telling him that the nervous condition of the grin — I don't actually recall telling him precisely why we felt the jury would be nervous. I do recall telling him or having it discussed in his presence that the jury, seeing those videos, the horrible nature of what was on that video, would not like him very much. We did not want them, basically, staring at him, those kinds of things. But we did not say to him, "Ira, you have a nervous mannerism, a grimace, when you are nervous, that may be misconstrued."

Q But at least you recall telling him the fact that you didn't want the jury staring at him while they were watching the video tape at the jury view?

A We didn't want the jury watching him while the video was playing, that's correct.

Q And he was informed of that?

A Yes, he was. (R 3287, 3288)

* * *

Q ...Did I hear you correctly that you did not advise him that there would be witnesses testifying at the jury scene crime view?

A No. What I said was: I have no recollection of giving him that specific advice. I may have told him that. I may not have. But I have no current recollection one way or the other of telling him whether witnesses would actually testify.

* * *

Q Did you ever explain to him the nature of a crime scene view, whet would occur at the crime scene view?

A I'm confident, comfortable, and have a recollection of explaining that the nature of it was to go to the Chapins' residence to view the house. It was a tri-level house, which was rather difficult to conceptualize without actually having seen it, that the video of the crime scene would be played there, and that generally, something would be on the video tape relating to the... exhibits and the decendents. To that extent, yes.

Q Do you recall ever advising Ira Amazon that he had the legal right to be present at the crime scene during the jury view?

A I doubt if I used the words "legal right," but the nature of our conversation made that self-evident that he had the right to be there....[W]e were talking to him in the context of waiving that right or waiving his entitlement to be there. So I feel like that it was discussed with him in terms that he had the right to be there, but not in the sense that the law provides you with an abso-

> lute constitutional right to be present during each and every phase of trial, and going through that kind of dialogue. But the essence of his entitlement to be there, I believe was explained to him. (R 3289-3291)

Ira Amazon testified that he was told that the jury would be brought to the crime scene and brought through the house; he never viewed the video tape of the crime scene; he did not know the video tape was going to be played for the jury at the crime scene, he never learned during the trial that the video tape was played at the crime scene; he did not know witnesses would testify at the crime scene; he did not learn during the trial that witnesses testified at the crime scene; if he had been advised that the crime scene view would include the testimony of witnesses and the showing of a video tape, he would have desired to be present at the view; he desired to go to the view even without that knowledge; he advised his counsel that he wanted to go to the crime scene; he did not agree with his lawyers' decision that he should not be present at the crime scene; he did not know he had the legal right to be present at the crime scene view; he did not know he had a choice to either agree or disagree with his lawyers' decision; he raised an objection to his lawyers' decision that he should not be present at the view; all strategy decisions were made by his lawyers and his parents; he had no say in the matter; and he was led to believe he had no say in the matter. (R 3293-3301)

Amazon admitted that he did have a nervous grin and that he was displaying it at the evidentiary hearing. (R 3300) He

also recalled that portions of the video tape were shown to the jury in the courtroom subsequent to the showing at the scene. (R 3302)

On rebuttal, Richard Pippinger testified that Amazon never voiced any disagreement with the decision that he should not be present at the view. (R 3306, 3307) Barry Cohen testified that he did not recall that Amazon asked to be present at the view. (R 3308)

Upon that evidence, Judge Penick's findings and conclusions were as follows:

> 1. That the attorneys for the defendant did discuss with the defendant prior to the viewing that there would be a viewing of the crime scene by the jury.
>
> 2. The defendant's attorneys did discuss with him his right to be at the viewing.
>
> 3. The defendant was present during all courtroom proceedings. During the courtroom proceedings, witnesses who testified at the crime scene again testified in the courtroom before the defendant.
>
> 4. The credentials, experience and reputations of the defendant's attorneys Barry A. Cohen and Richard G. Pippiner, are superb. The advice given the defendant by his said attorneys was sound legal advice and it was more than adequate.

It is therefore CONCLUDED THAT,

> 1. The defendant, IRA AMAZON, was fully informed by his attorneys that there would be a viewing of the crime scene by the jury.
>
> 2. The defendant's attorneys more than adequately informed defendant of his right to be present at the viewing.

