IN THE FLORIDA SUPREME COURT

IRA MARTIN AMAZON, :

Appellant, :

vs. : Case No. 64,117

STATE OF FLORIDA, :

Appellee. :

:

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

SUPPLEMENTAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE FACTS

On December 11, 1984, this Court temporarily relinquished jurisdiction in this case to the circuit court for purposes of conducting an evidentiary hearing. (R3236-3237) The hearing was to determine whether Ira Amazon knowingly and intelligently waived his right to be present at the jury view of the crime scene. (R3236) In particular, 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." (R3236)

Circuit Judge Thomas E. Penick conducted an evidentiary hearing pursuant to this Court's order on January 23, 1985. (R3260-3321) Ira Amazon and his trial lawyers, Barry Cohen and Richard Pippinger, testified. After the hearing, on February 27, 1985, Judge Penick filed his written findings and conclusions. (R3258-3259)

Barry Cohen testified that he and Richard Pippinger asked to view the crime scene during the pretrial stages of this case. (R3268) Furthermore, he testified that Amazon was not present when the jury viewed the crime scene during the trial. (R3269) Amazon did not attend because his lawyers decided that he should not be there. (R3269) The decision was based upon the fact that Ira had a nervous, involuntary grin when stressed, and his lawyers feared that such a grin at the crime scene could be misinterpreted by the jurors. (R3270-3271) Cohen advised Ira of his decision and that in his judgment, Ira should not be present. (R3271) He testified that Amazon acquiesced to his decision. (R3272) He also testified that Ira never had a choice in the

matter because he, as his lawyer, was making the major decisions. (R3272-3273,3275-3276,3309) Cohen never conveyed to Ira that he had a choice regarding his presence at the crime scene view. (R3275-3276) Additionally, Cohen said that Amazon may have expressed an interest in being present (R3308-3309), but he was not concerned because in his view Amazon did not have a choice. (R3309) Cohen had no recall of advising Amazon about the nature of the jury view. (R3277-3278) Furthermore, he had no recall of advising Amazon that a video tape would be played or that witnesses would testify. (R3278) Cohen had no reason to believe that Amazon knew that a video tape would be played and that witnesses would testify at the time Amazon agreed not to be present at the view. (R3279)

Richard Pippinger also testified. (R3280) He said that he was present and involved in the discussion concerning Ira Amazon's presence at the jury view. (R3285) Agreeing with Cohen, Pippinger stated the reason they did not want Amazon to be present was his nervous grin which was subject to misinterpretation. (R3286) Pippinger said that Ira was advised of his right to be present and that a video tape would be played at the scene. (R3286) He did not recall telling Amazon that witnesses would testify. (R3287,3289) Pippinger said that Ira was informed of his lawyer's decision on the matter and that he acquiesced to the decision. (R3287) Pippinger, like Cohen, said that Amazon did not have a choice (R3287), and that Amazon did not raise an objection. (R3287)

Ira Amazon testified at the evidentiary hearing. (R3293) He said that he was first advised that there would be a jury view

of the scene on the morning of the view. (R3293) Either Cohen or Pippinger told him that the jury would be given an opportunity to see the house where the crimes occurred. (R3293) Amazon did not know that witnesses would testify at the crime scene view. (R3294) Finally, after the view, he was not advised that witnesses testified or that a video tape was played. (R3295) Amazon stated that had he known witnesses would testify and a video tape would be played, he would have wanted to be present. (R3296) In fact, he desired to be present even without that knowledge. (R3296) He had advised his lawyers of his desire to be present, and he did not agree with their decision that he not be present. (R3297, 3300-3301) At the time of the view, Amazon did not know that he had the right to be present. (R3297) Moreover, he thought he was compelled to follow his lawyers' decision; he did not know that he had the choice to either agree or disagree with his lawyers' decision. (R3297)

Upon this evidence, Circuit Judge Penick made the following findings:

> 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. Pippinger, 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 MARTIN 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.

(R3258-3259)

ARGUMENT

ISSUE I.

IRA AMAZON DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT THE JURY VIEW OF THE CRIME SCENE WHERE TESTIMONY AND OTHER EVIDENCE WAS PRESENTED TO THE JURY.

