IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,148

BOBBY MARION FRANCIS, :

Appellant, :

vs. :

THE STATE OF FLORIDA, :

Appellee. :

_____ :

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

****

REPLY BRIEF OF APPELLANT

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INTRODUCTION

With respect to the Statement Of The Facts of the Appellee, the Appellant would respectfully point out to the Court that said Statement is highly argumentative and designed to improperly color the facts of the case in an attempt to influence this Court. See, e.g., the first paragraph at Page 8 of Appellee's Brief. Further, Appellant would point out that the Appellee made assertions of fact not reflected in the Record below. See, e.g., Page 5 of Appellee's Brief, where it is asserted that, because the victim was determined to be a police informant, a decision was made to apprehend the Defendant. This is mere speculation and is not supported by any Record citation, nor could it be, because the reasons for arresting the Defendant do not appear in the Record. Further, at Page 10 of its Brief, the State alleges that the Defendant attempted to mix a Drano injection and to torture the victim. However, the Record citation does not establish any attempt by the Defendant to inject Drano into the victim nor is this fact otherwise established in the Record below. Appellant would respectfully submit that the Statement Of Facts set forth in his Initial Brief is a more accurate and unbiased reflection of the relevant facts supported by the Record in the trial below.

In this Reply Brief, Arguments I, II and III relate to Points Involved On Appeal I and II of Appellant's Initial Brief. Arguments IV and V relate to Points Involved On Appeal VI and VII, respectively, of Appellant's Initial Brief. As to Points Involved On Appeal III, IV and V of Appellant's Initial Brief, Appellant would rely on the facts, reasons, authorities and arguments contained in the Initial Brief Of Appellant. In this Reply Brief, all emphasis is supplied unless otherwise indicated.

ARGUMENT I

THE TRIAL COURT ERRED IN IMPROPERLY PROHIBITING THE DEFENDANT FROM CROSS-EXAMINING DEBORAH WESLEY EVANS CONCERNING HER THEN PENDING CHARGES BEFORE THE SAME STATE ATTORNEY'S OFFICE WHO WAS PROSECUTING THE DEFENDANT, THEREBY DENYING THE DEFENDANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS.

The State's Response to this Argument, although citing Morrell v. State, 297 So.2d 579 (Fla. 1st DCA 1974) and conceding that evidence tending to show bias or prejudice by a witness who desires to curry favor with the authorities would be relevant (Appellee's Brief, p. 17), then attempts to argue that the point is not properly preserved for appellate review or that the Trial Court's ruling was not an abuse of discretion. Appellee's Brief, p. 18. In support of its assertion that the Defense Counsel's proffer below was inadequate, the State cites two (2) cases. However, a careful analysis of these cases reveals that neither truly supports the State's position. In Hernandez v. State, 360 So.2d 39 (Fla. 3d DCA 1978), the Court acknowledges that inquiry on cross-examination of a prosecution witness to show bias is proper, but should not be automatically allowed unless the reason for such inquiry appears in the Record. The Appellee, however, fails to point out the true extent of the deficiency of the Record in that case where,

> [c]ounsel for the defendant made no tender nor did he advise the court of the relevancy of the questions to a showing of bias.
>
> 360 So.2d at 41.

Further, in Hernandez, it was only on appeal that any grounds for relevancy of the cross-examination was ever put forth. Id., 360 So.2d at 39-40. In a similar vein, the State cites A. McD. v. State, 422 So.2d 336 (Fla. 3d DCA 1982), for the proposition that limiting cross-examination is appropriate where no basis of relevancy is apparent

from the Record. As in Hernandez, supra, the District Court of Appeal noted in its opinion in A. McD. v. State, supra, that no proffer or other statement in the Record gave the Trial Court any insight as to the relevancy of the proposed line of questions. Id., 422 So.2d at 377-38.