3. The defendant, at the time of the viewing of the crime scene, clearly gave his attorneys authority to waive his presence at the viewing.

4. The defendant, IRA MARTIN AMAZON, knowingly and intelligently waived his right to be present at the jury view of the crime scene. (R 3258, 3259)

SUMMARY OF ARGUMENT

The record in this case supports the trial court's finding that Ira Amazon knowingly and intelligently waived his right to be present at the jury view of the crime scene.

The record also supports a finding that Amazon knowingly and intelligently waived his right to be present when the video tape of the crime scene was viewed by the jury.

Amazon's right to be present when witnesses testified at the crime scene was waived by his counsel, and the strategic decision of Amazon's counsel to waive Amazon's presence should only be subject to collateral attack.

Appellant was constructively present or impliedly waived his presence at the crime scene proceedings because he failed to object to his absence when three opportunities were presented for him to object.

A defendant's presence at a critical stage of trial is waivable in view of the precedent set by decisions of the United States Supreme Court.

Appellant was not absent during a critical stage of trial because his presence was not important because of aid he could have given his counsel, and because there was no prejudice to appellant's defense by his absence.

Appellant's absence from a portion of his trial was not fundamental error. The right to be present during critical stages of criminal proceedings is subject to harmless error analysis. The evidence in this case, without reference to the

crime scene proceedings, fully sustained the verdict. Considered in the light of the whole record in this case, appellant's absence was harmless error at best.

ARGUMENT

ISSUE I.

WHETHER IRA AMAZON KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO BE PRESENT AT THE JURY VIEW OF THE CRIME SCENE.

Fla. R. Crim. P. 3.180(a)(7) provides that in all prosecutions for crime the defendant shall be present at any view by the jury. In State v. Melendez, 244 So.2d 137 (Fla. 1971), this Court noted that "the requirement of the defendant's presence is for his protection, and therefore he can waive it if he chooses by voluntarily absenting himself."

The record in this case (see appellee's statement of the facts) easily supports Judge Penick's finding that appellant knowingly and intelligently waived his right to be present at the jury view of the crime scene.

A trial court ruling comes to a reviewing court with the same presumption of correctness that attaches to jury verdicts and final judgments. Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, 449 U.S. 986 (1980)

ISSUE II.

WHETHER IRA AMAZON KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO BE PRESENT WHEN THE VIDEO TAPE OF THE CRIME SCENE WAS VIEWED BY THE JURY.

Fla. R. Crim. P. 3.180(a)(5) provides that in all prosecutions for crime the defendant shall be present at all proceedings before the court when the jury is present. This requirement may be waived by the defendant. State v. Melendez, 244 So.2d 137 (Fla. 1971).

The record in this case (see appellee's statement of the facts) easily supports a finding that appellant knowingly and intelligently waived his right to be present when the jury viewed the video tape of the crime scene.

ISSUE III.

WHETHER IRA AMAZON'S RIGHT TO BE PRESENT WHEN WITNESSES TESTIFIED AT THE CRIME SCENE WAS WAIVED BY AMAZON'S COUNSEL, AND WHETHER AMAZON'S PRESENCE COULD BE SO WAIVED BY COUNSEL.

Although the record in this case supports a finding that appellant knowingly and intelligently waived his right to be present at the jury view of the crime scene and his right to be present when the jury viewed the video tape of the crime scene, the record does not clearly support a finding that appellant positively waived his right to be present when Technician Levy, Detective Coachman, and Deputy Romanosky "testified" at the crime scene. The question then becomes whether Amazon's counsel waived Amazon's presence, and whether Amazon's presence could be so waived by his counsel.

Appellee submits that a defendant may waive his presence during a capital trial either personally or through his counsel, and that the waiver may be effectuated by specific affirmation or simply by the failure to interpose a timely contemporaneous objection in the trial court.

Recent decisions of the United States Supreme Court emphasize the vital role played by trial counsel in the criminal justice system. In Faretta v. California, 422 U.S. 806, at 820, 821, 45 L.Ed.2d 562, at 573, 9 S.Ct. 2525 (1975), the Court declared:

> It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel

> the power to make binding decisions of trial strategy in many areas.... This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative.