In deciding this issue, this Court will potentially be faced with three questions: (1) whether the jury view of the crime scene in this case was a critical stage of the trial at which Amazon had the right to be present; (2) whether Ira Amazon voluntarily, knowingly and intelligently waived that right; and (3) if this Court concludes a valid waiver occurred, whether a defendant can voluntarily waive his constitutional right to be present in a capital case. Although the remainder of this brief will address all three questions, question three will not have to be answered because Amazon had the right to be present at the view and he did not waive his presence.

A.

The Jury View Of The Crime Scene In This Case Was A Critical Stage Of The Trial At Which Witnesses Testified And Video Taped Evidence Was Presented To The Jury And Ira Amazon Had The Right To Be Present.

Amazon is aware of the United States Supreme Court's decision in Snyder v. Massachusetts, 291 U.S. 97 (1934) in which the court held that a jury view was not a crucial stage requiring the presence of the defendant. Furthermore, Amazon is aware of this Court's decision in McCollum v. State, 74 So.2d 74 (Fla.1954) which suggests a similar conclusion. (See footnote 4 of Initial Brief) However, the jury views in issue in Snyder and McCollum are distinguishable from the one in this case because no witnesses testified and no evidence was presented. When witnesses testified and videotaped evidence was introduced, the jury view in this case became a critical part of the trial itself. It was no longer a sterile display of the scene. It was no longer a mere viewing without comment as is typically contemplated.[1/]

1/ Section 918.05 Florida Statutes governs the conduct of jury views and provides:

> When a court determines that it is proper for the jury to view a place where the offense may have been committed or other material events may have occurred, it may order the jury to be conducted in a body to the place, in custody of a proper officer. The court shall admonish the officer that no person, including the officer, shall be allowed to communicate with the jury about any subject connected with the trial. The jury shall be returned to the courtroom in accordance with the directions of the court. The judge and defendant, unless the defendant absents himself without permission of court, shall be present, and the prosecuting attorney and defense counsel may be present at the view.

The provisions of this statute were not followed in this case. Consequently, the jury view of the scene was actually part of the trial itself conducted outside the courtroom.

The State has urged that the witnesses' testimony and the playing of the video tape did not render the view a critical stage. According to the State, the witnesses' testimony was cumulative of testimony given in the courtroom and the video tape was inconsequential because still photographs were later introduced. (R3246-3250) This position is without merit. The witnesses who testified at the crime scene and in the courtroom did not merely repeat their testimony. (R1142-1149,1180-1222,1353-1401) Furthermore, much of the witnesses' communication at the scene was nonverbal, and as a result, the comparison of the transcript of the testimony is of little value. Amazon could not possibly confront the nonverbal aspects of the witnesses' communication to the jury without actually being present. Finally, the playing of the video tape is not the equivalent of showing the jury still photographs.[2/] The videotape was played and fully narrated at the scene. (R1207-1222) It was not replayed in the courtroom. The still photographs were simply identified and introduced in the courtroom. (R1354-1360) They served only as reinforcement of the information earlier conveyed via the videotape. No attempt was made to again explain the photographs' significance in detail. (R1354-1360) Evidence

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2/ The State attempted to analogize this case to Herzog v. State, 439 So.2d 1372 (Fla.1983) in which this Court held that no error occurred when a motion to suppress photographs was conducted in the defendant's absence. (R3248-3249) Herzog is distinguishable because the photographic evidence was not being presented to the jury at the motion to suppress. A defendant's right to be present to confront the witnesses and evidence being presented to a fact-finder which will decide guilt or innocence is markly different from a motion hearing on an evidentiary question. Moreover, Herzog's absence was voluntary. 439 So.2d at 1375. Amazon's absence was involuntary. (See Issue I,B, infra)

at the crime scene was the main event. Any repetition of that evidence in the courtroom was but a cursory review.

Assuming for argument that this Court disagrees with Amazon's contention that the jury view was actually a crucial stage of the trial affording him the Sixth Amendment right to be present, Amazon still had a statutory and rule right to be present. §918.05, Fla.Stat.; Fla.R.Crim.P. 3.180. Florida Rule of Criminal Procedure 3.180(a)(5) and (7) confers a right to be present at "all proceedings before the court when the jury is present" and "any view by the jury." Section 918.05, Florida Statutes states, "The judge and defendant...shall be present...at the [jury] view." Consequently, whether by constitution, statute or rule, Ira Amazon had the right to be present at the crime scene view; a right which was violated in this case.