This is, of course, manifestly not the situation in the case at bar. As quoted by the State in its Brief, at Page 17, and as argued in Appellant's Initial Brief, the Defense Counsel did proffer and explain to the Trial Court the relevancy of his proposed cross-examination of the State witness, Deborah Wesley Evans. Specifically, Defense Counsel proffered that he sought to cross-examine the witness concerning her pending charges and the possibility that the State might decide to increase these charges to First Degree Murder, to demonstrate to the Jury this witness' bias and motivation; in that she might be seeking to gain or curry favor with the State, vis-a-vis those pending charges, by testifying as the State desired. Defense Counsel made it clear that it was appropriate for the Jury to know that this witness had good reason to want to please the State of Florida. T. 617.[1/]

The State's argument is that because Defense Counsel did not make a specific proffer of what the witness' answers to specific questions would be, the proffer was inadequate. Appellee's Brief, p. 19. None of the cases cited by the Appellee, however, reflect this requirement, because, obviously, this is not the proper rule of law. As noted in Appellant's Initial Brief, the United States Supreme Court's opinion in Alford v.

1/ The Record reflects that the Defense Attorney's initial proffer concerning this issue was, for some unexplained reason, not on the Record. The proffer set forth at Page 617 is a recapitulation by Defense Counsel of the proffer previously made for purposes of preserving the Record and the Trial Court acknowledged that the original proffer was made prior to the Court's ruling. T. 618.

United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), demonstrates the fallacy of this Argument.

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general apply. (Citations omitted) It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (Citations omitted) To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. (Citations omitted) In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. (Citation omitted)
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> * * *
>
> The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution. . . . (Citations omitted) Even if the witness were charged in some other offense by the prosecuting authorities, petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention. (Citations omitted)
>
> * * *
>
> The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error. (Citations omitted)

282 U.S. at 692-94.

As in Alford, the Trial Court, in the instant case, completely prohibited Defense Counsel, under pain of contempt, from any inquiry whatsoever concerning the witness' pending charges. T. 618.

The State argues that the relevancy of the proposed cross-examination was purely speculative. Nothing could be further from the truth. The relevancy of the proposed cross-examination was to show to the Jury the witness' motivation for testifying the way she did. Deborah Wesley Evans was under arrest in a recent homicide. This information was never disclosed to the Defendant by the State. The Defendant first became aware of this in the evening hours of the day before trial began in this cause when he was informed of this by a newspaper reporter. T. 6. All of these events were pointed out to the Trial Court at the beginning of the first day of trial. Defense Counsel argued that this non-disclosure by the State was prosecutorial misconduct and a violation of the applicable rules of discovery. The Court, however, found no prosecutorial misconduct. T. 11. Defense Counsel then requested an opportunity to investigate the circumstances surrounding these new charges,

> . . . to send my investigator down to investigate the circumstances surrounding this, to find out what's going on down in Key West.
>
> It's not like it's in Miami. There's a time frame here, get down to Key West, find out what's going on and we need time to do that.
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> T. 12-13.

This request was also denied by the Trial Court. T. 13. Thus, the State's assertion in its Brief, at Page 19, that Defense Counsel had investigated the possibilities of a deal between the State and Ms. Evans and had found no proof of such a transaction, is patently false. While Defense Counsel acknowledged, candidly, that he had uncovered no

information concerning any specific deal made between this witness and the State (T. 617), the Defendant had never been given an opportunity to fully explore this area. Further, as Defense Counsel pointed out,

> [s]he [Ms. Evans] was then charged with second degree.
> The Monroe County State Attorney is thinking about making it first degree murder.
>
> T. 7.

The failure of the State to reveal this witness' arrest and pending charges and the Trial Court's refusal to permit the Defendant time to investigate the circumstances surrounding this placed the Defendant in a "Catch 22" situation. First, the Trial Court erroneously required the Defendant to establish the existence of a "deal", but precluded him from the opportunity to do so. Second, the State now urges on appeal that because of the Defendant's failure to establish the "deal" the issue is not properly preserved for review here. Thus, the State's assertion, at Page 16 of its Brief, that the disposition of the witness' case demonstrates the fact that no deal was made, is sophistry. Evans v. State, ___ So.2d ___ (Fla. 3d DCA 1984)(9 FLW 1381), merely reflects that this witness' conviction for Second Degree Murder was affirmed. Nothing in that opinion reflects that Ms. Evans did not receive some consideration by virtue of the fact that she was only charged with Second Degree rather than the First Degree Murder.