Chief Justice Burger, concurring in Wainwright v. Sykes, 433 U.S. 72 at 93 (1977), wrote:

> Once counsel is appointed the day to day conduct of the defense rests with the attorney. He, not the client, has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client.

If indeed trial counsel is entrusted with the vast array of decision making, there is no reason why such decisions should not include whether or not the accused is present at a given portion of trial. Counsel frequently make decisions affecting the accused's constitutional rights without a record being made of the accused's agreement with the decisions.

Appellee respectfully urges this Court to hold that presence during a trial, capital or otherwise, may be waived either by the defendant or his counsel. If a defendant is prejudiced by such a decision of his counsel, the defendant can challenge the competence or effectiveness of his counsel pursuant to Fla. R. Crim. P. 3.850, and ultimately in federal habeas corpus proceedings. The responsibility of trial counsel to conduct the defense and make strategic decisions should be recognized and honored by this Court, and the right of counsel to waive a defendant's presence at trial should be affirmed.

In the instant case, Amazon's counsel waived Amazon's presence at all of the proceedings at the crime scene. Counsel knew that Detective Coachman would play and narrate the video tape at the crime scene, that Technician Levy would point out where physical evidence had been located in the Chapins' house, and that Deputy Romanosky would testify at the crime scene concerning the tracking of his dog, Thor. (R 1040-1043) Cohen and Pippinger knew those things before they advised Judge Penick that Amazon had authorized them to waive his presence at the crime scene. (R 1044)

Amazon's counsel deposed Levy and Romanosky prior to trial and also heard Detective Coachman narrate the video tape prior to trial. Consequently they knew essentially what their testimony would be. It was convenient for all concerned to have Technician Levy, Detective Coachman, and Deputy Romanosky testify at the crime scene about technical matters instead of in the courtroom.

Amazon's counsel agreed to allow Levy, Coachman, and Romanosky to "testify" or point out technical matters at the crime scene, and that agreement constituted a waiver of Amazon's right to be present. (R 1040-1044)

The strategic decision of Amazon's counsel to waive Amazon's presence at the crime scene should only be subject to collateral attack. See e.g., Shriner v. State, 452 So.2d 929 (Fla. 1984).

ISSUE IV.

WHETHER IRA AMAZON WAS CONSTRUCTIVELY PRESENT OR IMPLIEDLY WAIVED HIS PRESENCE AT THE CRIME SCENE PROCEEDINGS.

In Smith v. State, 453 So.2d 505 (Fla. 4th DCA 1984), the court declared:

> Rule 3.180(a)(5), Florida Rule of Criminal Procedure, provides that in all criminal prosecutions the defendant shall be present at all proceedings before the court when the jury is present. An exception to the rule is permitted where the criminal defendant in contemplation of law has voluntarily absented himself from the proceedings. Fla. R. Crim. P. 3.180(b). However, constructive presence satisfies the constitutional requirement where
>
> > a defendant is absent but is represented by counsel to whom he has not objected, who waives objection to the defendant's absence, [in which case] actual or constructive knowledge of the proceedings may be imputed to the defendant. Recognizing the possibilities of abuse of this doctrine, its application has been, and should be, limited to those cases in which the defendant, upon his reappearance at trial, acquiesces in or ratifies the actions taken by his counsel during his absence. State v. Melendez, 244 So.2d 137, 139 (Fla. 1971)(Emphasis Supplied)

In this case, Ira Amazon was represented by counsel of his own choosing, who were present during the viewing of the crime scene by the jury, at the showing of the video tape to the jury, and when witnesses testified at the crime scene. Amazon's counsel waived his presence at those events.

Appellee submits that appellant, through his silence, ratified the actions of his counsel. After the jury viewed

the crime scene, Technician Levy was recalled as a witness in the courtroom. Before he testified, Judge Penick said:

> Mr. Dodson, one thing I would like the record to also reflect and let it be clear, Technician Levy did testify at the crime scene yesterday. He was sworn at that time, and as the Bailiff indicated, he is still under oath, the continuing oath that he took yesterday. Proceed. (R 1352)

Although Judge Penick announced in the courtroom that Technician Levy testified at the crime scene, appellant did not object to that occurrence.