B.

Ira Amazon Did Not Knowingly, Intelligently And Voluntarily Waive His Right To Be Present At The Jury View Of The Crime Scene Nor Did He Ratify The Actions Of His Counsel Taken In His Absence.

As this Court recognized in Francis v. State, 413 So.2d 1175 (Fla.1982), the State has the burden of demonstrating that a defendant's absence from a crucial portion of his trial is the result of the defendant's voluntary, knowing and intelligent waiver of his presence. 413 So.2d at 1178. A defendant's silence is insufficient. Ibid. And, a waiver by counsel is likewise insufficient, ibid., unless the defendant freely, voluntarily and knowingly ratifies his counsel's actions at a later time. State

v. Melendez, 244 So.2d 137 (Fla.1971)[3/] Ira Amazon neither waived his right to be present, nor ratified the actions of his counsel taken in his absence.

The first element of a waiver is knowledge of the right. See, Johnson v. Zerbst, 304 U.S. 458 (1938); Schneckloth v. Bustamonte, 412 U.S. 218 (1973). A defendant cannot relinquish a right unless he is aware of the existence of the right and its nature and scope. Ira Amazon was never fully advised of the nature and scope of the jury view in this case. (R3277-3278) His lawyers told him that the jury would observe the house where the crimes occurred (R3285-3286,3293), but they did not tell him that witnesses would testify. (R3278-3279,3287) Amazon testified that he did not know that witnesses testified at the view until a few days before the evidentiary hearing conducted pursuant to this Court's remand. (R3293-3294) Furthermore, he said that neither of his trial lawyers advised him that witnesses would testify or that a videotape would be played. (R3293-3294) Amazon did not know his absence from the crime scene view would also be absence from the presentation of witnesses' testimony and videotape evidence.

A waiver also requires the voluntary relinquishment of the known right. Coerced relinquishment or mere acquiescence to authority is insufficient. Ibid. In this case, Ira Amazon asserted his right to be present. He told his lawyers that he

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3/ The holding in Melendez regarding a defendant's subsequent ratification of counsel's actions was limited to noncapital cases. Ratification of counsel's actions during a capital defendant's absence has not been addressed by this Court.

wanted to attend the view. (R3295-3297,3298-3300) His lawyers believed that it was in Amazon's best interest not to attend, and they led him to believe that he had no choice but to accept their decision. (R3297) Amazon's trial lawyers stated that Amazon did not have a choice and was not given a choice to attend or not attend the view. (R3272-3273,3275-3276,3309,3287) Amazon also testified that he was led to belief that he could not contest his attorneys' decision. (R3297) And, according to trial counsel, Amazon acquiesced to the decision his lawyers made. (R3272,3287) Acquiescence under such conditions is not a voluntary relinquishment of a known right. Amazon was not adequately apprised of his rights to personally decide whether or not he should be present. He was not apprised of his right to disagree with counsel or that his counsel could not waive his presence for him. He merely acquiesced to his lawyers' decision after they gave him no choice to do otherwise. A valid waiver did not occur.

C.

A Defendant In A Capital Case Cannot Voluntarily Waive His Presence At Any Crucial Stage Of His Trial.

The question of whether a capital defendant can waive his presence at his trial has not been decided by this Court. See, Francis v. State, 413 So.2d 1175,1178 (Fla.1982). However, the United States Supreme Court in a couple of early decisions held that a defendant's presence in a capital case is nonwaivable. Diaz v. United States, 223 U.S. 442,455 (1912); Hopt v. Utah, 110 U.S. 574,579 (1884). And, this holding was recently followed in the Eleventh Circuit Court of Appeals. Hall v. Wainwright, 733

F.2d 766,775 (11th Cir. 1984); Proffitt v. Wainwright, 685 F.2d 1227,1257-1258 (11th Cir. 1982), cert.den., 78 L.Ed.2d 698 (1983). Consequently, even if a waiver of Amazon's presence occurred, it is invalid. This Court must reverse this case for a new trial.

CONCLUSION

Upon the reasons and authorities expressed in this brief and in the Initial Brief filed in this appeal, Amazon asks this Court to reverse his convictions for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 18th day of March, 1985.

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