The rule of law applicable here is that,

> [a]any evidence which tends to establish that a witness is appearing for the state for any reason other than merely to tell the truth should not be kept from the jury. (Citations omitted)
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> Kufrin v. State, 378 So.2d 1341, 1342 (Fla. 3d DCA 1980).

Accord, Fulton v. State, 335 So.2d 280 (Fla. 1976). Appellant would respectfully submit, however, that the concern the Trial Court had in the existence of a "deal" between the State of Florida and this witness and the requirement imposed upon the Defense of establishing such a "deal" is not the point. Even if no "deal", either implicit or explicit, ever existed or was discussed or contemplated by the State of Florida, the Jury had a right to know of the existence of the charges so that they could decide, in their own minds, whether the witness herself sought to gain favorable treatment by the prosecuting authority by testifying in a manner which would please them. The prevention of an escalation of the charges to First Degree Murder clearly provides a basis for the Jury to conclude that this witness would do everything in her power to please the State of Florida and, in this case, the State Attorney for Monroe County; the same prosecuting authority in both her case and the case at bar.

Here the Trial Court improperly set itself up as a "Super Juror" who would weigh the evidence before allowing the Jury to hear same. The proper role for a trial court is to determine the relevance of evidence. The weight to be afforded relevant evidence is solely the province of the triers of fact, the Jury. The Trial Court's invasion of the province of the Jury, in the instant case, constitutes reversible error.[2/]

[2/] The harmless error argument made by the Appellee in this point, as well as that same argument made with respect to Issue II, will be discussed infra, at Argument III.

ARGUMENT II

THE DEFENDANT WAS DEPRIVED OF DUE PROCESS OF LAW AND A FAIR TRIAL THROUGH THE ACTIONS OF THE STATE IN CONNECTION WITH THE TESTIMONY OF CHARLENE DUNCAN, INCLUDING THE USE OF FALSE, FRAUDULENT OR MISLEADING TESTIMONY; ACTING OUTSIDE OF ITS AUTHORITY; AND FAILING TO INFORM THE DEFENDANT OF EXCULPATORY MATERIAL IN ITS POSSESSION, ALL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The State does not, in any way, dispute or deny the relevant facts concerning this issue. Specifically, on direct examination, the State elicited from Charlene Duncan, a co-defendant convicted of First Degree Murder and then serving a valid life sentence without the possibility of parole for twenty-five (25) years, that an Agreement was entered into between the witness and the State, in 1979, concerning her testimony in this case. R. 837. This 1979 Agreement provided that, in the event of a successful appeal or post-conviction relief concerning her current conviction, the State would permit this witness to plead guilty to Third Degree Murder and receive a sentence of no more than ten (10) years. R. 837. Further, the 1979 Agreement provided that, in the event of an unsuccessful appeal, the State would only solicit, assist and participate in proceedings seeking clemency or a pardon from the Governor concerning the mandatory twenty-five (25) year prison sentence. R. 837. Additionally, the Prosecutor below specifically pointed out that the Agreement this witness had was with a different prosecutor. T. 955. Finally, the witness was allowed to testify that her testimony in the instant case would not affect her attempt at resentencing. T. 1010.[3/]

[3/] In a prior deposition, both this witness and her appellate attorney stated that, in the event of an unsuccessful appeal, the only consideration the witness would receive from the State would be assistance in clemency or pardon proceedings. R. 838.