Deputy Romanosky testified in the courtroom before he testified at the crime scene. After he testified in court, Judge Penick instructed him: "Okay. You will discuss nothing until we go out there [to the crime scene] and take further testimony from you." (R 1160) Appellant did not object to the fact that further testimony was to be taken from Deputy Romanosky at the crime scene.

After Detective Coachman testified in court, Judge Penick instructed him, "...you are under oath, and will remain under oath until you have completed your testimony, and you have the complete care, custody, and control of the tape at this time, and it will be available for presentation at the scene." (R 1148) There was a clear implication in that instruction that Detective Coachman would complete his testimony when the video tape was presented at the crime scene. Again Amazon did not object.

Appellee submits that Amazon's silence on the three occasions mentioned above constituted acquiescence in or ratification of his counsel's decision that he not be present when Levy, Coachman, and Romanosky "testified" at the crime scene.

In Henzel v. State, 212 So.2d 92 (Fla. 3d DCA 1968), Henzel missed a portion of his trial and urged on appeal that he was denied the right to be present at his trial. Said the Court:

> ...the defendant was presented every opportunity to object, but he failed to do so. The first occurrence upon resumption of his trial on November 4, was the reading in open court of a list of witnesses who had testified prior to that point in the proceedings. We conclude, therefore, that defendant's right to be present at his trial for commission of a felony has not been abridged.

The present case is similar to Henzel, supra, in that appellant had three opportunities to object to the giving of testimony at the crime scene, but he did not do so. By remaining silent he acquiesced in or ratified the decision of his counsel that he not be present. Such acquiescence or ratification amounted to "constructive presence" or an implied waiver of his presence during the giving of testimony at the crime scene.

In United States v. Gagnon, __U.S__[36 CrL 4235; Case No. 84-690; March 18, 1985], the respondents asserted that their absence from an in camera discussion with a possibly prejudiced juror violated the Fifth Amendment Due Process Clause and Federal Rule of Criminal Procedure 43, which provides that a

defendant shall be present at every stage of trial. The Court declared:

> We think it clear that respondents rights under the Fifth Amendment Due Process Clause were not violated by the in camera discussion with the juror....
>
> * * *
>
> The Court of Appeals also held that the conference with the juror was a "stage of the trial" at which Gagnon's presence was guaranteed by Federal Rule of Criminal Procedure 43. We assume for the purposes of this opinion that the Court of Appeals was correct in this regard. We hold, however, that the court erred in concluding that respondents had not waived their rights under Rule 43 to be present at the conference with the juror.
>
> The Court of Appeals found the record insufficient to show a valid waiver of respondent's rights under Rule 43 because there was no proof that respondents expressly or impliedly indicated their willingness to be absent from the conference. The record shows, however, that the district judge, in open court, announced her intention to speak with the juror in chambers and then called a recess. The in camera discussion took place during the recess and trial resumed shortly thereafter with no change in the jury. Respondents neither then nor later in the course of the trial asserted any Rule 43 rights they may have had to attend this conference. Respondents did not request to attend the conference at any time. No objections of any sort were lodged, either before or after the conference. Respondents did not even make any post-trial motions, although post-trial hearings may ofter resolve this sort of claim. See Fed. R. Crim. P. 33; Rushen, supra, at 119-120, citing Smith v. Phillips, 455 U.S. 209, 218-219 (1982); Remmer v. United States, 347 U.S. 227, 230 (1954).
>
> We disagree with the Court of Appeals that failure to object is irrelevant to whether a defendant has voluntarily absented himself

> under Rule 43 from an in camera conference of which he is aware. The district court need not get an express "on the record" waiver from the defendant for every trial conference which a defendant may have a right to attend.

Gagnon supports the conclusion that Amazon impliedly waived his rights under Fla. R. Crim. P. 3.180 by failing to object to the giving of testimony of the crime scene.

ISSUE V.