It was not until subsequent to the trial, at the hearing on the Defendant's Motion For New Trial, some two and one-half (2 1/2) months later, that the Defense first learned that a different benefit was provided to this witness. R. 968. Specifically, the Record reflects that Ms. Duncan's appeal of her First Degree Murder conviction was unsuccessful and, thereafter, a Motion For Post Conviction Relief was filed on her behalf. R. 835-36. This Motion sought to have this witness' conviction vacated and set aside so that she could exercise her options under the 1979 Agreement. R. 835. This Motion was notarized, on March 3, 1983, by the same Assistant State Attorney who prosecuted the Defendant Francis on March 22-29, 1983. R. 836. The Motion itself was ultimately granted and the witness was released from custody. R. 967. At no time was the extra consideration received by this witness ever revealed by the State to the Defendant or the Jury. Upon learning of the witness' newfound benefit, after the trial herein, the Defendant, at the hearing on his Motion For A New Trial, requested an evidentiary hearing on this point. None was permitted. R. 968.[4/]

The sole response to this issue by the State is the argument that the Appellant has failed to show that the admittedly non-disclosed evidence was material and the blanket assertion that the non-disclosed evidence of how this witness was rewarded for her testimony is "not the stuff of due process violations". Appellee's Brief, p. 24. The State cites the case

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[4/]Appellant sought to supplement the Record on Appeal with certified copies of documents and transcripts from other courts of this State reflecting that Charlene Duncan voluntarily dismissed her appeal; that after the 1979 Agreement, which was revealed to the Jury, but prior to this trial, the State and the witness were involved in additional negotiations concerning her testimony; and the extent to which the prosecutor below argued on behalf of Ms. Duncan in her post-conviction proceedings held one (1) week after the trial of this cause. This supplementation was opposed by the Appellee and denied by this Court.

of Lister v. McLeod, 240 F.2d 16 (10th Cir. 1957), for the proposition that the failure of Appellant to show the materiality of the non-disclosed evidence precludes the granting of a new trial. In that case, the Court of Appeals held that the failure of the Petitioner, who claimed that his conviction was procured through the use of perjured testimony, to specify or allege what testimony was false and that the Prosecution knowingly used such false testimony, precluded the granting of habeas corpus relief. Id., at 17. The distinction to the facts in the case at bar is obvious. The witness below and, more significantly, the very Prosecutor who represented the State in the proceedings below, knew that the details of the deal between the State and this witness provided the Jury in this case were false. They knew this when the testimony was given and this Court can now examine with precision the details and extent to which the testimony was false.

The State then argues that the rule of law announced in Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957), as cited in Appellant's Initial Brief, is inapplicable to this case because the non-disclosed evidence in Alcorta was more important than the non-disclosed evidence in the case at bar. The relative importance of the non-disclosed evidence will be discussed infra, in Argument III. Significantly, the State's argument completely ignores the Supreme Court decisions in Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), which followed the Alcorta decision. It is easy to see why the Supreme Court decision in Napue was ignored by the State in its reply. The facts in Napue are almost identical to the facts in the case at bar and the holding by the Supreme Court directly contradicts the

State's self-serving statement that the non-disclosed evidence and the State's conduct in permitting false statements to go uncorrected before the Jury do not constitute a due process violation.

As the Supreme Court specifically stated in Napue:

> [t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides. (citation omitted)
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> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."
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> 360 U.S. at 269-70.

Similarly, the Supreme Court in Giglio v. United States, supra, again reiterated the holding in Napue, that non-disclosure of evidence concerning the credibility of a witness falls within the rule requiring a reversal when such evidence is presented to a jury and is uncorrected, even when the failure to correct the false information is not due to a lack of good faith by the prosecution. Id., 405 U.S. at 153-54.

The State's reliance upon United States v. Jennings, 724 F.2d 436 (5th Cir. 1984), is equally misplaced. In Jennings, the Defense had moved for the disclosure of criminal records of Government witnesses. The Court of Appeals, in its opinion, pointed out that although the

Government had failed to provide the criminal records of the witness in question, the Defendant's attorney admitted that he was fully aware of the record and, further, it was obvious from the record below that the Defense attorney fully cross-examined the witness in that regard. Id., 724 F.2d at 444. Therefore, the non-disclosure had no effect on what was presented to the Jury. This is manifestly not the situation in this case. The Defendant never knew, until after the trial, that this witness was to have her valid First Degree Murder conviction thrown out like yesterday's newspaper, without any legal grounds whatsoever, in exchange for her testimony in this case. As shall be discussed infra, at Argument III, it can in no way be argued that the Appellant got all the mileage he could have had this information been revealed to the Jury in this case.