WHETHER A DEFENDANT'S PRESENCE AT A CRITICAL STAGE OF TRIAL MAY BE WAIVED.

In a capital case, Snyder v. Massachusetts, 291 U.S. 97 at 106-108 (1934), Justice Cardoza stated:

> ...[I]n a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. Thus, the privilege to confront one's accusers and cross examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the Federal courts....No doubt the privilege may be lost by consent or at times even by misconduct.
>
> * * *
>
> ...Nowhere in the decisions of this court is there a dictum, and still less a ruling that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. What has been said, if not decided, is distinctly to the contrary .... So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. (Emphasis supplied)

The Court also cautioned in Snyder that the exclusion of a defendant from a trial proceeding should be considered in light of the whole record. 291 U.S., at 115. The Court held that a jury view of the crime scene in the absence of a defendant who has made demand that he be present is not a denial of due process under the Fourteenth Amendment. See also Haynes v. State, 72 So. 180 (Fla. 1916).

In Proffitt v. Wainwright, 685 F.2d 1227, 1256-58 (11th Cir. 1982), modified on reh'g, 706 F.2d 311 (11th Cir. 1983), cert. denied __U.S.__, 104 S.Ct. 508, 509, 78 L.Ed.2d 697, 698, the Eleventh Circuit held that a defendant may not waive his presence in a capital case. However, in Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984), the court said, "We read Proffitt to hold that a defendant may not waive his presence at any critical stage of his trial." The court indicated that a defendant's absence at a non-critical stage of trial is harmless error. Id at 775.[1/]

In his concurring opinion in Hall, Judge Hill pointed out that Diaz v. United States, 223 U.S. 442 (1912) and Hopt v. Utah, 110 U.S. 574 (1884) relied on by the Proffitt court are not valid authority for the proposition that presence at capital trial is unwaivable. Appellee submits that neither is there authority in decisions of the United States Supreme Court that presence at a "critical stage" of a capital trial is unwaivable. Appellee contends that any constitutional or statutory right of a defendant in a capital trial is waivable.

[1/] Petition for cert. was filed January 29, 1985, U.S. Case 84-1234. Both parties have asked the U.S. Supreme Court to decide whether a defendant's presence in a capital case may be waived. This Court may wish to await the outcome of that case before deciding whether presence at a critical stage may be waived.

In Frank v. Mangum, 237 U.S. 309 (1915), a capital case, the Court upheld a judgment and sentence where the defendant was not present in the courtroom, his presence being waived by counsel without his knowledge or consent. The Court rejected a contention that Diaz prohibited the imposition of such a judgment. 237 U.S. at 238-241. Even dissenting Justice Holmes acknowledged that:

> ...we never have been impressed by the argument that the presence of the prisoner was required by the Constitution.
>
> (237 U.S. at 346)

In another capital case, Howard v. Kentucky, 200 U.S. 164 (1906), the Court held that the due process clause was not violated when the accused was not present at a voir dire examination of a prospective juror's prejudice (the accused's counsel having waived the accused's presence).

This case presents an opportunity for the Florida Supreme Court to hold that a defendant's presence at a "critical stage" of a capital trial is waivable. Such a holding would be consistent with precedent set by the United States Supreme Court. Compare Johnson v. Wainwright, __So.2d__(Fla. 1985)[10 FLW 85; Case No. 66,458; January 28, 1985].

ISSUE VI.

WHETHER IRA AMAZON WAS ABSENT DURING A CRITICAL STAGE OF HIS TRIAL.

Critical stages of a trial are "all stages of trial when [the defendant's] absence might frustrate the fairness of the proceedings." United States v. Stratton, 649 F.2d 1066, 1080 (5th Cir. 1981). In Smith v. State, __So.2d__(Fla. 4th DCA 1984)[9 FLW 1685; Case No. 83-829; August 1, 1984], the court said:

> The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to be present during crucial stages of his trial, ... or "at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982).

It has been held that a jury view of the crime scene is not a critical stage of trial. Snyder v. Massachusetts, supra.

Appellee maintains that the playing of a video tape which has been admitted into evidence is certainly not a critical stage of trial, since the defendant's absence would not frustrate the fairness of the proceeding; i.e., his presence would have no "relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." Snyder.