ARGUMENT III

THE TRIAL COURT'S ERROR IN IMPROPERLY LIMITING THE CROSS-EXAMINATION OF DEBORAH WESLEY EVANS AND THE STATE'S CONDUCT WITH REGARD TO THE TESTIMONY OF CHARLENE DUNCAN, UNDER THE FACTS OF THIS CASE, CLEARLY PREJUDICED THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

In both Argument I, dealing with the limitation on the cross-examination of a State eye-witness, Deborah Wesley Evans, and Argument II, concerning the use of false testimony in connection with the State's witness, Charlene Duncan, and the non-disclosure of what the witness received from the State in return for her testimony in this case, the State argues that these errors did not prejudice the Defendant and that, accordingly, they were harmless. Essentially, the State's position is that, despite these errors, the other evidence against the Defendant was overwhelming. Appellee's Brief, pp. 21-22, 24-26. A brief review of the facts, however, reveals that the errors complained of were anything

but harmless and, rather, were clearly and onerously prejudicial to the Defendant.

The four (4) witnesses who testified against the Defendant were, by their own version of the facts, participants in the homicide in question. Elmer Wesley, Deborah Wesley Evan's brother, the transvestite who admitted being adicted to heroin at the time of the homicide and who had a one hundred (100%) percent psychological disability from the military, originally confessed to this homicide. T. 406, 451, 481-82, 484. This witness' version is that during the homicide he left the scene, upon instructions of the Appellant, was gone for a period of time and then returned. T. 431-433. This witness testified that while he was gone, although the police station was right around the corner, he never reported the incident to the police. T. 509. This witness acknowledged that he was charged with First Degree Murder in this case, but was told that if he cooperated with the police and testified against the Defendant, he and his cousin, Arnold Moore, would be released from jail and the First Degree Murder charges dropped. T. 514-515. The next witness was Arnold Moore, also a transvestite, who believed he was reincarnated as a woman and who was the cousin of Elmer Wesley and Deborah Wesley Evans. T. 326, 329, 332, 374. This witness testified that at the time of the homicide he was using heroin and cocaine, sometimes twice a day, smoking marijuana and drinking alcohol. T. 387-88. The witness testified that he drinks liquor every day and basically keeps drinking until he passes out, then goes home, falls asleep and when he wakes up he starts drinking again. T. 397. This witness testified that at the time of the homicide he and his cousin, Elmer, had a close relationship and they would both dress up as women and

go out and meet men for pay. Further, he "cared for [Elmer Wesley] very much." T. 376. This witness testified that he was present during the entire period of time when the victim was being restrained prior to his death, yet the witness never made any attempt to leave or summon help. T. 339-355. This witness also testified that the story he ultimately gave at the trial of this cause was completely different than that which he told the police the first time he spoke with them. He further acknowledged that both he and Elmer were charged with First Degree Murder, but that after he implicated the Defendant before the Grand Jury, those charges were dropped. T. 379-383.

Other than the testimony of Ms. Evans and Ms. Duncan, the rest of the "overwhelming evidence" against the Defendant consisted of two (2) witnesses who could put the Defendant in Key West, Florida at the time of the homicide and that the murder weapon was found in the Defendant's possession.[5/]

What the State fails to mention in its "overwhelming evidence" argument is the bolstering effect of the testimony of many "eye witnesses." The Appellant submits that the testimony of Elmer Wesley and Arnold Moore, standing alone, would have been insufficient to sustain a conviction. This is what the situation would have been had the Defendant been allowed to attack and undermine the credibility of both Ms. Evans and Ms. Duncan. The improper limiting of the proffered relevant cross-examination of Ms. Evans showing bias and motive to fabricate, left

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5/ The Defendant's theory of defense was that he was framed by the true perpetrators, the State's witnesses. The Record reflects that the Defendant obtained the firearm, which proved to be the murder weapon, from Elmer Wesley. T. 738. The fact that the Defendant retained possession of this weapon after the homicide is just as probative of his theory of the case as the State's theory, in that a jury could reasonably infer that had the Defendant known that this gun was used to kill Titus Walters he would not have kept it.

her testimony virtually unimpeached before the Jury. Accordingly, the Jury could have concluded that this unimpeached testimony made the questionable testimony of Mr. Moore and Mr. Evans more credible. In the case of Ms. Duncan, the use before the Jury of false testimony and the non-disclosure of exculpatory impeaching evidence to both the Defendant and the Jury, prevented the Defendant from fully and completely attacking her credibility. Therefore, here again, the Jury could have viewed her testimony in a light such as to make the suspect testimony of Mr. Moore and Mr. Evans more credible. The effect of each of these errors alone was to substantially injure the constitutional rights of the Defendant. The combined effect of both of these errors was to render the Defendant's trial unfair in violation of due process requirements.

The State, in its Brief, after alleging that the errors committed regarding Ms. Evans and Ms. Duncan were harmless, postulates a novel interpretation of the harmless error rule by stating that because "there was ample supporting evidence upon which a jury could have found Francis guilty," these error were harmless. Appellee's Brief, p. 22. The State seems to be confusing here the standard to be applied for harmless error under Florida Statute § 924.33 with the rule of law to be applied when the sufficiency of evidence is being questioned. The question before this Court is not whether the Jury could have found the Appellant guilty even if the error did not occur, but whether or not, as Florida Statutes § 924.33 provides, this Court finds,

> . . . after an examination of all of the appeal papers, that error was committed that injuriously affected the substantial rights of the Appellant.

The United States Supreme Court, in Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956, 959 (1968), held that the

improper denial of cross-examination is constitutional error of the first magnitude which is not cured by any showing of want of prejudice. See, McArthur v. Cook, 99 So.2d 565, 568 (Fla. 1957). The errors complained of with respect to the improper curtailment of the cross-examination of Deborah Wesley Evans concerning bias and motive to fabricate and the non-disclosure and use of false and misleading testimony concerning Charlene Duncan are errors of constitutional dimension. The standard that must be applied, therefore, is whether or not an Appellate Court can conclude that the errors were harmless beyond and to the exclusion of every reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Drake v. State, 441 So.2d 1079, 1082 (Fla. 1983). The Appellant submits that such a conclusion cannot be made under the facts and circumstances of this case.

ARGUMENT IV

THE TRIAL COURT ERRED IN OVERRIDING THE JURY RECOMMENDATION OF LIFE AND IMPOSING A SENTENCE OF DEATH IN THAT THERE WAS A REASONABLE BASIS FOR THE JURY'S RECOMMENDATION AND THE FACTORS SUGGESTING THE SENTENCE OF DEATH WERE NOT SO CLEAR AND CONVINCING SUCH THAT NO REASONABLE PERSONS COULD DIFFER AS TO THEIR APPLICABILITY.

The State's response to this issue misstates certain facts in the Record below, omits certain other facts and misperceives the import of some of the prior holdings of this Court. Specifically, the Appellee's Brief, at p. 40, states that the Trial Court "rejected all statutory mitigation." This is simply not true. The Trial Court specifically found that the Defendant did not have a significant history of prior criminal activity and, thus, found the mitigating circumstance provided for in Florida Statute § 921.141(6)(a) to have been applicable. R. 923; T. 1300; App. 3. The Appellee's Brief, at p. 42 n.13, states that the

Jury's deliberation on their advisory recommendation as to sentence lasted only thirty-two (32) minutes. The Record below specifically refutes this and shows that the Jury was in deliberation from 12:30 P.M. until 1:12 P.M., a period of forty-two (42) minutes. T. 1290. More significantly, the Appellee, in its Brief, fails to point out that the Jury's deliberation as to guilt or innocence, a decision that involved many more factors and should have taken a substantially longer period of time, only lasted from 6:10 P.M. until 7:10 P.M., a period of one (1) hour. R. 801. Accordingly, the time this Jury took to deliberate as to the proper penalty is insignificant in that it was obvious that this was a jury who reached its decision both as to guilt or innocence and as to penalty expeditiously.