Appellee also maintains that "considered in light of the whole record" in this case, the giving of testimony by Technician Levy, Detective Coachman, and Deputy Romanosky concerning technical details at the crime scene was not a critical stage of trial.

In view of the fact that Amazon's counsel informed the jury at the beginning of trial that Amazon killed the Chapins, and his only defense was that he killed in a drug-induced panic, his presence at the crime scene proceedings could have had no "relation, reasonably substantial, to the fulness of his opportunity to defend against the charge."

Amazon's presence at the crime scene proceedings was not important because of aid he could have given his counsel, and there was no prejudice to Amazon's defense by his absence. The testimony of the three witnesses (or "showers") at the crime scene was merely cumulative of their earlier or later courtroom testimony.

Because fundamental fairness was not thwarted by appellant's absence at the crime scene proceedings, appellant was not absent during a critical stage of his trial. See Francis, supra.

ISSUE VII.

WHETHER IRA AMAZON'S ABSENCE FROM A PORTION OF HIS TRIAL WAS FUNDAMENTAL ERROR.

At no time after appellant waived his presence at the jury view did he or his counsel object to his absence therefrom. No objection was made to the viewing of a video tape by the jury at the crime scene, or to the testimony of Detective Coachman, Detective Levy, or Deputy Romanosky at the crime scene. If there was error in appellant's absence from the jury view, that error was not preserved for appellate review by appropriate objection.

Only in the rare case of fundamental error is the defendant's right to appeal preserved without a contemporaneous objection. State v. Jones, 377 So.2d 1163 (Fla. 1979).

In Ray v. State, 403 So.2d 956 (Fla. 1981), this Court stated:

> ...Fundamental error has been defined as "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). The appellate courts, however, have been cautioned to exercise their discretion concerning fundamental error "very guardedly." Id. We agree with Judge Hubbart's observation that the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. Porter v. State, 356 So.2d 1268 (Fla. 3d DCA)(Hubbart, J., dissenting), remanded, 364 So.2d 892 (Fla. 1978), rev'd. on remand, 367 So.2d 705 (Fla. 3d DCA 1979).
>
> An accused, as is required of the state, must comply with established rules of procedure designed to assure both fairness

> and reliability in the ascertainment of guilt and innocence. The failure to object is a strong indication that, at the time and under the circumstnaces, the defendant did not regard the alleged fundamental error as harmful or prejudicial.

A recent case decided by the United States Supreme Court stated that the right to be present during all critical stages of criminal proceedings and the right to be represented by counsel are subject to harmless error analysis unless the deprivation, by its very nature, cannot be harmless. In Rushen v. Spain, __U.S.__, 78 L.Ed.2d 267, 104 S.Ct.__(1983), a California federal district court ruled that ex parte communications between judge and juror violated both respondent's right to be present during all critical stages of the proceedings and his right to be represented by counsel. The Court of Appeals for the Ninth Circuit affirmed on the basis that an unrecorded ex parte communication between trial judge and juror can never be harmless error. The United States Supreme Court declared:

> We emphatically disagree. Our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant. "At the same time and without detracting from the fundamental importance of [these rights], we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving [such constitutional] deprivations are [therefore] subject to the general rule that remedies should be tailored to the injury suffered... and should not unnecessarily infringe on competing interests." (Citations omitted)

Error, if any, in the present case is not fundamental. The evidence, without reference to the crime scene proceedings,

fully sustained the verdict. Appellant has shown no prejudice to his defense by his absence from the proceedings at the crime scene. Considered in the light of the whole record in this case, Amazon's absence was harmless error at best. Compare Lowman v. State, 85 So. 166 (Fla. 1920).

CONCLUSION

Based on the facts, authorities and arguments expressed in appellee's initial brief and in this supplemental brief, the judgments and sentences imposed by the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W.C. McLain, Assistant Public Defender, Chief, Capital Appeals, Hall of Justice Building, 455 N. Broadway Avenue, Bartow, Florida 33830 on this 1st day of April, 1985.

OF COUNSEL FOR APPELLEE