The Appellee asks this Court to find that the Jury's recommended sentence of life imprisonment was not reasonable in that it was based on an "emotional closing argument" given by Defense Counsel. Appellee's Brief, p. 41. All arguments by defense attorneys are emotional. Significantly, in the case at bar, the Trial Court never found that the argument was an emotional one or that this argument swayed the Jury in reaching its conclusion. Clearly, the Trial Court, sitting and actually hearing the argument and its effect, is in a much better position to determine whether or not it is a highly charged emotional argument than is this Court in reviewing said arguments from a cold record. This Court cannot make such a finding under the facts and circumstances of this case. Thus, the instant case is distinguishable from White v. State, 403 So.2d 331, 340 (Fla. 1981), where the Trial Court specifically made a finding of an emotional argument which affected the Jury's deliberation. Interestingly, the Appellee, when discussing Herzog v. State, 439 So.2d

1372, 1381 (Fla. 1983), recites that this Court found that there was no record evidence that the jury was lead astray by emotional appeal from counsel. Appellee's Brief, p. 42. That is not the statement of this Court. Rather, this Court stated that ". . . nor did the trial court find that the jury made its recommedation based on an emotional appeal of defense counsel." Id.

The Appellant would rely on the authorities and reasons cited in the Initial Brief of Appellant in support of this issue. Initial Brief of Appellant, p. 54-65. The standard of review is that of Tedder v. State, 322 So.2d 908 (Fla. 1975), wherein this Court stated that,

> [a] jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.
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> Id., at 910.

Subsequent decisions of this Court have recognized that where there is a reasonable basis for the jury's recommendation, it should not be disturbed on appeal. See, e.g., Hawkins v, State, 436 So.2d 44 (Fla. 1983); Gilvin v. State, 418 So.2d 996 (Fla. 1982); Goodwin v. State, 405 So.2d 170 (Fla. 1981); McKennon v. State, 403 So.2d 389 (Fla. 1981); Williams v. State, 386 So.2d 538 (Fla. 1980)[a jury recommendation of life imprisonment militates against the presumption in favor of death when aggravating circumstances and no mitigating circumstances are present.].

Finally, as Justice England recognized in his concurring opinion in Chambers v. State, 339 So.2d 204 (Fla. 1976):

> [w]here a jury and a trial judge reach contrary conclusions because the facts derived from conflicting evidence, or where they have struck a different

> balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice.

Id., at 208-09 (England, J. concurring).

Clearly, as was shown in the Initial Brief of Appellant, there were reasonable bases for the Jury's recommended sentence, the facts suggesting a sentence of death are not so clear and convincing that virtually no reasonable person could differ and a review of prior decisions of this Court involving death sentences imposed contrary to jury recommendations of life shows that death is not the appropriate penalty herein. Accordingly, the Trial Court's override of the Jury recommendation constitutes reversible error.

ARGUMENT V

> THE TRIAL COURT UNCONSTITUTIONALLY SENTENCED THE DEFENDANT TO DEATH AND THAT SAID SENTENCE WAS IMPOSED AS A PENALTY FOR THE DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS AND REJECTION OF THE TRIAL COURT'S PLEA OFFER OF LIFE IMPRISONMENT.

The State argues that this issue is not preserved for review. Appellant would rely primarily upon the facts and Record citations in his Initial Brief at pp. 67-70. Appellant would respectfully direct the Court's attention to the Appendix to the Initial Brief of Appellant, at. pp. 5-21, and again point out to the Court the Appellant's continuing willingness to have this matter returned to the Trial Court for purposes of an evidentiary hearing. See App. pp. 5-12; Initial Brief of Appellant, at p. 69 n.5.

The State argues that this Court should ignore the decisional law of this State as set forth in Fraley v. State, 426 So.2d 938 (Fla. 3d DCA

1983), and instead should find this issue non-meritorious by virtue of the United States Court of Appeals' opinion in Frank v. Blackburn, 646 F.2d 873 (5th Cir. 1980), cert. denied, 454 U.S. 840 (1981).[6/]

The holding in Blackburn is clearly distinguishable from the facts at bar because of the time at which the plea offer was made. The Court of Appeals in its opinion in Blackburn, clearly reflects that distinction:

> [w]e find nothing in the record of the present case to indicate a "realistic likelihood of vindictiveness" on the part of the trial judge. The sentencing which followed the trial upon the merits saw the trial judge in possession not only of more of the detailed facts of the offense itself but of the flavor of the event and the impact upon any victims. (Citation omitted)
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> 646 F.2d at 885.

In the case at bar, the offer of a sentence of life imprisonment in exchange for a guilty plea was made to the Defendant after all of the evidence had been presented and the Trial Court had been informed that the Jury had reached a verdict. App. 13-17, 18-19; T. 1228-29. Although the penalty proceeding took place after this plea offer, there was absolutely no evidence offered by the State, with the exception of the Defendant's one (1) prior conviction. R. 800; T. 1250-51. The Trial Court was already aware, however, of this prior conviction before making the plea offer. T. 721. Any other additional evidence in the penalty

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[6/] In its Brief, Appellee states that the opinion in Fraley v. State, supra, has been withdrawn pending en banc review by the District Court of Appeal. Appellee's Brief, p. 47. This is not true. The opinion in Fraley, found at 426 So.2d 983, concerns Third District Court of Appeals Case Nos. 81-2510 and 81-2521. Appellant's counsel has contacted the Clerk of the District Court of Appeal, Third District, and was advised that no order withdrawing the Fraley opinion was ever issued. Rather, that the last Order issued in Fraley v. State, supra, was the issuance of the Mandate on March 16, 1983. The en banc oral argument heard by the Third District Court of Appeal on April 10, 1984 and referred to in Appellee's Brief at p. 47 n.14, was in the case of Ronald Frazier a/k/a Ronnie Fraley v. State, District Court of Appeal of Florida, Third District, Case No. 83-1212.

phase was presented by the Defendant in mitigation. R. 804, T. 1252-60. Therefore, the rationale of Frank v. Blackburn, supra, and the case of Fernandez v. State, 446 So.2d 235 (Fla. 3d DCA 1984), also cited by the Appellee, do not apply.

Rather, as the District Court of Appeal announced in Fraley v. State, supra:

> [w]hen a trial judge imposes a sentence upon a defendant after trial, which is more severe than the plea offer made by the court after it has heard all the evidence, the reasons for the more severe sentence must affirmatively appear in the record so as to insure the absence of vindictiveness. (Citation omitted)
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> 426 So.2d at 985.

The Appellee misperceives what occurred below. The Record clearly shows that at the time the Trial Court ordered death it knew nothing more of the facts and circumstances of the homicide itself or the Defendant, other than favorable mitigating information concerning the Defendant, than when it offered life. Accordingly, because there is no reason for the more severe sentence of death, it was imposed to punish the Defendant not for the crime but for the exercise of his constitutional rights.

CONCLUSION

Based upon the foregoing reasons, authorities, facts and argument, the Defendant submits that the Judgment and Sentence be reversed and either (1) the Defendant be discharged, or (2) this cause be remanded for a new trial with instructions that the maximum penalty which can be imposed upon the Defendant in the event of a conviction is life imprisonment, or (3) this cause be remanded for a new trial. In the alternative, that the sentence of death be vacated and this cause be remanded with instructions that a sentence of life imprisonment be imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Richard E. Doran, Esq., Assistant Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 24th day of September, 1984.

BY: _____
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